

**THE GIFT OF LIFE AND “DISEASES OF LANGUAGE”:  
RECOVERING A LOST DISTINCTION IN  
EFFECTUATING THE PURPOSE OF THE NATIONAL  
ORGAN TRANSPLANT ACT’S PROHIBITION ON THE  
TRANSFER OF HUMAN ORGANS FOR VALUABLE  
CONSIDERATION**

*Rick K. Jones\**

I. INTRODUCTION

Communicating is not easy. We know how to speak and to converse, but to take the fullness of our thoughts and completely convey them to another through words and actions, and have them received and appreciated in equal fullness, is more than a little tricky.<sup>1</sup> In fact, George Bernard Shaw once said “[t]he single biggest problem in communication is the illusion that it has taken place.”<sup>2</sup>

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\* Counsel, Pennsylvania Legislative Budget & Finance Committee; B.A., East Stroudsburg University; J.D., the Penn State Dickinson School of Law. The opinions expressed in this Article are solely those of the author and do not represent the position of the Legislative Budget & Finance Committee, its individual members, or its staff. I thank my wife Deb, my son Ethan, and my daughter Ellie for their encouragement and laughter. A special acknowledgement goes to Addison Marie Sensenig—my niece—who during the writing of this Article died just before her life began. Addison’s short life has reminded me that the seemingly simple state of being alive that we mostly take for granted is nothing short of an extraordinary gift.

1. There is a funny story told of a divorce attorney engaging a new client for the first time.

Lawyer: Let me ask you some questions. Do you have any grounds for the divorce?

Client: Yes, of course. I have a house in town and one on the beach too.

Lawyer: No, what I mean is, do the two of you have a grudge?

Client: Well, of course, and a very large one too. We can park three cars in it.

Lawyer: Let’s get more basic. Does your spouse beat you up or anything like that?

Client: No way. I get up at 6 [a.m.] every morning. My spouse needs two alarm clocks just to get up by 7 [a.m.].

Lawyer: OK, then just tell me why you want a divorce.

Client: It’s simple. We just cannot communicate.

John Barkai, *Teaching Negotiation and ADR: The Savvy Samurai Meets the Devil*, 75 NEB. L. REV. 704, 724-25 n.51 (1996) (quoting GERALD CLAY & FLETCHER KNEBEL, *BEFORE YOU SUE: HOW TO GET TO JUSTICE WITHOUT GOING TO COURT* (William Morrow ed., 1987)). While the difficulties of communication can be humorous, they also can be tragic. On March 27, 1977, 582 people were killed at Santa Cruz de Tenerife, Canary Islands, after two jumbo jets collided on a runway. One pilot misunderstood the control tower and began takeoff prematurely. As that jet approached takeoff speed, it collided with another jet that entered the wrong runway after its pilot misunderstood the taxiing instructions. *Id.* at 725.

2. KEY ISSUES IN ORGANIZATION COMMUNICATION 235 (Dennis Tourish & Owen Hargie eds., 2004).

Despite this, however, people regularly strive to make known and exchange their thoughts, feelings, and ideas through the sounds, words, and combinations thereof that comprise language.<sup>3</sup>

As a medium of communication, the law is no different.<sup>4</sup> The text of a statute “communicate[s] the will of society, articulated by the legislature as society’s agent for that purpose, to society’s members, telling them how they should or should not behave or what consequences should or might attach to certain actions or events.”<sup>5</sup> Law uses language to communicate societal rules, and people look to that same language to interpret those rules and to grasp how they are to be observed. Clarity in the language of law is vital—as is care in listening to what a legislature has said when interpreting and construing statutory language.<sup>6</sup> Mark Twain famously recognized that “[t]he difference between the right word and the almost right word is the difference between lightning and a lightning bug”;<sup>7</sup> in a statute, that difference may be the difference between help denied and help given, between liability and nonliability, or perhaps between imprisonment and freedom. Language itself, however, can be an obstacle to clear statutory communication. Reed Dickerson wrote, for example, in *The Interpretation and Application of Statutes*, that “language remains subject not

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3. See Barkai, *supra* note 1, at 726 (describing process in which speakers “code” thoughts into speech and listeners seek to “decode,” or interpret, that message). The threat of miscommunication involved in this coding and decoding process is easily evident from the childhood game of “whisper down the lane” in which a message whispered to one child completely changes by the time it is whispered to the last child in a group. *Id.* at 725.

4. In fact, it may be thornier. Regarding statutes, one commentator observed:

[T]here may be identifiable elements in the ascertainment of meaning that have only an infrequent counterpart outside the law. This . . . refers . . . to the special social, substantive, constitutional, equitable, and procedural assumptions that comprise the broad legal context in which the normal principles of communication are considered to operate and of which those principles take implied account. These include the many tacit assumptions relating to the nature, goals, methods, and constitutional limitations of the prevailing legal system; that is, the general social and legal context in which statutes are necessarily read.

REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 29 (1975).

5. 2A NORMAN J. SINGER & J.D. SHAMBLE SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 45.01, at 4 (7th ed. 2007).

6. *Id.* at 4-5. Noting the “relational” aspect of communication, Singer adds:

Words comprise the connecting link in the relationship between persons endeavoring to convey ideas to others and persons to whom the ideas are to be conveyed, or, in the case of a statute, between a legislative body and members of the public. In the process of communication there are thus two essentially distinct and separate stages at which the word symbols which comprise the media or vehicles of communication are “used[]”—once by the party or parties on the sending end of the communication and again by the party or parties on the receiving end.

*Id.* at 5.

7. The Quotations Page, Quotation Details, <http://www.quotationspage.com/quote/1119.html> (last visited Aug. 1, 2008). Writer Denis Ledoux explained: “Lightning dazzles the eye. The sky is split open. Sometimes it makes our hair stand on end. A lightning bug, on the other hand, is a small, friendly flicker in our back yards, not enough light to illuminate even the smallest corner.” Denis Ledoux, *The Lightning Bug*, EZINEARTICLES.COM, available at <http://ezinearticles.com/?The-Lightning-Bug&id=1332785> (last visited Aug. 1, 2008).

only to inherent limitations but to serious and not easily curable diseases. . . . [such as] ambiguity, overvagueness, overprecision, overgenerality, and undergenerality.”<sup>8</sup>

“Valuable consideration” is a phrase contained within the federal law of organ donation that has impacted a Pennsylvania law intended to benefit organ donor families.<sup>9</sup> Pennsylvania law allows for the payment of a funeral benefit on behalf of the family of an organ donor,<sup>10</sup> but federal law prohibits the transfer of human organs for valuable consideration.<sup>11</sup> The question is and has been whether the payment of a funeral benefit associated with, and made subsequent to, the donation of a human organ constitutes a transfer of that human organ for “valuable consideration” in violation of federal law.

This Article will address this question, examining the federal prohibition on organ transfers in relation to Pennsylvania’s statutory provision allowing for a funeral benefit. It will begin with an overview of the history of organ donation in Pennsylvania prior to the development of Pennsylvania’s Act 1994-102<sup>12</sup> and will outline the national framework for organ donation, including enactment of the National Organ Transplant Act in 1984 (“NOTA”).<sup>13</sup> The Article will then look at discussions regarding the scope of the federal prohibition in light of developing support for allowing—at least on a trial basis—certain financial incentives, such as a funeral benefit, to help increase organ donation. It will consider the federal statutory language, taking into account pertinent rules of interpretation and construction, and will examine the March 2007 U.S. Department of Justice memorandum opinion analyzing the federal prohibition as applied to kidney-exchange programs. Finally, this Article will advance the idea that a lost distinction exists in the law of organ donation regarding the nature of gifts and commerce that needs to be recovered in effectuating the purpose of NOTA section 301(a)<sup>14</sup> and its prohibition on the transfer of human organs for valuable consideration.

## II. BACKGROUND

### A. *The Context of Organ Donation*

“Organ transplantation is unique among surgical procedures, in that the procedure cannot take place without the donation of an organ or a partial organ

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8. DICKERSON, *supra* note 4, at 43. For detailed discussion of Dickerson’s “diseases of language,” see *id.* at 43-53; see also *infra* notes 91-98 for a discussion about the limits of language when interpreting statutes.

9. See National Organ Transplant Act § 301, 42 U.S.C.A. § 274e (West 2003 and Supp. 2008) (prohibiting transfer of valuable consideration in exchange for human organ offered for transplant).

10. 20 PA. CONS. STAT. § 8622(b)(1) (2005). See *infra* Part II.B for a discussion of current law governing organ donation and allowing for compensation in return for such donation.

11. 42 U.S.C.A. § 274e. See *infra* Part II.C for a discussion of this prohibition.

12. 20 PA. CONS. STAT. § 8601-8642.

13. 42 U.S.C. § 274 (2000).

14. National Organ Transplant Act § 301(a), 42 U.S.C. § 274e (West 2003 & Supp. 2008).

from another person.”<sup>15</sup> The Institute of Medicine of the National Academies (“IOM”) reported that “[s]ince 1988, more than 390,000 organs have been transplanted, with approximately 80 percent of the transplanted organs coming from deceased donors.”<sup>16</sup> In the United States, more than 7500 deceased donors provided more than 23,000 organs in 2005.<sup>17</sup>

Organ donation has significant potential human impact. A single organ and tissue donor can directly help more than 100 lives,<sup>18</sup> giving transplant recipients “extended lifetime, improved quality of life, and a chance to resume activities that would have been precluded without a transplant.”<sup>19</sup> The National Organ Donor Memorial proclaims that “[o]rgan and tissue donors leave a miraculous legacy. They are living proof that death can bring life, that sorrow can turn to hope, and that a terrible loss can become the greatest gift of all.”<sup>20</sup> To illustrate, the following is a true story about David, an eight-year-old boy from Oklahoma.<sup>21</sup>

David was laughing as he and his little sisters, Susan and Karen, ran down to the pond to look for frogs. It was the day after his big day at the fair [showing his bucket calf, Leroy]. . . . [David’s father] Paul was starting up the gas grill, when he noticed that Leroy, David’s calf, had been left tied up to graze. As he went to put Leroy back in his pen, he heard Susan scream. He heard a heart-stopping scream from Susan from the direction of the pond, about 200 yards away. Paul raced toward the pond and found Susan, wet and screaming hysterically.

“I thought she had been bitten by a snake, but she couldn’t talk at first. When I calmed her down a little, she said, ‘David’s gone’.” [sic]

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15. COMM. ON INCREASING RATES OF ORGAN DONATION, INST. OF MED. OF THE NAT’L ACADS., ORGAN DONATION: OPPORTUNITIES FOR ACTION 15 (James F. Childress & Catharyn T. Liverman, eds., 2006) [hereinafter OPPORTUNITIES FOR ACTION].

16. *Id.*

17. *Id.*

18. Donor Alliance, The Difference It Makes, <http://www.donoralliance.org/info-page-14> (last visited Aug. 1, 2008).

19. OPPORTUNITIES FOR ACTION, *supra* note 15, at 25. The Institute of Medicine continued as follows:

A 10-year overall increase in life expectancy is reported for kidney transplant recipients compared with the life expectancy for individuals on transplant waiting lists. Transplant recipients not only experience gains in life expectancy but also enjoy improvements in the quality of their lives. A literature review of 218 independent studies involving approximately 14,750 transplant recipients demonstrated statistically significant improvements in physical functioning, mental health, social functioning, and overall perceptions of quality of life following transplantation. These improvements are particularly striking when they are contrasted with the pretransplant conditions of patients requiring a transplant, such as the health complications and difficulties associated with long-term dialysis and other medical interventions. Moreover, many individuals face imminent death without a transplant. The lack or inferiority of alternative therapies should be considered when post-transplant quality-of-life data are evaluated.

*Id.* at 25-26 (citations omitted).

20. National Donor Memorial, <http://www.donormemorial.org> (last visited Aug. 27, 2008).

21. LifeShare Transplant Donor Services of Oklahoma, Donor Stories: How David Lived, <http://www.lifeshareoklahoma.org/lifestories/?idx=24> (last visited Aug. 1, 2008).

As Susan continued to scream, Paul ran frantically around the edge of the pond. "When I saw muddy footprints at the edge of the water, I realized that David was somewhere under the water."

. . . Within seconds, Paul found himself neck deep in water and knee deep in mud. [David's mother] Stephanie waded into the water and reached out [to Paul]. . . .

"As I waded back toward shore," Stephanie remembers, "I stumbled over David's body. He was less than six feet from the shore." But the water in the pond was so muddy that they couldn't see him. "We pulled David out of the water and began to squeeze water out of his body, and Paul began CPR." [David was taken to the hospital by a LifeFlight helicopter.]

. . . .

Susan later told her parents that she and David had waded into the water to see how deep it was. She said they got out into the "too deep" water. David helped Susan turn on her back because she said she could swim better that way. By the time she reached shore and looked back to find her brother, he was gone.

. . . .

They waited five days, with friends and church members surrounding them and praying for a miracle. But David's brain continued to swell. The night before a final test to see if David was brain dead, a church friend . . . talked to Paul and Stephanie about the possibility of organ donation. . . .

Stephanie says, "When the test results the next day conclusively determined that his life on earth was done, we chose to make his organs available for donation. We were at peace in knowing that David's soul was already dwelling sweetly with Jesus. That assurance enabled us to release his physical body to share life-giving organs with someone else."

David's heart, liver and kidneys gave new life to a two year old child and three adults.<sup>22</sup>

There is, however, a growing gap between the need for transplantable organs and their availability.<sup>23</sup> The IOM reported that "[t]he success of organ

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22. *Id.* Transplantable organs that can be donated include the kidneys, heart, pancreas, liver, lungs, and intestines. OrganDonor.Gov, What Can Be Donated, [http://www.organdonor.gov/donation/what\\_donate.htm](http://www.organdonor.gov/donation/what_donate.htm) (last visited Aug. 1 2008). Tissues that can be donated include bone, corneas, heart valves, skin, veins, and tendons. *Id.*

23. The 2006 report on organ donation published by the Institute of Medicine of the National Academies stated as follows:

The number of organ donors has increased each year since 1988 . . . . Furthermore, there has been a steady increase in the number of organs recovered . . . . However, the growth of the waiting list has been much more dramatic, with approximately 5,000 more candidates for transplantation each year than in the prior year. The net result is a widening gap between the supply of transplantable organs and the number of patients on the waiting list—hence, the increasing need for donated organs.

OPPORTUNITIES FOR ACTION, *supra* note 15, at 45-46 (citation omitted). As of August 27, 2008, UNOS

transplantation as a treatment option, the rising incidence of related or contributory medical conditions, improvements in immunosuppressive medications, and other factors have resulted in a rapid escalation in the waiting list for transplantation in recent decades.”<sup>24</sup> As demand more and more exceeds supply, efforts are being taken and ideas generated to encourage increased donation.<sup>25</sup>

*B. Recent Historical Statutory Development*

Two laws provide a foundation for recent advancements in the law of organ donation prior to the enactment of Pennsylvania’s Act 102 in 1994.<sup>26</sup> In 1968, the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) promulgated the Uniform Anatomical Gift Act (“UAGA”),<sup>27</sup> which every state adopted by 1972.<sup>28</sup> The UAGA recognizes an adult person’s right to exercise control of his own body upon death and provides the legal framework on which human organs and tissue can be donated for transplantation by the execution of a document of gift authorizing an anatomical gift.<sup>29</sup> Moreover, if a written document expressing donative intent is not prepared, the UAGA sets forth a priority list of persons who may donate another’s organs.<sup>30</sup> Pennsylvania adopted the UAGA in 1972.<sup>31</sup>

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reports 99,338 waiting list candidates for organ transplants. United Network for Organ Sharing, <http://unos.org> (last visited Aug. 27, 2008).

24. OPPORTUNITIES FOR ACTION, *supra* note 15, at 15 (footnote omitted).

25. *Id.* at 16, 229-62. See *infra* Part II.E for a discussion of efforts to use incentives to increase donations.

26. REVISED UNIF. ANATOMICAL GIFT ACT § 1 (amended 2007), 8a U.L.A. 8 (2003 & Supp. 2007); UNIF. DETERMINATION OF DEATH ACT § 1, 12A U.L.A. 593 (2003). “The current U.S. system of organ donation, recovery, allocation, and transplantation has developed and evolved during the past 50 years” along with the development of immunosuppressive medications. OPPORTUNITIES FOR ACTION, *supra* note 15, at 18. “[N]umerous subsequent pharmacologic, surgical, and clinical advances have continued to improve the rates of graft survival and reduce the potential for organ rejection.” *Id.*

27. UNIF. ANATOMICAL GIFT ACT § 1 (1968).

28. See The National Conference of Commissioners on Uniform State Laws, UAGA Summary, <http://anatomicalgiftact.org/DesktopDefault.aspx?tabindex=1&tabid=67> (last visited Aug. 27, 2008) (providing history of UAGA). The NCCUSL is comprised of state commissioners from each state, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands. *Id.* “The original [UAGA] was promulgated in 1968, shortly after Dr. Christian Barnard’s successful transplant of a heart in November, 1967.” *Id.* The UAGA was amended in 1987 but only adopted in twenty-six states, creating an increased lack of uniformity. *Id.* A revised UAGA was adopted in 2006 and has, as of August 27, 2008 been enacted by thirty-three states and the District of Columbia. The National Conference of Commissioners on Uniform State Laws, Uniform Anatomical Gift Act, Enactment Status Map, <http://anatomicalgiftact.org/DesktopDefault.aspx?tabindex=2&tabid=72> (last visited Aug. 27, 2008).

29. See 8a U.L.A. 8, 13 (Supp. 2007) (commenting on how revision to Act allows person eighteen or over to donate organs for transplant upon death and that this gift cannot be rescinded by another party without donor’s consent). The revised UAGA also provides circumstances under which a minor may be eligible to donate. REVISED UNIF. ANATOMICAL GIFT ACT § 4(1).

30. See *id.* §§ 2(1), 4 (indicating that donor’s parents, guardian, or agent may donate deceased’s organs).

31. Act of June 30, 1972, Pub. L. No. 164, 1972 Pa. Laws 508, *repealed by* Act of Dec. 1, 1994,

In addition to the UAGA, the Uniform Determination of Death Act (“UDDA”)<sup>32</sup> was designed to provide guidance in the determination of death.<sup>33</sup> In the late 1960s, development of the first set of neurological criteria for determining death coupled with advances in medical equipment that prolong cardiopulmonary function fueled the need to understand when death occurs.<sup>34</sup> Under common law, death is determined by “the cessation of all vital functions, traditionally demonstrated by an absence of spontaneous respiratory and cardiac functions.”<sup>35</sup> This standard does not, however, ensure recognition of modern advances in lifesaving technology such as (1) artificial support to enable respiration and circulation following the irreversible cessation of all brain functions,<sup>36</sup> and (2) techniques for assessing the loss of brain functions during administration of cardiorespiratory support.<sup>37</sup> The UDDA sought to fill the gap between current biomedical practice and the common law standard by recognizing an alternative standard for determining death.<sup>38</sup> The UDDA “codifies the existing common law standard” while also acknowledging “the new procedures for determining death based on irreversible loss of all brain functions.”<sup>39</sup> Under this alternative standard, “the entire brain must cease to

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Pub. L. No. 1994-102, 1994 Pa. Laws 665.

32. § 1, 12A U.L.A. 593 (2003).

33. Uniform Law Commissioners, A Few Facts About the Uniform Determination of Death Act, [http://www.nccusl.org/nccusl/uniformact\\_factsheets/uniformacts-fs-udda.asp](http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-udda.asp) (last visited Aug. 27, 2008).

34. OPPORTUNITIES FOR ACTION, *supra* note 15, at 18.

35. NAT’L CONFERENCE OF COMM’RS ON UNIFORM STATE LAWS, UNIFORM DETERMINATION OF DEATH ACT WITH PREFATORY NOTE 1 (1980), available at <http://www.law.upenn.edu/bll/archives/ulc/fnact99/1980s/udda80.pdf> [hereinafter UDDA PREFATORY NOTE] (internal quotation marks omitted).

36. *Id.* The UDDA has been criticized on several different bases. James M. DuBois, *Non-Heart-Beating Organ Donation: A Defense of the Required Determination of Death*, 27 J.L. MED. & ETHICS 126, 126 (1999). Some have argued, for example, that brain death is essential to death and so there is no reason to include the circulatory-respiratory criteria in the definition of death. *Id.* Others debate how the term “irreversibility” is to be understood in the UDDA. *Id.* at 127. Finally, there is fear that the UDDA resulted from “ethical gerrymandering” that attempted to increase the availability of organs for transplantation insofar as it allowed for Non-Heart-Beating Organ Donation (“NHBD”). *Id.* (internal quotation marks omitted). James DuBois defends the UDDA against these criticisms in several interrelated ways, including: (1) that “[a] single coherent underlying *concept* or *definition* of death may be compatible with two . . . *criteria* for determining death”; (2) that “brain death is not essential to death,” it is only “one set of criteria for meeting the definition of death”; and (3) that the legal definition of death should be sufficiently vague to allow for different philosophical and theological conceptions of death and the varying normative implications of these conceptions. *Id.*

37. See UDDA PREFATORY NOTE, *supra* note 35, at 1 (describing need for statute because common-law standard does not appreciate these new medical techniques).

38. See *id.* (noting discrepancy between biomedical practice and common-law standard). The UDDA “is silent on acceptable diagnostic tests and medical procedures. It sets the general legal standard for determining death, but not the medical criteria for doing so. . . . [relying on the medical profession for new] acceptable medical practices and to utilize new biomedical knowledge, diagnostic tests, and equipment.” *Id.* at 2.

39. See UNIFORM DETERMINATION OF DEATH ACT § 1, 12A U.L.A. 593 (2003) (indicating that death is determined by common-law standard or by loss of brain function).

function, irreversibly.”<sup>40</sup> The UDDA was approved in 1980 by the NCCUSL and has since been adopted by forty states, including Pennsylvania in 1982.<sup>41</sup>

C. *The National Framework for Organ Transplantation*

Federal oversight of the national transplant system began in 1984 when Congress passed the National Organ Transplant Act (“NOTA”).<sup>42</sup> NOTA established, among other things, a national system for the uniform matching of organs with potential recipients.<sup>43</sup> This system, the national Organ Procurement and Transplantation Network (“OPTN”), includes all federally certified organ procurement organizations (“OPOs”) and transplant centers that receive Medicare and Medicaid funding.<sup>44</sup> The United Network for Organ Sharing (“UNOS”), a private, nonprofit entity under contract with the Health Resources and Services Administration (“HRSA”), administers the OPTN.<sup>45</sup> The OPTN is primarily responsible for administration of the national waiting list of transplant

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40. UDDA PREFATORY NOTE, *supra* note 35, at 2 (noting that entire brain includes neocortex and brain stem); *see also* UNIFORM DETERMINATION OF DEATH ACT § 1 (defining death as “irreversible cessation” of “circulatory and respiratory functions” or “all functions of the entire brain, including the brain stem”).

41. *See* UNIFORM DETERMINATION OF DEATH ACT § 1, 12A U.L.A. 593 (passed in 1980); Uniform Death Determination Act, 35 PA. CONS. STAT. ANN. §§ 10202-10203 (West 2003) (passed in 1982). Pennsylvania adopted the UDDA in substantially similar form as drafted by the NCCUSL. *Compare* 35 PA. CONS. STAT. ANN. §§ 10202-10203 (listing statute as enacted), *with* UNIFORM DETERMINATION OF DEATH ACT § 1 (listing NCCUSL version of statute).

42. National Organ Transplant Act, Pub. L. No. 98-507, 98 Stat. 2339 (1984) (codified as amended in scattered sections of 42 U.S.C.).

43. 42 U.S.C. § 274(b)(2)(A) (2000). The Act indicated that the OPTN should be a private, nonprofit entity. *Id.* § 274(b)(1); *see also* Organ Procurement and Transportation Network, About OPTN, <http://www.optn.org/optn> (last visited Aug. 1, 2008) (describing private, nonprofit organization created as result of Act).

44. OPPORTUNITIES FOR ACTION, *supra* note 15, at 20; *see also* MICHELE GOODWIN, BLACK MARKET: THE SUPPLY AND DEMAND OF BODY PARTS 97 (2006) (noting that failure to comply with OPTN may result in loss of federal Medicaid and Medicare funding for OPOs). The national transplant system functions as follows:

Currently, the organ donation and transplantation system in the United States is coordinated by 58 OPOs serving unique geographic areas (donor service areas). When a donated organ becomes available, the organ allocation algorithms developed by OPTN-UNOS identify a potential recipient on the basis of multiple factors, including severity of disease; geographic proximity; and blood, tissue, and size matches with the donor. Ongoing efforts are made to ensure impartiality in the allocation process. OPOs are charged with working with individuals, families, and hospital staff to explore consent for and facilitate organ donation; evaluating the medical eligibility of potential donors; coordinating the recovery, preservation, and transportation of donated organs; and educating the public about organ donation.

OPPORTUNITIES FOR ACTION, *supra* note 15, at 20-21 (citation omitted).

45. United Network for Organ Sharing, Who We Are—The OPTN, <http://www.unos.org/whoWeAre/theOPTN.asp> (last visited Aug. 1, 2008). The HRSA is an agency of the U.S. Department of Health and Human Services. The agency promotes access to health care for the uninsured or underinsured. Health Resources and Services Administration, About HRSA, <http://www.hrsa.gov/about/default.htm> (last visited Aug. 1, 2008).

candidates and the development of equitable policies for organ allocation.<sup>46</sup>

NOTA section 301(a) restricts how human organs may be transferred.<sup>47</sup> It declares that “[i]t shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for *valuable consideration* for use in human transplantation if the transfer affects interstate commerce.”<sup>48</sup> A violation of this prohibition is subject to criminal penalties of a possible \$50,000 fine, five years’ imprisonment, or both.<sup>49</sup> “Valuable consideration” is not defined under NOTA. The language of section 301(a) merely states that “‘valuable consideration’ *does not* include the reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ or the expenses of travel, housing, and lost wages incurred by the donor . . . in connection with the donation of the organ.”<sup>50</sup>

#### D. Pennsylvania’s Funeral Benefit Under Act 102

In December 1994, Pennsylvania Act 1994-102 (hereinafter referred to as Act 102) was signed into law by Governor Robert P. Casey, himself the beneficiary of a double-organ transplant.<sup>51</sup> Act 102 promoted education and public awareness activities about organ and transplant donation in the hope that those efforts would increase organ and tissue donation.<sup>52</sup> Section 8 of Act 102

46. See United Network for Organ Sharing, *supra* note 45 (noting that UNOS’s contractual responsibilities under OPTN contract include analyzing and publishing waiting list, organ matching, and providing guidelines). Through the OPTN, UNOS “collect[s] and manage[s] data about every transplant event occurring in the United States”; “facilitate[s] the organ matching and placement process using UNOS-developed data technology and the UNOS Organ Center”; and “bring[s] together medical professionals, transplant recipients and donor families to develop organ transplantation policy.” United Network for Organ Sharing, Who We Are, <http://www.unos.org/whoWeAre/> (last visited Aug. 1, 2008) (emphasis omitted).

47. National Organ Transplantation Act § 301(a), 42 U.S.C.A. § 274e (West 2003 & Supp. 2008).

48. *Id.* § 274e(a) (emphasis added). The historical background on the restrictions on human organ transfers dates to September 1983. H. Barry Jacobs, a doctor whose Virginia license was revoked in 1977, created a company to connect kidney donors with recipients. Susan Hankin Denise, Note, *Regulating the Sale of Human Organs*, 71 VA. L. REV. 1015, 1015 (1985). The organ recipient would pay the price of the kidney plus a \$2000 to \$5000 service fee to Jacobs. *Id.* Virginia responded to Jacobs’s idea by prohibiting the sale of human organs; Congress and several states followed suit. *Id.*

49. 42 U.S.C.A. § 274e(b).

50. *Id.* § 274e(c)(2) (emphasis added). On December 21, 2007, NOTA section 301(a) was amended to address human organ paired donation. See *infra* note 108 for a discussion of human organ paired donations.

51. Act of Dec. 1, 1994, Pub. L. No. 1994-102, 1994 Pa. Laws 665 (codified as amended at 20 PA. CONS. STAT. § 8601-8642 (2005)). For an account of Governor Casey’s heart and liver transplant, see generally ROBERT P. CASEY, FIGHTING FOR LIFE (1996). Act 102 was incorporated as an amendment to the state’s Anatomical Gift Act. 20 PA. CONS. STAT. ANN. § 8601-8642 (West 2005 & Supp. 2007).

52. See Pennsylvania Department of Health, Act 102 of 1994, <http://www.dsf.health.state.pa.us/health/cwp/view.asp?A=174&Q=244786> (last visited Aug. 1, 2008) (describing intended purpose of Act). Key components of Act 102 are (1) to increase the requirements placed on hospitals regarding the organ donation process, 20 PA. CONS. STAT. § 8617 (2006); (2) to increase public awareness of organ donation, *id.* § 8622(b)(3); (3) to establish a fifteen-member Organ Donation Advisory Committee, *id.* § 8622(c); and (4) to create the Governor Robert P. Casey Memorial Organ and Tissue Donation Awareness Trust Fund, *id.* § 8622(a). Act 102 was amended in 2000 to rename the trust fund

established the Organ and Tissue Donation Awareness Trust Fund (later renamed in memory of Governor Casey after his death),<sup>53</sup> in part from donations collected by the Pennsylvania Department of Transportation during the driver's license issuance and renewal process.<sup>54</sup> Following payment of program implementation costs, remaining trust funds can be used four possible ways—one of which is for hospital, medical, and *funeral* expenses in connection with organ donation.<sup>55</sup> Specifically, Section 8 of Act 102 reads as follows:

Any remaining funds are appropriated subject to the approval of the Governor for the following purposes:

(1) 10% of the total fund may be expended annually by the Department of Health for reasonable hospital and other medical expenses, funeral expenses and incidental expenses incurred by the donor or donor's family in connection with making a vital organ donation. Such expenditures shall not exceed \$3,000 per donor and shall only be made directly to the funeral home, hospital or other service provider related to the donation. No part of the fund shall be transferred directly to the donor's family, next of kin or estate. The advisory committee shall develop procedures, including the development of a pilot program, necessary for effectuating the purposes of this paragraph.<sup>56</sup>

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after Governor Casey, who died earlier that year. Act of Dec. 20, 2000, Pub. L. No. 2000-120, 2000 Pa. Laws 881. The success of Pennsylvania's Act 102 provisions was recently documented. LEGIS. BUDGET & FIN. COMM., A PERFORMANCE EVALUATION OF PENNSYLVANIA'S ORGAN AND TISSUE DONOR AWARENESS PROGRAM, HR-698, 1st Sess., at S-8 (Pa. 2007), *available at* <http://lbc.legis.state.pa.us/reports/2007/291.PDF> [hereinafter LB&FC REPORT]. In June 2007, Pennsylvania's Legislative Budget & Finance Committee reported as follows:

While difficult to quantify the impact of [the Act 102 program] in dollar terms, it is possible to make a "cost-per-donor" calculation (that is, the amount spent for each of the more than 4.0 million Pennsylvanians who joined the state registry since the program began.) Even when the full \$6.2 million amount spent in the program is used in this calculation, the amount spent per donor is only \$1.55. In contrast, one recent analysis reported by the Institute of Medicine found that with the cost savings of transplantation, society should be willing to spend up to \$1,900 to register a single organ donor. Pennsylvania's accomplishments are all the more significant considering that about two-thirds of the money invested in the program comes from voluntary donations made by Pennsylvania citizens.

*Id.* at S-8 to S-9.

53. See Act of Dec. 20, 2000, Pub. L. No. 2000-120 (codified as amended at 20 PA. CONS. STAT. § 8622(a)) (changing name of Organ Donation Awareness Trust Fund to the Governor Robert P. Casey Memorial Organ and Tissue Donation Awareness Trust Fund).

54. 20 PA. CONS. STAT. § 8621(a). Subsequent legislation, Pennsylvania's Act 1998-74, directed PennDOT to provide the same opportunity to applicants for a renewal vehicle registration to donate to the fund. Act of Jun. 18, 1998, Pub. L. No. 1998-74, 1998 Pa. Laws 529 (codified as amended at 20 PA. CONS. STAT. § 8621(b)).

55. 20 PA. CONS. STAT. § 8622(b)(1). The other three possible uses are for organ procurement organization grants, the Project Make-a-Choice Program, and a secondary school awareness program. *Id.* § 8622(b).

56. *Id.* § 8622(b). The 2007 report by Pennsylvania's Legislative Budget & Finance Committee noted that:

According to officials of the Department of Health, as early as May 1997, the Bureau of Family Health and the Organ Donation Advisory Committee began to plan for the

*E. A Growing Impasse over “Valuable Consideration”*

There is developing interest within the organ donation community to use certain incentives, such as the payment of a funeral benefit as authorized by Pennsylvania’s Act 102, to boost organ donations and help address the increasing need for organs.<sup>57</sup> Commentators suggest that certain incentives should be allowed, at least on a trial basis.<sup>58</sup> At the request of HRSA and the Greenwall Foundation,<sup>59</sup> in 2004, IOM initiated a study of the issues affecting organ donation levels.<sup>60</sup> This report—*Organ Donation: Opportunities for Action*—was published in 2006 as “the result of a 16-month study conducted by an IOM committee composed of experts in the fields of bioethics, law, health care, organ donation and transplantation, economics, sociology, emergency care, end-of-life care, and consumer decision making.”<sup>61</sup>

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reimbursement of a portion of an organ donor’s funeral expenses under the Act 102 provisions. A subcommittee was developed to evaluate and provide recommendations for a voluntary benefit program according to Act 102. By 1999, these discussions had reached the proposal stage. As proposed, the plan would have provided a \$300 stipend to help families of organ donors cover their funeral expenses. The payment was to be made directly to funeral homes and not to family members.

LB&FC REPORT, *supra* note 52, at 113 (footnote omitted). The Committee’s report continued:

On June 9, 1999, the Organ Donation Advisory Committee officially delivered its plan to the Pennsylvania Secretary of Health for review and approval. The Secretary of Health received the plan and stated that the Department would conduct a thorough review of the proposed funeral reimbursement pilot program, including exploration of both its ethical and legal implications.

At that time, the Secretary directed the state Physician General to review ethical issues raised by the funeral benefits program. In conducting this review, the Physician General met with four bioethicists who concluded that a proposed \$300 funeral donation did not violate any ethical or bioethical principles but that if the amount were to be increased, it could cause a crossover into an unethical situation. Also at that time, however, DOH legal counsel advised . . . that the use of Trust Fund monies for funeral expenses would violate [the National Organ Transplant Act] prohibition on the transfer of organs for “valuable consideration.”

*Id.* at 116. See *supra* notes 47-50 and accompanying text for a discussion of the prohibition on donating organs in exchange for valuable consideration. In 2002, at the recommendation of the state advisory committee, DOH implemented the Organ Donation Expense Benefit Pilot Program, which makes available a reimbursement payment of up to \$300 to eligible organ donors and their families to help defray the cost of lodging and meal expenses relating to an organ donation. LB&FC REPORT, *supra* note 52, at 129.

57. See *supra* notes 58-60 and accompanying text for discussion of the growing interest in using incentives to encourage organ donation.

58. See OPPORTUNITIES FOR ACTION, *supra* note 15, at 250 (noting recent support from prominent organizations for studies and pilot programs which explore the possibility of offering financial incentives for organ donation).

59. In 1949, Frank and Anna Greenwall established the Greenwall Foundation, which awards grants in the fields of arts and humanities and bioethics. The Greenwall Foundation, <http://www.greenwall.org> (last visited Aug. 1, 2008).

60. OPPORTUNITIES FOR ACTION, *supra* note 15, at 3.

61. *Id.*

According to the IOM report, the present approach to organ donation, which requires that organs be given as gifts rather than sold, stems partly from the “supposition that solid organs of deceased individuals *should not* be bought and sold.”<sup>62</sup> The IOM reported:

The discrepancy between organ supply and need remained troubling; and even though the rates of organ donation increased, they remained disappointing, even with the adoption of measures such as required request, which assumed that there was no shortage of givers, only a shortage of askers. Not surprisingly, proposals for the use of financial incentives and new nonfinancial incentives emerged with greater frequency and forcefulness.<sup>63</sup>

According to the IOM, the public, for the most part, appears ambivalent regarding the issue of financial incentives for organ donation.<sup>64</sup> A national survey indicated that financial incentives did not affect more than two-thirds of respondents’ decisions about donating a family member’s organs; approximately nineteen percent of respondents would be more likely to donate while almost eleven percent would be less likely to donate.<sup>65</sup> The IOM believed “there are powerful reasons to preserve the idea that organs are donated rather than sold.”<sup>66</sup> According to the IOM, “the question remains whether rates of donation would increase even more if current motivations to donate were reinforced by the provision of something of material worth.”<sup>67</sup> The IOM reasoned:

Human behavior is complex, and people often have multiple motivations for engaging in an act. For example, charitable gifts continue to be perceived as donations, even though they are also accompanied by tax incentives. Under the right circumstances, donated organs might continue to be viewed as gifts, despite the presence of financial incentives.<sup>68</sup>

The IOM noted that “[f]inancial incentives for [organ] donation are meant to function within the *gift* model of donation.”<sup>69</sup> Proponents of providing financial incentives for organ donation argue that “the distinction between an incentive of material value and a payment for organs is sometimes lost in public discussions.”<sup>70</sup> Upholding this distinction, concluded the IOM, is fundamental to

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62. *Id.* at 239 (emphasis added).

63. *Id.* at 231 (citations omitted); *see also id.* at 249-51 (providing listing of some incentives being considered and implemented). “Required request” is a policy “ensuring that all potential donor families are asked about donation.” OPPORTUNITIES FOR ACTION, *supra* note 15, at 101.

64. *Id.* at 244.

65. *Id.* The percentages from the same question in a 1993 survey showed that twelve percent of respondents were more likely to donate, five percent of respondents were less likely to donate, and seventy-eight percent of respondents were neither more nor less likely to donate. *Id.*

66. *Id.* at 247.

67. OPPORTUNITIES FOR ACTION, *supra* note 15, at 247.

68. *Id.* at 247-48.

69. *Id.* at 248.

70. *Id.* It is this lost distinction that this author believes needs to be recovered to effectuate the statutory purpose of the federal prohibition under section 301(a) of the National Organ Transplant Act. 42 U.S.C.A. § 274e (West 2003 & Supp. 2008). For further discussion of the distinction between

"whether . . . the strengths of the gift model can be preserved [where] donation is rewarded by a financial payment."<sup>71</sup> Opinions diverge as to whether financial incentives for organ donation can promote the goals of the gift model without risking commodification of the human body.<sup>72</sup>

The IOM specifically considered the hypothetical proposal to pay funeral expenses as an incentive for organ donation.<sup>73</sup> According to the IOM, "[s]urvey data consistently indicate that the public would be more receptive to an incentive program involving a funeral payment than a direct cash payment for organs."<sup>74</sup> In fact, the IOM stated that a \$1000 "payment earmarked for the deceased donor's funeral expenses as an incentive to consent to donation and an expression of gratitude for the decision may be conceptually and morally distinguishable from buying an organ."<sup>75</sup> This is so because the payment would not reflect the actual value of the organ and would be situated within a gift model of donation, analogous to a tax incentive for charitable giving.<sup>76</sup>

In Pennsylvania, a recent study showed that a majority of households supported the general idea of providing financial incentives for organ donation.<sup>77</sup> Eighty-one percent of respondents favored providing payments to help with funeral expenses and nearly twenty-five percent indicated they would be more willing to register and consent to donate if a funeral benefit were provided.<sup>78</sup> Sixty-eight percent of respondents thought that a funeral benefit would make others more likely to donate.<sup>79</sup> The study demonstrated that registered organ donors remain committed to their donation plans and supportive of plans to offer benefits as an incentive to donate.<sup>80</sup> Most respondents who disagreed with providing incentives were not registered donors.<sup>81</sup>

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gifts and commercial activity, see *infra* Part IV.

71. See OPPORTUNITIES FOR ACTION, *supra* note 15, at 248 ("For example, would families question whether their decision to donate was motivated by the desire to save the life of others or by the funeral benefit? Would this affect the meaning that they find in donation?").

72. *Id.* at 248-49.

73. *Id.* at 248-50.

74. *Id.* at 249.

75. LB&FC REPORT, *supra* note 52, at 121.

76. OPPORTUNITIES FOR ACTION, *supra* note 15, at 248, 250. In the end, the IOM concluded, however, that "a pilot study of the effect of financial incentives should be undertaken only if other, less controversial strategies of increasing organ donation have been tried and proven unsuccessful and if, as a result, policy makers have become inclined to implement such a strategy." *Id.*

77. C.L. Bryce et al., *Do Incentives Matter? Providing Benefits to Families of Organ Donors*, 5 AM. J. TRANSPLANTATION 2999, 2999 (2005).

78. *Id.* at 3002 tbl.2.

79. *Id.* A large majority, however, indicated that \$300 would be "too little" to pay in helping to defray funeral expenses. *Id.* at 3003 fig.1.

80. Bryce et al., *supra* note 77, at 3005.

81. *Id.* Other relevant organizations and observers have supported the idea of further investigating the use of financial incentives in organ donation. See LB&FC REPORT, *supra* note 52, at 121-26 (summarizing views of organ donation of key organizations and individuals regarding financial incentives). Some, on the other hand, maintain positions strictly opposed to any form of incentives for organ donation. See *id.* (summarizing views of opponents of use of financial incentives for organ donation).

While there is movement to integrate financial incentives such as Pennsylvania's funeral-expense benefit into the organ donation process and studies have shown that the public would not necessarily oppose such a development, the question remains to what extent *can* such incentives legally be used in light of the prohibition in NOTA section 301(a). The Advisory Committee on Organ Transplantation ("ACOT")<sup>82</sup> has discussed the scope of NOTA's prohibition in relation to incentives and addressed the question of what is prohibited and, conversely, what should be permitted under federal law. ACOT concluded that "clarification and greater specificity [was needed] in regard to the broad and somewhat confusing prohibition of valuable consideration in the context of organ donation."<sup>83</sup> In fact, ACOT recommended amending NOTA to give the Department of Health and Human Services discretion in further defining "valuable consideration."<sup>84</sup> ACOT explained that "[it] has concluded that a process to limit the scope of 'valuable consideration' would encourage the development of ethical practices to increase the supply of human organs and provide certainty to the transplant community about the scope of permissible activities."<sup>85</sup>

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82. The ACOT assists the Secretary of the U.S. Department of Health and Human Services ("HHS") in "[e]nhancing organ donation, [e]nsuring that the system of organ transplantation is grounded in the best available medical science, [a]ssuring the public that the system is as effective and equitable as possible, and thereby [i]ncreasing public confidence in the integrity and effectiveness of the transplantation system." OrganDonor.Gov, U.S. Department of Health and Human Services, Advisory Committee on Organ Transplantation, <http://www.organdonor.gov/research/acot.htm> (last visited Aug. 27, 2008). For more information on the composition and expertise of the ACOT, see *id.*

83. ADVISORY COMM. ON ORGAN TRANSPLANTATION, U.S. DEP'T OF HEALTH & HUMAN SERVS., SUMMARY NOTES FROM FALL MEETING (2004), available at [http://www.organdonor.gov/research/acot11\\_2004.htm](http://www.organdonor.gov/research/acot11_2004.htm) [hereinafter ACOT FALL 2004 MEETING NOTES]. ACOT considered the legality of fourteen different organ donation incentive options, one of which was the payment of funeral expenses for deceased donors. ADVISORY COMM. ON ORGAN TRANSPLANTATION, U.S. DEP'T OF HEALTH & HUMAN SERVS., SUMMARY NOTES FROM SPRING MEETING (2004), available at [http://www.organdonor.gov/research/acot5\\_2004.htm](http://www.organdonor.gov/research/acot5_2004.htm) [hereinafter ACOT SPRING 2004 MEETING NOTES]. While ACOT did not find funeral benefits to be unquestionably acceptable under the NOTA prohibition, it found that a funeral-benefit program would be an "ideal" study and voted to keep the funeral-benefits concept under consideration. *Id.* The fourteen potential incentives for organ donation considered by ACOT were as follows: "[p]ayment for organ procurement-related expenses (i.e., removal, transportation, quality control, processing, etc.);" "[p]ayment for lost wages experienced by living donors"; "[p]ayment for travel and subsistence expenses for living donors"; "[c]ongressional commemorative medal for organ donors"; "[p]referred status"; "[p]aired exchange"; "[p]ayment of funeral expenses for deceased donors"; "[t]ax deduction to a person previously designated by a deceased donor"; "[r]efundable credit to individuals who donate their organs at death"; "[i]nsurance policy to be received by a person or organization designated by the donor following successful donation"; "[g]uaranteed lifetime health insurance coverage for living donors"; "[b]onuses paid to individuals and organizations involved in organ procurement"; "[l]iving donor/deceased donor exchange"; and "[d]irect cash payment." *Id.* app. A.

84. ADVISORY COMM. ON ORGAN TRANSPLANTATION, U.S. DEP'T OF HEALTH & HUMAN SERVS., RECOMMENDATIONS 36-41 (2004), available at <http://www.organdonor.gov/research/acotrecs36-41.htm>.

85. *Id.* In further explanation of the proposed amendment, ACOT stated:

The Secretary's authority should be limited to legitimate and beneficial practices that are intended to increase the supply of human organs, without creating a commercial market for

III. PENNSYLVANIA’S FUNERAL BENEFIT, NOTA SECTION 301(A), AND  
“DISEASES OF LANGUAGE”<sup>86</sup>

Since Pennsylvania’s Organ Donor Advisory Committee first proposed a funeral expense pilot program in 1999,<sup>87</sup> Pennsylvania’s Department of Health has held that “reimbursing an organ donor’s funeral expense necessarily violates NOTA [s]ection 301(a)” and its prohibition on the transfer of human organs for valuable consideration.<sup>88</sup> Whether it violates NOTA depends on the language of the law and how it is interpreted. In the nearly twenty-three-year period since NOTA’s adoption in 1984 through March 2007, however, neither the U.S. Department of Justice nor any court decision had announced an official interpretation of the prohibition under section 301(a).<sup>89</sup>

A. *Effectuating Statutory Purpose*

Chief Justice John Marshall said “[t]o listen well is as powerful a means of communication and influence as to talk well.”<sup>90</sup> In scrutinizing any statute, one

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the purchase or sale of human organs or posing a risk of coercion of a potential donor or donor family. In addition, the Secretary should be required to obtain an appropriate independent ethical evaluation before excluding any practice from the prohibition on valuable consideration.

. . . Regulatory authority is both more flexible and more responsive to innovation than an expanded statutory list of practices that are not included in the term “valuable consideration.”

*Id.*; see also LB&FC REPORT, *supra* note 52, at 126 (noting lack of response to ACOT’s proposal).

86. Reed Dickerson writes that “the job of writing a clear statute remains formidable. . . . due to several important, and largely curable, diseases of language.” Reed Dickerson, *The Diseases of Legislative Language*, 1 HARV. J. ON LEGIS. 5, 6 (1964).

87. See *supra* notes 55-56 and accompanying text for a discussion of the history of Pennsylvania’s funeral-expense program and other organ donor initiatives.

88. LB&FC REPORT, *supra* note 52, at 126. Nevertheless, Pennsylvania’s OPOs have disagreed. The Legislative Budget and Finance Committee Report noted:

General counsel to one of Pennsylvania’s two OPOs argued the point in a March 28, 2000, letter to DOH, concluding that the NOTA prohibition is limited only to the *selling* of organs for profit and that “it is inconsistent with the express language of [NOTA], as well as the legislative history, to broaden the prohibition well beyond its express words to somehow prohibit the *reimbursement* of a portion of the funeral expenses of an organ donor.”

*Id.* (quoting Letter from General Counsel, Pennsylvania OPO, to Pennsylvania DOH (Mar. 28, 2000) (emphasis in original). OPO counsel pointed to NOTA section 301(a)’s status as a criminal statute in arguing that it “should be strictly construed and strictly limited to pure commercial transactions in human organs.” LB&FC REPORT, *supra* note 52, at 126. “To do otherwise ‘would violate the basic tenets of statutory construction and criminalize conduct that [was] never expressly addressed.’” *Id.* (quoting Letter from General Counsel, Pennsylvania OPO, to Pennsylvania DOH, *supra*).

89. In late March 2007, however, the Department of Justice issued a memorandum opinion addressing the interaction between NOTA section 301(a) and the practice of kidney-exchange agreements. Legality of Alternative Organ Donation Practices Under 42 U.S.C. § 274(e), 31 Op. Off. Legal Counsel (Mar. 28, 2007), available at <http://www.usdoj.gov/olc/2007/organtransplant.pdf> [hereinafter Legality of Alternative Organ Donation Practices].

90. Thinkexist.com, John Marshall Quotes, [http://en.thinkexist.com/quotes/John\\_Marshall](http://en.thinkexist.com/quotes/John_Marshall) (last visited Aug. 27, 2008).

must listen to what the legislature attempted to communicate by engaging in the careful process of interpreting and construing statutory language.<sup>91</sup> The “overriding objective of statutory construction is to effectuate statutory purpose”<sup>92</sup>—to discover and give meaning to what was intended by what was said. Rules of statutory construction and interpretation help this process, if needed.<sup>93</sup> Determining the legislature’s intent and purpose through a statute begins by looking at the express language of the statute itself.<sup>94</sup> If the statute’s text is clear, the inquiry proceeds no further.<sup>95</sup> Justice Felix Frankfurter noted, however, that “the phrasing of a document, especially a complicated enactment, seldom attains more than approximate precision.”<sup>96</sup>

91. The terms *interpretation* and *construction* are, for the most part, used interchangeably in this Article. Moreover, this Article is not intended to engage the full scope of the discussion regarding the interpretation and construction of statutes. For an illustration of how voluminous the discussion of statutory interpretation is, see the extensive list of articles addressing the topic at, for example, SINGER & SINGER, *supra* note 5, § 45:01, at 2 n.1.

92. CONG. RESEARCH SERV. OF THE LIBRARY OF CONG., STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 3 (2006) [hereinafter STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS].

93. SINGER & SINGER, *supra* note 5, § 45:2, at 15.

94. STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS, *supra* note 92, at 2.

95. *Id.*

96. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528 (1947)). Frankfurter continued:

If individual words are inexact symbols, with shifting variables, their configuration can hardly achieve invariant meaning or assured definiteness. Apart from the ambiguity inherent in its symbols, a statute suffers from dubieties. It is not an equation or a formula representing a clearly marked process, nor is it an expression of an individual thought to which is imparted the definiteness a single authorship can give. A statute is an instrument of government partaking of its practical purposes but also of its infirmities and limitations, of its awkward and groping efforts.

*Id.* Such “diseases of language,” as originally described by Reed Dickerson, include ambiguity, vagueness, precision, and generality—all in the extreme. Dickerson, *supra* note 86, at 6-14. For example, ambiguous language may include a word that is equivocal—that is it has “different significations equally appropriate” or is “capable of double interpretation.” *Id.* at 6 (quoting III Oxford English Dictionary E263 (James A.H. Murray ed., 1933)). Ambiguities can be: (1) semantic, in that their “uncertainties of meaning[] . . . are traceable to the multiplicities of dictionary meanings, which exist independently of context”; (2) syntactic, which are “uncertainties of modification or reference within the particular statute”; or (3) contextual, where there is simply an internal inconsistency or uncertain implication within the context of the statute. *Id.* at 7-8. Language is vague, however, “to the degree to which, independently of equivocation, [it] is uncertain in its respective applications to a number of particulars.” *Id.* at 10. “[T]he uncertainty of vagueness lies in marginal questions of degree.” *Id.* For example, the word “he” in a sales agreement could equally refer to the seller or the buyer and is, therefore, ambiguous in that it is not apparent which of the two is intended. The term is not vague because it plainly refers to a male person. There is no degree of “maleness” needed to understand what is anticipated by the term “he.” Conversely, while the word “intentional” in the same sales agreement would clearly denote the idea of “deliberate,” it raises the question as to what degree of deliberateness is anticipated. The term, consequently, is not ambiguous—there is no “either-or” question—but is vague because it is unclear as to the extent or amount of the concept envisioned. Dickerson, *supra* note 86, at 10. Vagueness, too, may be either semantic or contextual. It is possible that vagueness may be desirable depending on the extent to which it is “desirable to leave the

The express language of NOTA section 301(a) proscribes the transfer of human organs for “valuable consideration”<sup>97</sup> but never defines the term. Therefore, the full scope of reference covered by the term cannot be known from the language of the statute. Moreover, the law does not describe the characteristics that are essential to defining the concept from which the totality of the prohibition can be determined. It gives examples only as to what is *not* included within the term.<sup>98</sup> As such, NOTA section 301(a) clearly suffers from a “disease of language” in that it is overly broad and, therefore, too general. Nevertheless, two aspects of the language, in light of accepted rules of interpretation and construction, are instructive in working out how to effectuate its purpose, in interpreting what was intended, and, therefore, in understanding what the law is.

### 1. Technical Meaning

First, “valuable consideration” is a term with associated technical meaning likely culled from the field of contract law. Such a technical term—unless otherwise defined by statute—brings with it the accepted and well-established technical meaning associated with it.<sup>99</sup> Under contract law, “consideration” signifies a bargained-for exchange between parties that serves as the basis for an enforceable contract.<sup>100</sup> The exchange is mutually induced—meaning that one party intends to induce the other’s response and also intends to be induced by the other’s response.<sup>101</sup> The other party then responds in accordance with the inducement.<sup>102</sup> Conversely, where a *gratuitous* transfer is made there is no

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resolution of uncertainties to those who will administer and enforce the statute.” *Id.* at 11. “A term is ‘general’ when it is not limited to a unique referent and thus can denote more than one.” *Id.* at 12. “[C]lasses denoted in a statute should be neither broader nor narrower than those appropriate to carrying out the legislature’s objectives.” DICKERSON, *supra* note 4, at 52; Dickerson, *supra* note 86, at 12. Finally, “[o]ver-precision and over-particularity not only needlessly circumscribe the actions of those who are affected by the statute but make it harder to read, understand, and administer.” Dickerson, *supra* note 86, at 12.

97. National Organ Transplant Act § 301(a), 42 U.S.C.A. § 274e (West 2003 & Supp. 2008).

98. See *supra* note 50 and accompanying text for a list of the examples of what is not included in the term “valuable consideration.”

99. See STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS, *supra* note 92, at 5-6 (citing *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991)). “[W]here a common law principle is well established, . . . the courts may take it as a given that Congress has legislated with an expectation that the principle will apply except “when a statutory purpose to the contrary is evident.”” *Id.* at 6 n.21 (omission in original) (quoting *Astoria*, 501 U.S. at 108).

100. RESTATEMENT (SECOND) OF CONTRACTS § 71(1) (1979).

101. See *id.* § 71(2) (explaining requirement of mutual promises).

102. See *id.* § 71 cmt. b (noting that requirement of bargain for valid consideration implies requirement of mutual inducement). In fact, other areas of federal law that use the term *valuable consideration* use it to describe things of value that serve as an inducement for a contract, deal, transfer, sale, business arrangement, or the like. See, e.g., 15 U.S.C. § 1679b(b) (2000) (barring credit repair organizations from charging or receiving money or other valuable consideration for performance of any service that credit repair organization has agreed to perform for any consumer before such service is fully performed); 22 U.S.C. § 4341(7) (2000) (defining “profits” as cash and other valuable consideration); 29 U.S.C. § 1802(7) (2000) (defining “farm labor contractor” as

*consideration* involved even if the receiving party subsequently promises to pay the value of the thing transferred to the one who made the gift.<sup>103</sup> Therefore, the use of the phrase “valuable consideration” suggests that a contract-type, bargained-for exchange—as opposed to a gratuitous exchange—is what was intended to be prohibited by NOTA section 301(a).

The legislative history of NOTA corroborates this perspective. The Senate Committee on Labor and Human Resources Report No. 98-382, dated April 6, 1984, addressing NOTA, stated that it “[p]rohibits the interstate *buying and selling* of human organs for transplantation.”<sup>104</sup> It further stated that “the prohibition on the buying and selling of human organs is directed at preventing the for-profit *marketing* of kidneys and other organs”<sup>105</sup> and that “[i]t is the sense of the Committee that individuals or organizations should not *profit* by the sale of human organs for transplantation.”<sup>106</sup> *Buying, selling, marketing, and profit*<sup>107</sup> are all terms relating to commercial business transactions.<sup>108</sup>

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someone who receives valuable consideration); 42 U.S.C. § 1382b(c)(1)(C)(iii)(I) (2000) (using valuable consideration as threshold for determining ineligibility for supplemental security income benefits); 47 U.S.C. § 338(e) (2000) (barring satellite carriers from accepting monetary payment or other valuable consideration for carrying local television broadcast stations); 47 U.S.C. § 508(a) (2000) (requiring disclosure of valuable consideration given to broadcast station employees).

103. RESTATEMENT (SECOND) OF CONTRACTS § 71, cmt. b (using following example as illustration: “A receives a gift from B of a book worth \$10. Subsequently A promises to pay B the value of the book. There is no consideration for A’s promise. This is so even though B at the time he makes the gift secretly hopes that A will pay him for it.”).

104. S. REP. NO. 98-382, at 2 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3975, 3976 (emphasis added).

105. *Id.* at 4, 1984 U.S.C.C.A.N. at 3978 (emphasis added).

106. *Id.* at 16, 1984 U.S.C.C.A.N. at 3982 (emphasis added).

107. *Id.* at 1-2, 4, 16, 1984 U.S.C.C.A.N. at 3975-76, 3978, 3982.

108. See POSITION STATEMENT: KIDNEY PAIRED DONATIONS, KIDNEY LIST DONATIONS AND NOTA § 301, at 6 (2006), *available at* [http://www.unos.org/SharedContentDocuments/WMCD-1297256-v9-UNOS\\_Revised\\_NOTA\\_301\\_Position\\_Paper.pdf](http://www.unos.org/SharedContentDocuments/WMCD-1297256-v9-UNOS_Revised_NOTA_301_Position_Paper.pdf) (noting that Congress’s intent in enacting NOTA was to criminalize purchase and sale of organs for profit, as in commercial business transaction). Associate General Counsel to UNOS also concluded that paired kidney donations involved conditional gifts—not transfers induced by valuable consideration—and were, therefore, not restricted by section 301(a) of the NOTA, Pub. L. No. 98-507, 98 Stat. 2339 (1984) (codified as amended at 42 U.S.C.A. § 274e (West 2003 & Supp. 2008)). POSITION STATEMENT, *supra*, at 3-6. These transactions work, counsel concluded, within the basic gift framework and any incidental emotional or psychological benefit to the donor in “desiring to help a family member, friend, or someone else for whom the donor feels a personal bond or from the donor’s desire to benefit an unidentified fellow human being,” is an inherent component of donative intent in any type of gift and is not to be confused with “consideration.” *Id.* The Senate, by unanimous consent, passed the Living Kidney Organ Donation Clarification Act, S. 487, 110th Cong. (2007), *available at* [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_bills&docid=f:s487es.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:s487es.txt.pdf), in February 2007. ERIN D. WILLIAMS ET AL., CRS REPORT FOR CONGRESS, LIVING ORGAN DONATION AND VALUABLE CONSIDERATION (2007), *available at* <http://openocrs.cdt.org/document/RL33902> (summarizing legislative history). The House responded by passing a companion measure, the Charlie W. Norwood Living Organ Donation Act, H.R. 710, 100th Cong. (2007), by a unanimous vote. WILLIAMS ET AL., *supra*. Together, the bills sought to amend NOTA to the effect that kidney paired donation would not constitute the transfer of a human organ “valuable consideration.” *Id.* The Norwood Act has since become law, excluding human organ paired donation from the prohibition in NOTA section 301(a). Charlie W. Norwood Living Organ Donation Act, § 2, Pub. L. No. 110-144

## 2. Criminal Provisions and the Rule of Lenity

The second important aspect of the phrase “valuable consideration” is that its prohibition is enforced by criminal penalties.<sup>109</sup> Criminal statutes generally are strictly construed such that any reasonable doubt about their meaning is to be strictly construed with uncertainties decided in favor of those subject to the statute.<sup>110</sup> This rule of lenity flows from the concern that “expansive judicial interpretations [would] create penalties not originally intended by the legislature.”<sup>111</sup> Narrow construction and interpretation of criminal prohibitions, therefore, ensures both “fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability.”<sup>112</sup> Accordingly, the prohibition imposed against the transfer of human organs for valuable consideration—because it is a penal provision about which uncertainty exists regarding the full scope of the term “valuable consideration”—must be interpreted narrowly, thereby limiting the scope of prohibited activity to that clearly covered by the language of the statute.

### B. Memorandum Opinion of the U.S. Department of Justice

On March 28, 2007, the U.S. Department of Justice (“DOJ”) issued a memorandum opinion to the U.S. Department of Health and Human Services regarding the legality of kidney-exchange practices in light of NOTA section 301(a).<sup>113</sup> Because each kidney-exchange procedure reviewed involved a transfer of a human organ in return for a benefit to the living donor’s intended recipient as a third party, it called into question the legality of the practice under NOTA

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(2007).

109. 42 U.S.C.A. § 274e. As discussed *supra* in Part II.C, violations of the NOTA section 301(a) prohibition are subject to criminal penalties of a possible \$50,000 fine, five years’ imprisonment, or both. “Where the primary purpose of a statute is expressly enforceable by fine, imprisonment, or similar punishment the statute is always construed as penal.” SINGER & SINGER, *supra* note 5, § 59:1, at 113.

110. *See id.* § 59:3, at 126-31 (citing *State v. Cox*, 908 P.2d 603, 618 (1995) (discussing strict construction of penal statutes); *Cleveland v. United States*, 531 U.S. 12, 25 (2000) (discussing need to resolve ambiguity of criminal statute in favor of less harsh alternative); *United States v. Fruit Growers Express Co.*, 279 U.S. 363, 369 (1929) (noting that defendant is entitled to reasonably strict construction of statutory language)).

111. *Id.* § 59:3, at 133.

112. *Id.* Strict construction is a means of assuring fairness to persons subject to the law by requiring penal statutes to give “clear[] and unequivocal[]” warning in language that people generally would understand, concerning “actions [that] would expose [them] to liability for penalties and what the penalties would be.” *Id.* § 59:3, at 138.

113. Legality of Alternative Organ Donation Practices, *supra* note 89. The DOJ addressed two forms of kidney exchange. The first was the “Living Donor/Deceased Donor Exchange,” where a living donor donates a kidney to an unknown, compatible recipient on the list for a deceased donor in exchange for the living donor’s intended (but incompatible) recipient receiving some priority on the deceased-donor waiting list, thereby shortening his waiting time. *Id.* at 1. Second was the “Paired Exchange,” where an OPO “matches two or more incompatible donor/recipient pairs where each living donor is compatible with another living donor’s intended recipient.” *Id.*; *see also* LB&FC REPORT, *supra* note 52, at 126-29 (summarizing DOJ opinion on kidney exchange).

section 301(a) as a possible transfer of a human organ for “valuable consideration.”<sup>114</sup> The DOJ memorandum opinion provided the first official written insight into the interpretation of NOTA section 301(a).<sup>115</sup> The DOJ concluded that because the kidney programs did not involve exchanges of things of “pecuniary, readily convertible into monetary value,”<sup>116</sup> they did not “clear[ly] and definite[ly]” fall within the prohibition of NOTA section 301(a) and, therefore, should be allowed.<sup>117</sup> Three aspects of the DOJ’s analysis are helpful in evaluating the potential legality of financial incentives generally and Pennsylvania’s funeral-benefit program specifically.

First, the DOJ affirmed that NOTA section 301(a) *does not* specifically define “valuable consideration” but simply provides initial guidance as to its meaning by listing certain acts that are *not* valuable consideration.<sup>118</sup> This initial conclusion by the DOJ clarified the role of the language in NOTA by rejecting the notion that anything not expressly excluded from “valuable consideration” under the statute is necessarily included within it. The DOJ’s reasoning allowed that an activity not specifically excluded from “valuable consideration” under NOTA section 301(a) could possibly still be a permitted activity.<sup>119</sup>

Second, the DOJ’s opinion helped further define “valuable consideration.” The DOJ concluded—following a process of legal analysis and statutory interpretation—that the term “valuable consideration” in the context of organ donations involves “some sort of buying and selling, or otherwise commercial transfer, of organs.”<sup>120</sup> It is important to note that DOJ’s analysis focused heavily on the involvement of *monetary* value in the transfer of human organs and how the presence or absence of monetary value impacts the conclusion that a transaction contains “valuable consideration.” This focus apparently enabled the DOJ to address the issue at hand as to whether something *not* of monetary value—the kidney-exchange programs—could be “valuable consideration.” At this point, the devil is in the detail. The DOJ concluded that for consideration to be *valuable* it must involve something “pecuniary, readily convertible into monetary value.”<sup>121</sup> It did not, however, conclude the converse: that all things “pecuniary, readily convertible into monetary value” are “valuable

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114. Legality of Alternative Organ Donation Practices, *supra* note 89, at 1-2.

115. See *supra* notes 89, 97-98 and accompanying text for a discussion of the lack of insight as to the scope of NOTA section 301(a) prior to the DOJ’s March 2007 memorandum opinion.

116. Legality of Alternative Organ Donation Practices, *supra* note 89, at 6.

117. *Id.* at 7 (internal quotation marks omitted) (quoting *Dowling v. United States*, 473 U.S. 207, 214 (1985)).

118. *Id.* at 2.

119. *Id.* at 3. The kidney exchanges were not specifically excluded from “valuable consideration” and were still permitted by DOJ. *Id.* at 2-7.

120. Legality of Alternative Organ Donation Practices, *supra* note 89, at 5. The fact that NOTA section 301(a) is founded on Congress’s authority under the Commerce Clause was seen by DOJ to “further suggest[ ] that ‘valuable consideration’ involves some sort of commercial transaction.” *Id.* at 3 (citing *United States v. Lopez*, 514 U.S. 549, 561 (1995)); see also U.S. CONST. art. I, § 8, cl. 3 (granting Congress authority to regulate commerce among states).

121. Legality of Alternative Organ Donation Practices, *supra* note 89, at 6.

consideration.” The DOJ ultimately said that “valuable consideration” in section 301(a) of NOTA refers to the “buying and selling of organs for monetary gain or to organ exchanges that are otherwise commercial.”<sup>122</sup> The fundamental distinction drawn, therefore, was not between the monetary or nonmonetary value of the thing transacted but between the commercial as opposed to noncommercial nature of the transactions.

Third, the DOJ found that the full scope of the phrase “valuable consideration” remained open to some question and that the language of NOTA was not “clear and definite” on the point.<sup>123</sup> Given this, the DOJ reasoned that the prohibition in NOTA must be read less harshly because as a criminal statute the rule of lenity required such a narrow reading.<sup>124</sup> DOJ recognized “[t]here is no doubt a sense in which any act or thing could be given some value in dollars and cents. But the third-party benefits received under [the kidney-exchange programs] at issue here are not commonly or readily so measured.”<sup>125</sup> Because NOTA section 301(a) is a criminal statute lacking clarity as to the full scope of its reach, the DOJ concluded that it must be read narrowly,<sup>126</sup> and, therefore, scenarios that could *possibly* be covered by the prohibition were deemed not prohibited because they were not unquestionably included within the required narrow interpretation of the law.<sup>127</sup>

#### IV. RECOVERING A LOST DISTINCTION

The funeral-benefit program envisioned by Pennsylvania’s Act 102<sup>128</sup> clearly would provide a payment that is “pecuniary, readily convertible into monetary value.”<sup>129</sup> There would, therefore, be *valuableness* in the exchange. But, as has been shown above, the key distinction in interpreting NOTA section 301(a) is not in the nature of the things transacted but in the nature of the transaction itself—that is, the key is not simply whether there is monetary gain but whether that monetary gain is clearly and definitely part of a transaction that is *commercial* in nature. Indeed, monetary gain is an element of *valuable consideration* but does not define it—it clarifies the scope of *valuableness*. Monetary gain is significant to the extent it is part of a “buying and selling” or “otherwise commercial” activity.<sup>130</sup>

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122. *Id.* at 6-7.

123. *Id.* at 7 (quoting *Dowling v. United States*, 473 U.S. 207, 214 (1985)).

124. *Id.* at 6-7.

125. *Id.* at 6.

126. Legality of Alternative Organ Donation Practices, *supra* note 89, at 6-7.

127. *See id.* at 7 (concluding that kidney-exchange programs, scenarios possibly covered by NOTA section 301(a), do not violate that provision of statute).

128. 20 PA. CONS. STAT. § 8622(b) (2006).

129. Legality of Alternative Organ Donation Practices, *supra* note 89, at 6. The proposed program would provide a \$300 payment directly to a funeral home on behalf of an organ donor’s family. *See supra* notes 52-56 and accompanying text for a discussion of Pennsylvania’s legislative efforts to encourage organ donation.

130. Legality of Alternative Organ Donation Practices, *supra* note 89, at 6-7.

There is, therefore, a distinction here—between commercial and noncommercial activity, between a sale and a gift—that, as suggested by the IOM report, gets lost in the discussion of organ donation<sup>131</sup> and that needs to be recovered to effectuate the purpose of NOTA section 301(a). Organ donation operates within a *gift* model.<sup>132</sup> It involves a *gratuitous* transfer—a transfer of a human organ *freely, without consideration*,<sup>133</sup> as distinguished from a sale, which, conversely, “imports a transfer *for consideration*,”<sup>134</sup> denoting a bargained-for, mutually induced exchange between parties.<sup>135</sup> Inasmuch as the kidney-exchange programs reviewed by the DOJ did not have any clear pecuniary transfer, they were deemed not to involve valuable consideration because without obvious monetary value in the exchange there was no *valuableness* in the transfer. Without *valuableness* there could be no *valuable* consideration. This author concludes, however, that the DOJ neither addressed nor resolved (because it did not need to) the definitive question whether, irrespective of the *valuableness* of the things exchanged, the transactions were ultimately *commercial*.

If an organ donation is genuinely made gratuitously—as a gift—then any benefit, even a benefit of monetary value, provided to or on behalf of an organ donor’s family in recognition of that gift, would not *necessarily* be a commercial activity because there would simply be no bargained-for, mutually induced business deal but only two gratuitous acts. The law allows for this—such an organ donation with a subsequent donor benefit is either a gift in exchange for a gift<sup>136</sup> or a gratuitous conditional promise.<sup>137</sup> It is important to underscore that such a gift transaction would still be considered a gift even where the amount given in return was equivalent to the market value of the organ donated<sup>138</sup> and especially where there was only a minimal payment to help with funeral

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131. See *supra* notes 60-75 and accompanying text for a discussion of the IOM report and the distinction between a sale and a gift.

132. See *supra* notes 69-72 and accompanying text for the IOM report’s conclusion that organ donation operates within a gift model, rather than a commercial transaction model.

133. 38A C.J.S. *Gifts* § 1 (1996).

134. *Id.* § 8 (emphasis added).

135. RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. b (1979). See *supra* notes 99-103 and accompanying text for a discussion of consideration.

136. See 38A C.J.S. *Gifts* § 8 (noting that in gift exchange, benefit is gratuitously made in response to gift of donation).

137. See 3 RICHARD A. LORD, WILLISTON ON CONTRACTS § 7.18, at 350-51 (4th ed. 1992) [hereinafter WILLISTON ON CONTRACTS] (explaining that with gratuitous conditional promises, benefit is gratuitously made on condition of gift of donation). Williston explains: “[I]f A were to promise to pay \$5000 to B should B’s house burn down within a year, he has made a gratuitous conditional promise; if B’s house were to burn down within the year, A would not be liable on his promise because it was gratuitous.” *Id.* at 348. Corbin explains as well: “[w]hether something is a consideration [as opposed to merely a condition] depends upon whether it is bargained for by the promisor in exchange for the promise.” 2 JOSEPH M. PERILLO & HELEN HADJIYANNAKIS BENDER, CORBIN ON CONTRACTS § 5.34, at 194 (rev. ed. 1995). In fact, Pennsylvania’s Superior Court has held that a gift is still a gift even though it is made with the understanding and stipulation that the donor’s funeral expenses will be paid with a part of the gifted property. *Reynolds v. Maust*, 15 A.2d 853, 855 (Pa. Super. Ct. 1940).

138. See *supra* notes 99-103 and accompanying text for a discussion of gift transactions and consideration.

expenses.<sup>139</sup> The organ donation would be a gift and the subsequent benefit provided also would be a gift given in recognition of the organ donation. Neither would induce the other.

While there may be a fine line between what is a *gift for a gift* or a *gratuitous conditional promise* and what is *valuable consideration* that supports commercial activity, there *is* a distinction, both legal and real. Its delineation depends on whether a reasonable person would believe that the fulfillment of the condition—in this context donating an organ—was requested in exchange for the payment of the funeral benefit.<sup>140</sup> Although difficult, the determination of whether words of condition in a promise represent a request for consideration or just a condition in a gratuitous promise is made easier by considering whether the occurrence of the condition benefits the promisor.<sup>141</sup> A *benefit* "means that the promisor has, in return for a promise, acquired some legal right to which he would not otherwise have been entitled."<sup>142</sup> In the Pennsylvania scenario, the recipient of the organ receives a benefit and the service providers receive payment for their services, but none of the administrators of the program—neither the Pennsylvania Department of Health, the state Organ Donor Advisory Committee, nor the Casey Organ and Tissue Donation Awareness Trust Fund—directly receives a legal benefit. While these entities may be motivated by increasing donation rates through the payment of a funeral-expense benefit, motive alone, however, is not consideration.<sup>143</sup>

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139. See Stanley Becker & Julio Jorge Elías, *Introducing Incentives in the Market for Live and Cadaveric Organ Donations* 11 (George Stigler Ctr. of the Econ. & the State, unpublished working paper, 2002), available at [http://home.uchicago.edu/~gbecker/MarketforLiveandCadavericOrganDonations\\_Becker\\_Elias.pdf](http://home.uchicago.edu/~gbecker/MarketforLiveandCadavericOrganDonations_Becker_Elias.pdf) (classifying transaction as "donation," although still advocating that donors should be compensated for "risk of death, . . . time lost during recovery, and a monetary compensation for risk of reducing quality of life"). Nobel Prize-winning economist Gary Becker estimated that the market price of a liver could be approximately \$37,600. *Id.* at 16. Given this, it would appear unreasonable to conclude that a \$3000 payment could or would induce, in fact, the transfer of a human organ theoretically valued approximately ten times more than the payment given under Pennsylvania's Act 102. See 20 PA. CONS. STAT. § 8622(b) (2006) (providing for funeral expenditures paid to donors that do not exceed \$3000).

140. WILLISTON ON CONTRACTS, *supra* note 137, § 7:18, at 348-49. Williston explains it this way:

If a benevolent man says to a tramp, 'If you go around the corner to the clothing shop there, you may purchase an overcoat on my credit,' no reasonable person would understand that the short walk was requested as the consideration for the promise; rather, the understanding would be that in the event of the tramp going to the shop the promisor would make him a gift. Yet the walk to the shop is in its nature capable of being consideration. It is a legal detriment to the tramp to take the walk, and the only reason why the walk is not consideration is because on a reasonable interpretation, it must be held that the walk was not requested as the price of the promise, but was merely a condition of a gratuitous promise.

*Id.* § 7:18, at 348-50 (citation omitted).

141. *Id.* § 7:18, at 350-51.

142. WILLIAM H. PAGE, PAGE ON CONTRACTS § 274 (1905).

143. See WILLISTON ON CONTRACTS, *supra* note 137, § 7:17, at 331 (noting that motive is not essential and cannot by itself serve as consideration).

## V. CONCLUSION

UNOS states the following:

No matter how far medicine advances, the field of transplantation is a human endeavor. It is the only field of medicine that relies on public trust and the goodness of human nature, for the only way lives may be saved through organ transplantation is by a human being making the decision to give life.<sup>144</sup>

Organ donation—the gift of life—should not be devalued by attributing nongratuious motives to circumstances that are not clearly and definitely commercial in nature. A gift is not a sale. While they may, at times, look very much alike, in the end they are different, not in what is transacted, but in the nature of the transaction itself. A sale is based on a bargained-for, business-type exchange while a gift is rooted in a free and gratuitous act. Drawing this distinction is not impossible.<sup>145</sup> This distinction, however, as it relates to the federal prohibition on the transfer of human organs for “valuable consideration” appears to have been missed to date.<sup>146</sup> It needs to be explored in shaping the scope of “valuable consideration” in light of the March 2007 U.S. DOJ

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144. United Network for Organ Sharing, National Transplant System: The First 20 Years (Sept. 29, 2006), available at <http://www.unos.org/news/newsDetail.asp?id=708>.

145. Case law has historically drawn distinctions between gifts and other transactions. For example, judicial precedents have distinguished gift transactions from loans, sales, and trusts, among other things. See 38A C.J.S. *Gifts* §§ 6-9, at 186-88 (1996) (noting that law has historically drawn distinctions between gifts and other transactions such as loans, sales, and trusts).

146. For example, the Kansas State Attorney General found, in 2000, that a \$300 tax credit for the donation during a taxable year of one or more body parts is valuable consideration in violation of federal law without discussing the meaning of the term. Op. Kan. Att’y Gen. No. 2000-18 (2000), available at <http://ksag.washburnlaw.edu/opinions/2000/2000-018.htm>. Yet, the opinion recognized that “[w]ith the exception of reasonable payments for the costs associated with the procurement of the organs, the federal statute prohibits the payment of valuable consideration for the transfer of human organs used in human transplantation.” *Id.* (footnote omitted). The Kansas State Attorney General also admitted that “NOTA legislative findings indicate that Congress intended to reflect our society’s moral value in attributing organ donation to altruistic motives and clearly set out to prevent human organs from becoming commodities in a for-profit marketing of human organs.” *Id.* The opinion appears to implicitly accept the premise that all “payments” are valuable consideration because the limited examples of exclusions from the prohibition are for certain payments. The logical extension then is that because a \$300 tax credit is a *payment* and not expressly excluded from NOTA, it is prohibited. On the other hand, ACOT has discussed a broader concept of “valuable consideration,” having reported that “[w]hen lawyers say valuable consideration it means something specific. It does not simply mean money, as many lay persons think. In the general common law it refers to anything having worth, whether monetary or intrinsic, which induces or motivates an agreement or a contract.” ACOT SPRING 2004 MEETING NOTES, *supra* note 83 (internal quotation marks omitted). “Under this definition, any incentive designed to motivate an anatomic gift, not merely those with direct monetary value, would constitute valuable consideration.” *Id.* (internal quotation marks omitted). Additionally, at the May 2007 ACOT meeting, the March 2007 DOJ memorandum opinion was discussed, with discussion focusing on the monetary aspect of DOJ’s analysis of “valuable consideration” and reporting that “[t]he [DOJ] ruling stated that the prohibition [on the transfer of human organs for valuable consideration] is mainly for ‘pecuniary gain [that is] readily convertible into monetary value.’” ADVISORY COMM. ON ORGAN TRANSPLANTATION, U.S. DEP’T OF HEALTH & HUMAN SERVS., SUMMARY NOTES FROM MAY MEETING (2007), available at [http://www.organdonor.gov/research/acot05\\_2007.htm](http://www.organdonor.gov/research/acot05_2007.htm).

Memorandum Opinion pertaining to kidney-exchange practices and to be worked out in developing the use of other incentives for organ donation.<sup>147</sup>

So does the payment of a funeral benefit that is associated with and made subsequent to the donation of a human organ constitute a transfer of that human organ for “valuable consideration” in violation of federal law? *Not necessarily.* The overbreadth and underinterpretation of the term “valuable consideration” has prevented the fullness of thought behind the idea from being effectively communicated. But the historical, technical meaning associated with the term—corroborated by NOTA’s legislative history—suggests that a bargained-for, commercial activity is intended to be prohibited. Moreover, the rule of lenity requires a narrow construction of the prohibition, thereby restricting it to activity that is “clearly and definitely” commercial. This conclusion was affirmed by the March 2007 U.S. Department of Justice Memorandum Opinion. Therefore, it appears that Pennsylvania Act 102’s provisions for funeral benefits<sup>148</sup> *could be implemented* so as not to frustrate the purposes of NOTA section 301(a) and to give effect to both NOTA section 301(a) and Act 102.<sup>149</sup> To do so, it is incumbent on Pennsylvania to undertake construction of the details of the organ donor funeral-expense benefit program in such a way as to underscore the noncommercial nature, purpose, and intent of the program.<sup>150</sup>

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147. See ACOT SPRING 2004 MEETING NOTES, *supra* note 83 (noting that there are serious consequences to lack of clarity on meaning of term “valuable consideration”). ACOT listed these consequences as follows:

- Uncertainty about legal consequences could deter transplant centers and OPOs from engaging in beneficial practices aimed at increasing organ donation[;]
- Uncertainty about federal preemption of state law could deter state legislative action to create incentives intended to increase organ donation[;]
- Risk of criminal prosecution for innovative programs that provide incentives to increase donation[;]
- Federal preemption of state laws that create incentives to enhance donation on the grounds that the state law conflicts with the federal prohibition[; and]
- Loss of potential donors.

*Id.*

148. 20 PA. CONS. STAT. § 8622(b) (2006).

149. The point is there is not an unavoidable conflict between NOTA section 301(a), 42 U.S.C.A. § 274e (West 2003 & Supp. 2008), and Pennsylvania’s Act 102, 20 PA. CONS. STAT. § 8622(b) (2006), triggering the superseding impact of federal law. “The Supremacy Clause of the Constitution provides that valid federal law supersedes *inconsistent* state law,” but absent explicit preemptive federal language, courts will not imply preemption without a *direct* conflict between federal and state law—that is, where the implementation of state law would necessarily frustrate congressional purposes. STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS, *supra* note 92, at 18-19 (citation omitted) (emphasis added).

150. For example, regarding the future of Pennsylvania’s funeral-benefit program, the LB&FC recommended that the state advisory committee develop a proposal for the funeral-benefit program that expressly “underscore[s] the noncommercial nature, purpose, and intent of the . . . benefit.” LB&FC REPORT, *supra* note 52, at S-31 to S-33. The report further recommended that the program obtain donor family attestation to full compliance with section 301 of NOTA and require periodic state assessment to ensure that Act 102’s provisions for funeral benefits are being implemented so as not to frustrate the purposes of NOTA section 301(a). *Id.*

