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# “Body Property”: Challenging the Ethical Barriers in Organ Transplantation to Protect Individual Autonomy

*Charles C. Dunham IV\**

“Every human being of adult years and sound mind has a right to determine what shall be done with his own body . . . .” – *Justice Benjamin Cardozo*

## I. INTRODUCTION

Throughout history the human body has been cherished in family and friendships, admired in art and literature, honored in scholastics and competition, and subjugated in slavery and war. The value of the human body is distinct in each context.

As the progressive field of biotechnology<sup>1</sup> promises advancements in human health, it produces new ways of valuing the human body. While the organs and tissues of the human body have a recognized intrinsic worth, the advancements in medical transplant technology continue to redefine this value. Today, the transplantation of a kidney or heart in a dying patient can mean the promise of prolonged life. Unfortunately, not every person who needs an organ transplant will receive one. According to the United Network for Organ Sharing, as of October 24, 2007, there were 97,910 patients waiting for transplants, and only 14,225 organs donated.<sup>2</sup> Until

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\* As a Juris Doctor Candidate at Albany Law School, I have concentrated my degree on legal issues in the health care industry. This comment addresses one of the relevant and timely topics facing both our medical and legal communities. In recognition of the support and assistance provided to me in reaching this stage, I wish to thank Professor Alicia Ouellette at Albany Law School, the law firm of Epstein Becker & Green, P.C., the entire staff of the *Annals of Health Law* of Loyola University Chicago School of Law, and my family and friends. Thank you all.

1. “[T]he manipulation (as through genetic engineering) of living organisms to produce useful products.” THE MERRIAM-WEBSTER DICTIONARY 49 (11<sup>th</sup> ed. 2005).

2. United Network for Organ Sharing, <http://www.unos.org/> (last visited Nov. 18, 2007). However, America still has the second highest rate of donors in the world. Spain has the world’s highest rate at 35 donors per million, the United States has 21 per million, and Australia has 10 per million. Kelly Andrew, *Organ Donor Rate Falls to Record Low*, SOUTHLAND TIMES (N.Z.), Jan. 8, 2007.

recently, the legislative solution had been to advance funding for organizations and marketing directed at motivating the public to become organ donors.<sup>3</sup> However, the simple truth is that altruism is not a motivator sufficient to produce the number of organ donors necessary to keep pace with the ever increasing number of recipients, many of whom will die while waiting. Consequently, this disparity between organ donors and recipients has become a national concern. Thus, federal and state governments are considering alternatives, such as “mandated choice,” forcing everyone to choose whether or not they want to be a donor, or “presumed consent,” assuming everyone wants to be a donor unless they indicate otherwise.<sup>4</sup> These initiatives, however, are criticized for the ethical drawbacks pertaining to the loss of autonomy and the right to choose; therefore, they arguably violate constitutional rights of due process and freedom of religion.<sup>5</sup>

An alternative proposal permits “direct economic payments.”<sup>6</sup> Under this proposal, two approaches exist: (1) to offer indirect financial incentives to the potential donor and their family or (2) to create a commercial market for organs.<sup>7</sup> The law and ethics of organ procurement permit the first approach which allows states to offer potential donors and their families “valuable consideration” in exchange for the organ donation.<sup>8</sup> Proponents of this approach often seek to distinguish it from a market-based approach by arguing that the compensation is public, not private, and thus, represents the appreciation of the entire community rather than the product of a private contract between parties for the sale of a good.<sup>9</sup> Furthermore, economic payment advocates oppose opening the door to a market-based approach because it would require a significant expansion of the scope of human

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3. See S. REP. NO. 98-382 (1984) (discussing the National Organ Transplant Act, 42 U.S.C. § 201, April 6, 1984). The federal legislature recently approved \$23,282,000 in funding; signed into law by President Bush on Dec. 30, 2006.

4. Kieran Healy, *Do Presumed-Consent Laws Raise Organ Procurement Rates?*, 55 DEPAUL L. REV. 1017, 1018 (2006); Denise Spellman, *Encouragement is Not Enough: The Benefits of Initiating a Mandated Choice Organ Procurement System*, 56 SYRACUSE L. REV. 353, 371 (2006). Courts in Florida, Georgia, and Michigan have upheld the constitutionality of cornea removal statutes under presumed consent. See *State v. Powell*, 497 So.2d 1188, 1193-94 (Fla. 1986); *Georgia Lions Eye Bank, Inc. v. Lavant*, 335 S.E.2d 127, 129 (Ga. 1985); *Tillman v. Detroit Receiving Hosp.*, 360 N.W.2d 275, 277 (Mich. Ct. App. 1984).

5. Vanessa Chandis, *Addressing A Dire Situation: A Multi-Faceted Approach to the Kidney Shortage*, 27 U. PA. J. INT’L ECON. L. 205, 248, 263 (2006).

6. David I. Flamholz, *A Penny For Your Organs: Revising New York’s Policy On Offering Financial Incentives For Organ Donation*, 14 J.L. & POL’Y 329, 354-55 (2006).

7. *Id.* at 332.

8. 42 U.S.C. § 274e(c)(2) (2000).

9. President’s Council on Bioethics, *Organ Transplantation: Ethical Dilemmas and Policy Choices* (January 2003), [http://www.bioethics.gov/background/org\\_transplant.html](http://www.bioethics.gov/background/org_transplant.html) (last visited Nov. 18, 2007).

body property rights.<sup>10</sup> The notion of the body as property (or the commodification of the body) raises ethical concerns and challenges the moral integrity and dignity of the body.<sup>11</sup>

Currently, federal and state statutes specifically forbid the sale of human organs.<sup>12</sup> However, courts have recognized this limitation on the disposition of human organs as a reflection of public health concerns, rather than a legislative policy against a property interest in the body.<sup>13</sup> Specifically, organs for transplantation are regulated "as a scarce national resource allocated to balance medical utility with equity in a formulation designed to avoid wastage and maximize the life saving potential of each donation."<sup>14</sup> Nevertheless, the extent to which the government can encourage the development of incentive systems for organ donors will be limited by the extent that the legislature recognizes a possessory right, or property right, in organs.<sup>15</sup>

This comment will discuss the need to reconstruct organ transplantation legislation to recognize organs and tissues separated from the body as a distinct category of personal property. Section I will also address the removal of prohibitions on the sale of *non-vital* and *cadaveric organs* in order to resolve the current organ shortage and protect the interests of the decedent and donor. Section II will discuss the legislative history of organ procurement and allocation in America and the psychological barriers to donor consent that have weakened the system and caused a universal shortage of organs for transplantation. Section III will present discourse on the human body as property and the importance of separating the lifetime rights of ownership in our own bodies from post-mortem rights. This

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10. *Id.*

11. Arthur L. Caplan, C.T. Van Buren & N.L. Tilney, *Financial Compensation for Cadaver Organ Donation: Good Idea or Anathema?*, in THE ETHICS OF ORGAN TRANSPLANTATION 219, 222 (Arthur L. Caplan ed., 1998). "Calls for markets, compensation, bounties, or rewards should be rejected because they pose risks to personal autonomy and fairness. They convert donor into sources, human beings into products, thus undermining the foundational values requisite for respect for others and for self-esteem." *Id.* at 223.

12. 42 U.S.C. § 274e (2000); CAL. PENAL CODE § 367f (West 1999); MD. CODE ANN., HEALTH-GEN. § 5-408 (LexisNexis 2005); MICH. COMP. LAWS ANN. § 333.10204 (West 2001); N.Y. PUB. HEALTH LAW § 4307 (McKinney Supp. 2007).

13. *Moore v. Regents of Univ. of Cal.*, 793 P.2d 479, 489 (Cal. 1990); *Moore v. Regents of Univ. of Cal.*, 249 Cal. Rptr. 494, 505 (Cal. Ct. App. 1988). These concerns are later addressed by this note, but are important to be familiar with when comparing the courts' and legislatures' reasoning for denying a property interest in the human body.

14. Brief for N.Y. Organ Donor Network, Inc. et al. as Amici Curiae Supporting Respondents at 6, *Colavito v. N.Y. Organ Donor Network, Inc.*, 860 N.E.2d 713 (N.Y. 2006), available at [http://www.unos.org/SharedContentDocuments/Colavito\\_Amicus\\_Brief\\_and\\_Motion\\_-\\_As\\_Filed.pdf](http://www.unos.org/SharedContentDocuments/Colavito_Amicus_Brief_and_Motion_-_As_Filed.pdf).

15. Alicia M. Markmann, *Organ Donation: Increasing Donations While Honoring Our Longstanding Values*, 24 TEMP. J. SCI. TECH. & ENVTL. L. 499, 501 (2005).

section will also review case law in America upholding the majority view on limited property rights in the body and focus on a recent New York Court of Appeals decision concerning property rights in donated, cadaveric organs. This review will illustrate why the legislative branch, rather than the judicial branch, will need to make a distinction between lifetime and post-mortem rights and recognize a broadened property interest in cadaveric organs to promote organ procurement. Section IV will argue that following the expansion of property rights in the human body, the legislature needs to remove the ban on the sale of non-vital and cadaveric organs for transplantation to resolve the national crisis facing organ procurement for transplantation. Then this section will propose that a regulated "Futures Market"<sup>16</sup> approach would be the most consistent with the current law and ethics. Finally, Section V will discuss the interplay between the legal and ethical implications surrounding the concept of a market-based approach. These legal and ethical implications must be respected for a market-based approach to successfully address the organ shortage crisis.

## II. LEGISLATIVE HISTORY OF ORGAN TRANSPLANTATION IN AMERICA

### A. *The Uniform Anatomical Gift Act (UAGA)*

The first successful long-term transplant of a human kidney occurred in 1954.<sup>17</sup> As surgeons continued to have success with the transplantation of other organs, the public recognized a new value in the human body.<sup>18</sup> However, obtaining an adequate supply of organs to cover the new demand proved difficult. This necessitated establishing laws and regulations to recognize a legal right of the living donors, and the next of kin, to convey the organ(s) of the decedent. After years of debate, the National Conference of Commissioners on Uniform State Laws approved the Uniform Anatomical Gift Act ("UAGA") to provide states with a model law to outline who may execute anatomical gifts,<sup>19</sup> the rights and duties of

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16. See Gregory S. Crespi, *Overcoming the Legal Obstacles to the Creation of a Futures Market in Bodily Organs*, 55 OHIO ST. L.J. 1 (1994).

17. Joseph E. Murray, John P. Merrill & J. Hartwell Harrison, *Renal Hemotransplantation in Identical Twins*, 6 SURGICAL F. 432, 432-35 (1956).

18. Robert M. Veatch, Professor, Medical Ethics, Georgetown University, Address at Union University Bioethics Proseminar (August 2006). In 1962, first successful cadaveric (deceased) kidney transplant; 1967, first successful liver transplant; 1968, first successful heart transplant; 1983, first successful lung transplant. See Timeline of Key Events in U.S. Transplantation and UNOS History, <http://www.UNOS.org/whoweare/history.asp> (last visited Nov. 18, 2007).

19. UNIF. ANATOMICAL GIFT ACT § 9 (revised 2006), 8A U.L.A. 21 (Supp. 2007). The priority of classes that may authorize the gift of all or part of the human body after death for specified purpose are (1) agent of the decedent at the time of death who could have made an

the donee,<sup>20</sup> and who can become a donee.<sup>21</sup> By 1973, all 50 states and the District of Columbia had adopted the UAGA or a variation thereof.<sup>22</sup>

The UAGA expresses a patient's right to designate, prior to removal, the postmortem use of a body part.<sup>23</sup> The UAGA also designates the same authority to the next of kin when the individual had not indicated his desire during his lifetime.<sup>24</sup> Furthermore, the UAGA specifically prohibits the sale of organs.<sup>25</sup> Nonetheless, commentators have suggested that Congress recognized "the altruistic model of organ donation" and that "until the issue of payment becomes a problem of some dimensions, the matter should be left to the decency of intelligent human beings."<sup>26</sup> The government must have believed that the demand could be met by granting a limited property interest in one's own body to execute an anatomical gift upon their death. Unfortunately, the shortfall in supply became a significant problem in the early eighties as concerns emerged over reports of an existing black market in human organs.<sup>27</sup>

### *B. National Organ Transplantation Act (NOTA)*

In response, Congress enacted the National Organ Transplantation Act ("NOTA") which rendered it unlawful 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>28</sup> NOTA

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anatomical gift immediately before the decedent's death; (2) spouse; (3) an adult son or daughter; (4) either parent; (5) an adult brother or sister; (6) adult grandchildren of the decedent; (7) grandparents of the decedent; (8) an adult who exhibited special care and concern for the decedent; (9) the persons who were acting as the [guardians] of the person of the decedent at the time of death; and (10) any other person having the authority to dispose of the decedent's body. *Id.*

20. *Id.* § 11.

21. *Id.*

22. Tanya K. Hernandez, *The Property of Death*, 60 U. PITT. L. REV. 971, 1022 (1999).

23. UNIF. ANATOMICAL GIFT ACT §§ 4-5 (revised 2006), 8A U.L.A. 12-14 (Supp. 2007).

24. *Id.* § 9.

25. *Id.* § 16.

26. Markmann, *supra* note 15, at 505 (quoting Shelby E. Robinson, *Organs for Sale? An Analysis of Proposed Systems for Compensating Organ Providers*, 70 U. COLO. L. REV. 1019, 1026 n.57 (1999)).

27. See ARTHUR L. CAPLAN ET AL., *THE ETHICS OF ORGAN TRANSPLANTS: THE CURRENT DEBATE* 235 (Daniel H. Coelho & Arthur L. Caplan eds., Prometheus Books 1998).

28. 42 U.S.C. § 274e(a) (2000). "Before the passage of the NOTA, a few states prohibited the sale of human organs and bodies after death. See, e.g., Law of Aug. 1, 1968, ch. 429, § 7, 56 Del. Laws 1773, 1773 (1967) (repealed 1970) (prohibiting the sale of bodies and body parts after death); Law of May 20, 1967, ch. 94, § 1, 1967 Hawaii Laws 91, 91 (repealed 1969) (prohibiting the sale of bodies after death); Law of April 24, 1961, ch. 315, § 1, 1961 Md. Laws 397, 398 (repealed 1968) (prohibiting the sale of bodies, body tissues, or organs after death); Act of June 12, 1967, ch. 353, 1967 Mass. Acts 202, 202 (repealed 1971) (prohibiting the sale of bodies, body tissues, or organs after death); Law of April 22, 1964,

also sought to address the shortage of organ donors by establishing a task force to “conduct comprehensive examinations of the medical, legal, ethical, economic, and social issues presented by human organ procurement and transplantation.”<sup>29</sup> The task force provided recommendations based on its studies to the U.S. Department of Health and Human Services (“HHS”). HHS then solicited proposals for the operation of the Organ Procurement and Transplantation Network (“OPTN”), which was established under NOTA.<sup>30</sup> Today, organs for transplantation in the United States are procured and allocated through a national system designed and administered by the OPTN pursuant to federal statute.<sup>31</sup>

The OPTN establishes the process and policies for allocating organs through the federal contractor that operates the network, the United Network for Organ Sharing (“UNOS”).<sup>32</sup> UNOS creates computerized algorithms pursuant to principles stipulated by federal regulations that take into account clinical factors such as blood type, tissue type, medical urgency, geographic location (in some cases), physical size of the donor, and potential recipient (for some organs), as well as equity factors such as the time spent waiting on the list.<sup>33</sup>

NOTA also provided the Secretary of the HHS with the power to make grants to private Organ Procurement Operations (“OPOs”) that were already committed to educating and motivating the public to donate their organs or the organs of decedents.<sup>34</sup> Currently, coordinators from 58 federally-designated, non-profit OPOs are responsible for recovering organs for transplantation from deceased patients in the United States.<sup>35</sup> The OPO coordinators’ process of obtaining consent for donation varies slightly by state and OPO practice, but it is guided by the UAGA.<sup>36</sup>

Yet, even with this entire network formulated to increase public

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ch. 702, § 1, 1964 N.Y. Laws 1827, 1828 (repealed 1971) (prohibiting the sale of eyes, body parts, or bodies after death).” Susan Hankin Denise, *Regulating the Sale of Human Organs*, 71 VA. L. REV. 1015, 1022 (1985).

29. 42 U.S.C. § 273(b)(1)(A) (2000).

30. Organ Procurement and Transplantation Network, History, <http://www.optn.org/optn/history.asp> (last visited Nov. 18, 2007).

31. *Id.*

32. *Id.*

33. United Network for Organ Sharing, <http://www.unos.org/inthenews/factsheets.asp?fs=1> (last visited Nov. 18, 2007) (describing the computerized network system and utilizing recipient characteristics).

34. 42 U.S.C. § 273(a)(1) (2000). Authorized to be appropriated: \$5 million for fiscal year 1985; \$8 million for fiscal year 1986; and \$12 million for fiscal year 1987. 42 U.S.C. § 273(c) (2000).

35. Organ Procurement and Transplantation Network, <http://www.optn.org/members/> (last visited Nov. 18, 2007).

36. *See id.*

donation, the problem of organ shortage continues.<sup>37</sup> Currently, the U.S. still tries to procure transplant organs by merely urging people to register as organ donors.<sup>38</sup> A recent report by the Institute of Medicine ("IOM") on the severe shortage of transplant organs proposed "more of the same medicine," suggesting that coordinators simply need to ask more ardently.<sup>39</sup> However, activists argue that "continuing this policy, no matter how fervently we solicit would-be donors, will only fail to prevent more unnecessary deaths and more reports on the chronic organ shortage."<sup>40</sup>

### C. Understanding the Continued Shortage

Theorists have suggested a multitude of reasons to explain the barriers to obtaining donor consent, such as cultural and religious views, lack of motivation, distrust of the medical community, the perceived inequities in organ distribution, and, of course, the reluctance to face death.<sup>41</sup> These reasons are not unique to American culture, but also pose barriers in countries imposing mandatory-choice or presumed consent initiatives.<sup>42</sup> Further analysis suggests that removing prohibitions on the sale of cadaveric organs can potentially circumvent these issues to increase the procurement of organs.

#### 1. Cultural and Religious Perspective

Beliefs about the body are often formed through religious tradition.

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37. See United Network for Organ Sharing, <http://www.unos.org/> (last visited Nov. 18, 2007).

38. David E. Harrington & Edward A. Sayre, *Buying Bodies, Stealing Organs?*, Washingtonpost.com, Nov. 27, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/26/AR2006112600820.html>. In 2001, Health and Human Services Secretary Tommy Thompson announced a broad initiative to boost transplants, including a model organ donor card and new efforts to sign up donors at U.S. workplaces. Online NewsHour: Organ & Tissue Donation (April 17, 2001) (transcript available at [http://www.pbs.org/newshour/bb/health/jan-june01/organ\\_donor.html](http://www.pbs.org/newshour/bb/health/jan-june01/organ_donor.html) (last visited Nov. 18, 2007)).

39. Harrington & Sayre, *supra* note 38.

40. *Id.*

41. See Chandis, *supra* note 5, at 210-12. See also Daniel T. Stimson, *Private Solicitation of Organ Donors: A Threat to the Fairness of the U.S. Organ Transplantation System, or A Solution to the National Organ Shortage?*, 10 MICH. ST. U. J. MED. & L. 349, 364-65 (2006).

42. Financial compensation in exchange for live kidney donation is prohibited in Canada. However, patients in Canada with end-stage renal disease and without a suitable biologically or emotionally related live donor face substantial waiting times on lists for deceased donor kidneys, and so may therefore choose to acquire organs from a live donor in a procedure performed outside Canada as part of a commercial transaction. G.V. Ramesh Prasad, *Outcomes of Commercial Renal Transplantation: A Canadian Experience*, 82 TRANSPLANTATION 1130, 1130 (2006).



Some religious texts and teachings regard the body as intact, in some form, after death.<sup>43</sup> Nevertheless, almost all religious traditions support the gift of an organ when it will make the difference between life and death.<sup>44</sup> However, most religious followers believe it is against their religion to donate their organs, or the organs of their loved ones, upon death.<sup>45</sup> This ignorance has become a barrier to obtaining consent, as most potential donors, or their next of kin, are unwilling to donate based on their faith.<sup>46</sup>

The philosophical underpinnings of the current restrictive policies seem closely related to the religious and cultural perspectives on the issue of organ procurement. Commentators argue that commodifying the human body would violate religious and cultural perspectives of how the body should be respected in our society.<sup>47</sup> Robert Veatch notes: "The body is affirmed to be a central part of the total spiritual being. Any scheme that abandons the mode of donation in favor of viewing the cadaver as a social resource to be mined for worthwhile social purposes will directly violate central tenets of [religious] thought."<sup>48</sup> Nevertheless, these perspectives should not preclude the government from removing such prohibitions on the sale of organs. Religious intolerance and misconception, which already pose barriers to the current altruistic system, cannot direct public health.

## 2. Lack of Motivation

Currently, the system of organ donation expressly forbids the offer of direct "valuable consideration" for a human organ. The government and most of the public believe that human body parts should not be viewed as commodities and individuals or organizations should not profit by the sale of human organs for transplantation.<sup>49</sup>

However, theorists and economists suggest that this altruistic model does not provide sufficient motivation for organ donation.<sup>50</sup> They have proffered that monetary payments would create the incentives necessary to increase the supply of organs for transplantation.<sup>51</sup> While this may be the unfortunate reality of our capitalistic society, it is true that for the past forty

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43. ROBERT M. VEATCH, *TRANSPLANTATION ETHICS* 13 (Georgetown University Press 2000).

44. *See* The Gift of a Lifetime: Religion and Organ and Tissue Donation, <http://www.organtransplants.org/understanding/religion/> (last visited Nov. 18, 2007).

45. VEATCH, *supra* note 43, at 13.

46. *See id.*

47. *Id.*

48. *Id.*

49. *See* UNIF. ANATOMICAL GIFT ACT § 16 (revised 2006), 8A U.L.A. 30 (Supp. 2007).

50. *See* Flamholz, *supra* note 6, at 335.

51. *Id.* at 352.

years there has been a shortage of organ donors. A market-based approach would permit the buying and selling of human organs and tissue for financial gain, which theorists and economists project would motivate the public to increase the number of willing donors.<sup>52</sup>

### 3. Distrust of the Medical Community

The public distrust for the medical community is a notion that cannot be denied. The horrible vestiges of slavery, segregation, and racism continue to provide a disturbing context for the delivery of health care to minorities.<sup>53</sup> While theorists debate whether or not minority groups are unequally represented as organ donors, the remnants of these inequities have been offered to account for the statistical fact that minority groups are largely unrepresented as organ donors.<sup>54</sup>

However, irrespective of race or status, there exists a general distrust that an organ donor's wishes will not be respected at the critical hour.<sup>55</sup> The Omnibus Reconciliation Act of 1986 requires hospitals accepting Medicare and Medicaid to "discuss organ donation with families of deceased patients who were potential donors."<sup>56</sup> However, "[t]hese laws had an unexpected repercussion. By requiring doctors to always ask for familial consent to donate, these laws undermined the authority of donor cards, as well as the idea of patient autonomy," because the next of kin would sometimes refuse to grant the physician consent in spite of the decedent's express wish.<sup>57</sup> Since then, "doctors and hospitals have overwhelmingly insisted on honoring the wishes of the living family, even when it means ignoring the decedent's wishes."<sup>58</sup> While concern for the wishes of the living family is reasonable, it ignores the express wishes of the patient. Therefore, recognizing the supremacy of a donor's (testator) right to "vest" their

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52. See Andy H. Barnett, Roger D. Blair, & David L. Kaserman, *Selling Organs For Transplants is Ethical*, in BIOMEDICAL ETHICS: OPPOSING VIEWPOINTS 52, 53 (Tamara L. Roleff ed., Gale Group 1998).

53. See Patricia A. King, *Reflections on Race and Bioethics in the United States*, 14 HEALTH MATRIX 149, 153 (2004).

54. Vernellia R. Randall, *Slavery, Segregation and Racism: Trusting the Health Care System Ain't Always Easy! An African-American Perspective on Bioethics*, 15 ST. LOUIS U. PUB. L. REV. 191, 219-20 (1996) (arguing blacks donate less and have less access to the organs). *Organ Transplantation*, 103 HARV. L. REV. 1519, 1626 (1990) (arguing that blacks donate at a rate equal to whites, and simply need more kidneys).

55. Ann C. Klassen & David K. Klassen, *Who Are the Donors in Organ Donation?: The Family's Perspective in Mandated Choice*, 125 ANNALS OF INTERNAL MED. 1, 71-73 (1996).

56. Ben Berkman, *Organ Donor Card Effectiveness*, AMA (VIRTUAL MENTOR) CASE IN HEALTH LAW, (August 2002), <http://www.ama-assn.org/ama/pub/category/8560.html>; Omnibus Reconciliation Act of 1986, 42 U.S.C. § 1320b-8 (2000).

57. Berkman, *supra* note 56.

58. *Id.*

organs could deter the next of kin from contesting a decedent's designation. Further, a market-based approach would properly record the decedent's wishes under contract and protect him from third-party interference.

The way to change the public mindset is to change the system. The prohibition against buying and selling organs expresses clear legislative intent that the transfer of organs from donors to recipients is outside of the traditional legal principles of contract and property law.<sup>59</sup> However, if our estate, body, or personal property were distributed after our death without adherence to our personal wishes, most individuals would find this unacceptable. An advantage that all forward-looking approaches share is that the autonomy of the individual is maximized. In the case of a commercial market in organs, the legal principles of contract and property law would apply and provide the decedent's estate standing upon which to enforce the decedent's personal wishes upon his or her death.

#### 4. Inequities in Organ Distribution

The current organ distribution scheme limits accessibility based on determinations of how to equitably allocate organs among those in need.<sup>60</sup> Such disparate factors include "biological compatibility between donor and donee, age of donee, gravity of donee's medical condition, geographical location of donor and donee, and time donee has spent on a waiting list."<sup>61</sup> These factors limit access for countless patients in need of an organ transplant.

However, there are multiple underlying limitations to the current organ distribution scheme. For instance, before candidates are even placed on the national waiting list, they must first prove that they have the funds to pay for the transplant, either through state assistance or insurance.<sup>62</sup> Secondly, minority groups have historically received inferior treatment as compared to whites.<sup>63</sup> Even though no race information is specified on the national transplant waiting list, the perception remains that donated organs will be

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59. *Colavito v. N.Y. Organ Donor Network, Inc.*, 860 N.E.2d 713, 716-19 (N.Y. 2006).

60. United Network for Organ Sharing, <http://www.unos.org/inthenews/factsheets.asp?fs=1> (last visited Oct. 24, 2007) (discussing how the transplant system works in matching donors and recipients).

61. See Melissa A.W. Stickney, *Property Interests in Cadaverous Organs: Changes to Ohio Anatomical Gift Law and the Erosion of Family Rights*, 17 J.L. & HEALTH 37, 38 (2002) (citing Roderick T. Chen, *Organ Allocation and the States: Can the States Restrict Broader Organ Sharing?* 49 Duke L.J. 261, 266 (1999)).

62. Stimson, *supra* note 41, at 364.

63. See Sana Halwani, *Racial Inequality in Access to Health Care Services*, ONTARIO HUMAN RIGHTS COMMISSION (Dec. 2004), available at <http://www.ohrc.on.ca/en/issues/racism/racepolicydialogue/sh/pdf>.

given to whites.<sup>64</sup> Lastly, public reports of physicians altering a patient's condition reports to place the patient at a higher-status on the national waiting list,<sup>65</sup> or celebrities receiving favorable considerations over other waiting recipients,<sup>66</sup> have created a negative stereotype of inequality in the allocation process.

If the public does not trust that the distribution of this scarce commodity is fair, individuals become less likely to register as donors. There is no question that a market-based approach to organ procurement would be affected by the natural inequalities of purchase power in the market. However, even health care has historically been inaccessible to many people based upon a person's economic, racial, and social status. The current government is certainly not willing to promote equal access for basic health care needs, so why should this be a limitation in the present case?

### III. THE HUMAN BODY AS PROPERTY

Given the multitude of factors inhibiting organ donation, it is not surprising that the need to rethink the current legislation on organ procurement is a highly publicized and politicized topic on an international scale. Indeed, it is crucial to the public health that the government comes to a resolution. This comment takes the position that the shortage will not be curtailed until an expansion of property rights in the human body is recognized and the government removes the prohibitions on the sale of cadaveric organs and tissues.

In the article "She's Got Bette Davis's Eyes," author Erik S. Jaffe categorizes four groups of substantive rights existing relative to the body: "(1) common-law rights involving burials and autopsies; (2) modern statutory rights concerning the dead body, most notably the UAGA and its variations; (3) rights involving parts of the body that are no longer connected to the whole body; and (4) rights concerning living bodies."<sup>67</sup>

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64. An investigation by the New York Daily News discovered that 75 percent of patients from the New York City area referred for organ transplantation, between 1996 and 1998, were white. Michele Goodwin, *Altruism's Limits: Law, Capacity, and Organ Commodification*, 56 RUTGERS L. REV. 305, 332-35 (2004).

65. Press Release, N.Y. State Dep't of Health, *State Health Department Fines Albany Medical Center* (May 28, 2004), available at [http://www.health.state.ny.us/press/releases/2004/albany\\_medical\\_center\\_release\\_05\\_28\\_2004.htm](http://www.health.state.ny.us/press/releases/2004/albany_medical_center_release_05_28_2004.htm).

66. Lawrence K. Altman, *The Doctor's World: Defending Tough Decisions In a Case Open to Hindsight*, N.Y. TIMES, Aug. 15, 1995, available at <http://query.nytimes.com/gst/fullpage.html?res=990CE3DE1F39F936A2575BC0A963958260>.

67. Erik S. Jaffe, *She's Got Bette Davis[s] Eyes: Assessing the Nonconsensual Removal of Cadaver Organs Under the Takings and Due Process Clauses*, 90 COLUM. L. REV. 528, 543 (1990) (presenting an argument that the body is property to ensure protection under the

Jaffe argues, “[s]ince property rights are viewed as surviving the death of their owner, a corollary to this seems to be that any such rights in a dead body also exist prior to death, though perhaps in a somewhat modified form.”<sup>68</sup> This concept is particularly important to establishing the individual’s right to contract for the sale of his body upon death, and therefore, will be the focus of this section. In addition, this section will demonstrate why courtrooms are not the proper forum for the proposed policy change.

#### *A. Property Rights in the Body of a Deceased Person*

The common law on this subject extends back for centuries. The development of American common law defining property rights in the human body progressed from the earlier English common law which held that there was no property right in a dead body.<sup>69</sup> However, American case law eventually deviated from this idea:

[A]s cases involving unauthorized mutilation and disposition of bodies increased toward the end of the 19<sup>th</sup> century, paralleling the rise in demand for human cadavers in medical science . . . courts began to recognize an exclusive right of the next of kin to possess and control the disposition of the bod[y] . . . .<sup>70</sup>

This right, referred to as a “quasi-property right,” belongs to the spouse or next of kin to prevent mutilation or damage to the body and it allows the next of kin to possess the body in order to guarantee proper burial.<sup>71</sup> However, this merely asserts a protected “negative right” to be free from interference with possession of the decedent’s body, rather than a “positive right” of ownership to demand possession of the body.<sup>72</sup> While many courts confronted with the issue of whether a property interest can exist in a dead body have found that a property right of some kind does exist, the

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due process and takings clause of the U.S. Constitution).

68. *Id.* at 545 n.82.

69. See *Brotherton v. Cleveland*, 923 F.2d 477, 481 (6th Cir. 1991) (citing to *Williams v. Williams*, (1882) 20 Ch.D. 659, 665 (U.K.)).

70. *Colavito v. N.Y. Organ Donor Network, Inc.*, 438 F.3d 214, 223 (2d. Cir. 2006) (citing *Newman v. Sathyavaglswaran*, 287 F.3d 786, 791-92 (9th Cir. 2002)).

71. *Colavito v. N.Y. Organ Donor Network, Inc.*, 356 F.Supp.2d 237, 243-44 (E.D.N.Y. 2005) (opinion affirmed in *Colavito v. N.Y. Organ Donor Network, Inc.*, 438 F.3d 214 (2d. Cir. 2006)).

72. See Stanley E. Cox, *Government As Arbiter, Not Custodian: Relational Privacy As Foundation For A Right To Refuse Medical Treatment Prolonging Incompetents' Lives*, 18 N.M. L. REV. 131, 141 (1988).

same courts refuse to recognize an absolute property right to the body, in life or death.<sup>73</sup>

### *B. Property Rights in the Living Body*

Historically, the rights in a living body have been viewed as a liberty interest, and not as property.<sup>74</sup> This is an important distinction when arguing in favor of recognizing a property interest in the body after death because one must provide "an explanation that accounts for the existence of *both* liberty and property interests in a live body . . . to reconcile the change in the legal treatment of the body at death."<sup>75</sup> This liberty, or ownership, interest includes the rights to use, posses and "exclude others from one's body while one is alive."<sup>76</sup> This interest is protected under substantive due process.<sup>77</sup>

This liberty interest in the living body is demonstrated in several ways. The right to possess one's own body is historically recognized in the prohibition against slavery<sup>78</sup> and false imprisonment penalties.<sup>79</sup> Personal employment contracts illustrate the right to use the body.<sup>80</sup> The right to exclude others is evident in civil and criminal penalties for assault and battery.<sup>81</sup> These rights bear a great deal of resemblance to the rights associated with a property interest under the common law definition of property.<sup>82</sup>

The legal definition of property most often refers not to a particular physical object, but rather to the legal bundle of rights recognized in that object.<sup>83</sup> This "bundle of rights" includes the rights to possess, use, exclude, sell, and dispose.<sup>84</sup> Those opposed to recognizing the living body as property argue "that there is no general right to sell the body, and

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73. See, e.g., *Ga. Lions Eye Bank, Inc. v. Lavant*, 335 S.E.2d 127 (1985); *In re Donn*, 14 N.Y.S. 189 (1891).

74. Jaffe, *supra* note 67, at 553.

75. *Id.*

76. *Id.* at 545.

77. *Id.* at 543, 547.

78. *Id.* at 545-46. See also U.S. CONST. amend. XIII, § 1.

79. Jaffe, *supra* note 67, at 545-46. See also MODEL PENAL CODE § 212.2 (1962) (felonious restraint); RESTATEMENT (SECOND) OF TORTS §§ 35-42 (1965) (false imprisonment).

80. Jaffe, *supra* note 67, at 546.

81. *Id.* See also MODEL PENAL CODE § 211.1(1) (assault); RESTATEMENT (SECOND) OF TORTS §13 (1965) (battery).

82. Jaffe, *supra* note 67, at 549-50.

83. *Id.* at 548.

84. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-36 (1982).

therefore, it lacks an essential attribute of property.”<sup>85</sup> While a person need not possess all of the rights relative to any given object in order to have property rights, opponents argue that the right to sell is so important to recognizing a property interest that its exclusion is sufficient to deny a property label.<sup>86</sup> However, such a limitation under common law will not necessarily deny the recognition of an underlying property interest. The case of *Andrus v. Allard* concerned the state’s ban on the sale of eagle feathers.<sup>87</sup> The Supreme Court noted, “the destruction of one ‘strand’ of the bundle is not a taking, because the aggregate must be viewed in its entirety.”<sup>88</sup> Hence, even though the right to sell the property was taken away, the appellant maintained the rights to possess, use, and dispose.<sup>89</sup>

Therefore, the reasonable expectation that the body is subject to the exclusive control of the individual, or their next of kin, may serve as a basis for calling the body property. This supports the assumption that while there are practical limitations on the sale of the *living body* (or its components) due to public health concerns over the promotion of life, there still remains a vested property interest in the individual’s body that does not cease upon removal or upon death, and should then be transferable upon death. Nonetheless, the majority of courts have not held this view.

### C. The Human Body as Property in American Case Law

Presently, the majority of courts uphold the common law limits on the property rights that exist in the body of the dead and refuse to identify or forecast the implications of a contrary decision under modern circumstances.<sup>90</sup> In the benchmark case, *Moore v. Regents of the University of California*, the Supreme Court of California was faced with a claim for conversion of bodily matter (unique cancerous cells) wrongly acquired under false pretense by the plaintiff’s physician who used the cell-line for his own lucrative research.<sup>91</sup> In analyzing this case, the California Appellate Court held that the “crux” of the claim for conversion rested on whether the tissue of a living person was a form of tangible personal

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85. Jaffe, *supra* note 67, at 551.

86. *Id.* See also RESTATEMENT OF TORTS § 868 cmt. a (1979). “This [right of control] does not, however, fit well into the category of property since the body cannot ordinarily be sold or transferred, has no utility, and can be used only for the one purpose of internment or cremation.”

87. *Andrus v. Allard*, 444 U.S. 51, 54 (1979).

88. *Id.* at 65-66.

89. *Id.* at 66. “It is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds.” *Id.*

90. *Colavito v. N.Y. Organ Donor Network, Inc.*, 860 N.E.2d 713, 719 (N.Y. 2006).

91. *Moore v. Regents of Univ. of Cal.*, 793 P.2d 479, 479 (Cal. 1990).

property.<sup>92</sup> The court noted that “no public policy has ever been articulated, nor is there any statutory authority, against a property interest in one’s own body.”<sup>93</sup> Furthermore, the court held that “even though the rights and interests one has over one’s own body may be subject to important limitations because of public health concerns, the absence of unlimited or unrestricted dominion and control does not negate the existence of a property right for the purpose of a conversion action.”<sup>94</sup> Nevertheless, the California Supreme Court refused to recognize an absolute right in the human body, denying the claim for conversion by pointing to the public policy implications of allowing a patient to retain a property right in a body part after removal from the body.<sup>95</sup> The policy consideration balanced in favor of refusing to recognize the plaintiff’s ownership rights in his own cells was the fear that the establishment of such rights would hinder the free exchange of human biological materials and inhibit the advancement of the biotechnology industry, which the court saw as “crucial to the future of health care.”<sup>96</sup>

Unfortunately, the *Moore* case has been seen merely as an extension of case precedent on limited property interests in the human body<sup>97</sup> by which the majority of courts refuse to grant full property rights in the body.<sup>98</sup> However, some courts have been willing to rethink the holding in *Moore*,<sup>99</sup>

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92. *Moore v. Regents of Univ. of Cal.*, 249 Cal. Rptr. 494, 503 (Cal. Ct. App. 1988).

93. *Id.* at 504.

94. *Id.* at 506-07.

95. *Moore*, 793 P.2d at 492. Ironically, the court held “[a] patient must have the ultimate power to control what becomes of his or her tissues,” and therefore, recognized the plaintiff’s claim that the acquisition and use of his cells, tissue, and other bodily substances was a breach of fiduciary duties on the part of his physician. *Id.* at 491.

96. E. RICHARD GOLD, *BODY PARTS: PROPERTY RIGHTS AND THE OWNERSHIP OF HUMAN BIOLOGICAL MATERIALS* 50 (Georgetown Univ. Press 1996).

97. See *Holsen v. Heritage Mut. Ins. Co.*, 478 N.W.2d 59 (Wis. Ct. App. 1991) (stating that there is no property interest in a cadaver); *Ramirez v. Health Partners of S. Ariz.*, 972 P.2d 658, 667 (Ariz. Ct. App. 1998) (holding that the common law claim for negligent interference with a dead body does not extend to the organ donation context).

98. See, e.g., *Shults v. United States*, 995 F. Supp. 1270, 1275-76 (D. Kan. 1998) (parents of deceased airman had no claim of conversion where portion’s of son’s tissues and organs were discarded after autopsy); *Hasselbach v. Mt. Sinai Hosp.*, 159 N.Y.S. 376, 376 (N.Y. App. Div. 1916) (widow could not sustain conversion claim for unauthorized autopsy performed on husband).

99. Maryland district court held that cell lines are indeed property, recognizing the claim of conversion for the misappropriation of those human tissue lines. *United States v. Arora*, 860 F. Supp. 1091, 1099 (D. Md. 1994), *aff’d*, 56 F.3d 62 (4th Cir. 1995). California court granted the decedent a property interest in sperm for the purpose of inheritance. *Hecht v. Superior Court*, 20 Cal. Rptr.2d 275, 281 (Cal. Ct. App. 1993).



especially in the area of post-mortem property rights in the body.<sup>100</sup> In particular, the Ninth Circuit, in *Newman v. Sathyavaglswaran*, recognized that a property interest in the body of a deceased child had vested in his parents, giving them the “exclusive and legitimate claims of entitlement to possess, control, dispose and prevent the violation of the [body] . . . .”<sup>101</sup>

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Nevertheless, even as scientific advances lead to increased use of and demand for human organs, and the body continues to take on the functional characteristics of property,<sup>102</sup> the majority of courts refuse to overturn traditional notions of a limited property interest in the human body.<sup>103</sup> Recently, the Second Circuit Court of Appeals certified to the New York Court of Appeals the question of whether a property right of the donor, or next of kin, exists in regards to a cadaveric organ donated for transplantation.<sup>104</sup> The case *Colavito v. New York Organ Donor Network, Inc.* (“NYODN”) concerned the misappropriation and transplantation of a donor kidney into a recipient not indicated in the “directed donation.”<sup>105</sup> The Second Circuit recognized the controversy surrounding this issue and the potential implications this decision could have on public policy in the State of New York, and therefore, held that the state’s current public policy was a more proper determination than common-law principles.<sup>106</sup>

When, in August 2002, Peter Lucia died of intra-cranial bleeding, his widow and her sons decided to donate both of his kidneys to his friend, Robert Colavito.<sup>107</sup> Defendant Spencer Hertz, an NYODN official, assisted Debra Lucia in filling out an organ-donor form.<sup>108</sup> At that time, Lucia told Hertz that the kidneys were a “directed donation” specifically

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100. See, e.g., *Newman v. Sathyavaglswaran*, 287 F.3d 786, 796 (9th Cir. 2002) (granting parents exclusive and legitimate claims of entitlement to possess, control, dispose and prevent the violation of the body of their deceased child). But see *Georgia Lions Eye Bank, Inc. v. Lavant*, 335 S.E.2d 127, 128 (Ga. 1985) (finding no constitutionally protected right vested in a decedent’s body); *State v. Powell*, 497 So.2d 1188, 1191 (Fla. 1986) (upholding the constitutionality of legislation authorizing medical examiners to remove corneas without the consent of the next of kin for public health interests).

101. *Newman*, 287 F.3d at 796-97.

102. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 10 (Little Brown and Co. 1974) (1972).

103. See *Moore*, 793 P.2d at 487.

104. See *Colavito v. N.Y. Organ Donor Network, Inc.*, 860 N.E.2d 713, 719 (N.Y. 2006).

105. *Id.* at 715.

106. *Colavito v. N.Y. Organ Donor Network, Inc.*, 438 F.3d 214, 216-17 (2d Cir. 2006).

107. *Id.* at 216.

108. *Id.* at 217.

for Colavito.<sup>109</sup> While awaiting implantation of the first kidney, the attending surgeon, Dr. George W. Burke, discovered that the kidney had been damaged by aneurysms.<sup>110</sup> Therefore, a staff member called to request the second kidney be air-lifted for transplantation.<sup>111</sup> However, the NYODN representative informed the party that the second kidney had already been implanted in another recipient; as it turned out, the kidney was not transplanted until three days later.<sup>112</sup> Subsequently, Colavito filed a lawsuit in the United States District Court for the Eastern District of New York alleging conversion, fraud, and violations of New York Public Health Law Articles 43 and 43-A (pertaining to organ donation).<sup>113</sup>

The U.S. District Court found that New York courts historically have not recognized a dead body as property in common law,<sup>114</sup> and that property interests “only extend[] to preserving and burying the body.”<sup>115</sup> Therefore, the court found that it would be “against public policy to recognize broad property rights in the body of a deceased” and “to engage in a valuation of Mr. Colavito’s kidneys, which are not property.”<sup>116</sup> In addition, the court noted the distinction between the *Colavito* case, which involved a third party beneficiary, and those cases that only allowed the next of kin to sustain a conversion claim.<sup>117</sup> Therefore, the court found it improper to expand the minimal cadaveric rights recognized by other courts.<sup>118</sup>

On appeal, the Second Circuit Court of Appeals disagreed with the lower court’s interpretation on the claim for conversion on two grounds. First, the Second Circuit reasoned that “there is by no means a modern consensus that body parts are excluded from conversion actions at common law.”<sup>119</sup> The Second Circuit cited *Cornelio v. Stamford Hospital*, which noted that the existence of property rights in body parts is a “‘new, and thorny, question’ that ‘has as yet been the subject of very little authority and commentary.’”<sup>120</sup> Second, the Second Circuit concluded that Colavito

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109. *Id.* at 218.

110. *Id.*

111. *Colavito*, 438 F.3d at 218.

112. *Id.*

113. *Id.* at 216. “The donors, the Lucia family, have also brought suit against a variety of persons and entities in New York State court alleging fraud, battery, conversion, and violation of *N.Y. Public Health Law Article 43*. See *Lucia v. N.Y. Organ Donor Network, Inc.*, No. 03-012981 (Supreme Ct. Nassau Co.).” *Id.* at 216 n.1.

114. *Colavito v. N.Y. Organ Donor Network, Inc.*, 356 F. Supp. 2d 237, 242 (E.D.N.Y. 2005) (citation omitted).

115. *Id.* at 243.

116. *Id.* at 244, 246.

117. *Id.* at 244 n.9.

118. *Id.* at 244.

119. *Colavito*, 438 F.3d at 224.

120. *Id.* at 224 (quoting *Cornelio v. Stamford Hosp.*, 717 A.2d 140, 143 n.6 (Conn.

could maintain a cause of action because as a human organ recipient, the suit was not brought for control of the body and its parts, but rather, for the deprivation of a working organ.<sup>121</sup> In short, the Second Circuit argued that plaintiffs, such as Colavito, are not creating a “legal fiction,” but have real legal claims based on the “loss of a functioning organ.”<sup>122</sup>

Regrettably, in its resolution of the *Colavito* appeal, the New York Court of Appeals adhered to the common law rule that no one can have a property right in a dead body.<sup>123</sup> The court commented that “a next of kin has only a right to possess the body only for the purposes of burying it, and a corresponding duty to do so.”<sup>124</sup> Even though the court recognized “that the ‘no property right’ jurisprudence was developed long before the age of transplants and other medical advances,” it refused to identify or forecast the circumstances in which someone may conceivably have actionable rights in the body or organ of a deceased person.<sup>125</sup>

#### *E. A Need for Legislative Action*

The *Colavito* decision represents a standstill in the law and highlights the need for legislatures to finally recognize a property interest in the body of a decedent. The expansion of property rights in the body of a human decedent would not only be a step closer towards resolving the organ shortage, but it would also protect the donors and donees of cadaveric organs for transplantation as they are presently without legal recourse under a claim for conversion.

Currently, the State of Ohio is one of only three states to acknowledge that property rights are the basis for the next of kin’s entitlement to donate an organ.<sup>126</sup> In contrast to current case law,<sup>127</sup> Ohio’s anatomical gift laws suggest “either that a donor has a property right to her organs prior to her demise transferable to the donee upon the execution of the statutorily approved instruments or upon death or that the newly created donee’s property right to the donated organ springs out of nowhere.”<sup>128</sup> In short, the donor has a property right to his or her organs before death, which transfers

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1998).

121. *Id.* at 225. The court argued that the consent form directing a donation to Colavito would meet the standard under N.Y. Jur. Contracts § 302. *Id.* at 228 n.14.

122. *Id.* at 225.

123. *Colavito*, 860 N.E.2d at 718 (citing *Patterson v. Patterson*, 59 N.Y. 574, 583 (1875)).

124. *Id.*

125. *Id.* at 719.

126. Stickney, *supra* note 61 at 38 (discussing Ohio Senate Bill 188: Ohio’s New Anatomical Gift Law enacted December 13, 2000).

127. *Id.*

128. *Id.*

to the next of kin, or donee, upon the execution of the statutorily approved instruments or upon death. The State of Ohio hopes that "[b]y recognizing the supremacy of a donor/testator's right to bequeath her organs and subsequently deterring family from contesting a decedent's designation, the new statute may alleviate . . . the overwhelming shortage of transplantable organs . . . ."<sup>129</sup>

This is certainly a move in the right direction, but until federal and state legislatures follow suit and begin to expand the scope of property rights in the human body, the issue of whether a property interest exists in the organs and tissues of the decedent will continue to arise in courtrooms across the country. So, why do the legislatures around the country refuse to recognize a vested property right to protect the donors or donees and provide legal recourse when their rights have been violated by acts of fraud and conversion? Also, why do the legislatures refuse to allow parties to contract for the harvesting of organs upon the decedent's death, when the only true public health concern of promoting life no longer applies because the individual is deceased? The answers to these questions are not based on property law or public health concerns, but on the regulatory and moral issues concerning the commodification of the human body.

#### IV. MARKET-BASED APPROACH

##### A. "Body Property": Commodifying the Human Body

"While the body may once have lacked the commercial characteristics often associated with property, changing circumstances are emphasizing these very characteristics."<sup>130</sup> One commentator has argued that "the very existence of a law forbidding commercial alienation of organs paradoxically portrays the human body as an 'article of commerce' that lies within the purview of congressional power and would otherwise be subject to sale on the market."<sup>131</sup>

In his book, *Body Parts: Property Rights and the Ownership of Human Biological Materials*, E. Richard Gold attempts to forecast what is likely to occur if our society recognizes human biological materials as commodities by examining case law to determine the bases upon which courts balance and award property rights.<sup>132</sup> He argues that "courts are likely to award property rights if to do so will enhance such trade"; however, "[i]f . . . the

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129. *Id.*

130. Jaffe, *supra* note 67, at 555.

131. Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L.REV 359, 376 (2000).

132. GOLD, *supra* note 96.

allocation of property rights . . . hinder[s] trade in the good, the court is unlikely to award a property right.”<sup>133</sup> However, if the courts look primarily to a good’s economic value in determining whether to attach property rights to that good,<sup>134</sup> then why do the courts fail to consider that organs are already being bought and sold on the black-market, as a result of the shortage of available organs? Thus, it seems unwarranted to assume that organs do not have a commercial value recognizable of such a property interest.

The truth is that granting an individual, or the next of kin, property rights in cadaveric organs would be a step toward opening the door to the sale of the human body, and this concept arguably “offends common notions of decency.”<sup>135</sup> Cohen states:

Human beings . . . are of incomparable ethical worth and admit of no equivalent. Each has value that is beyond the contingencies of supply and demand or of any other relative estimation. They are priceless. Consequently, to sell an integral human body part is to corrupt the very meaning of human dignity.<sup>136</sup>

These views are reflective of the raw sentiments held by many regarding the commercialization, trade, or sale of the human body.<sup>137</sup> However, Gregory Crespi notes that in enacting the prohibition on the sale of organs, “Congress appears to have assumed without reflection that allowing any form of compensation to be paid to organ donors would violate fundamental social norms. There was no attempt made to examine alternative regulatory frameworks that might harness financial incentives to enhance organ availability without transgressing those norms.”<sup>138</sup>

In truth, offering compensation for organs will not necessarily lead to exploitation—on the contrary, it may be regarded as necessary to minimize the level of inequities that exists in current organ procurement systems.<sup>139</sup> Furthermore, “[a] market in body parts and products [is needed] . . . to ensure that patients are protected from coercion and given the chance to be paid fairly for their contributions.”<sup>140</sup> Therefore, federal and state

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133. *Id.* at 44.

134. *Id.*

135. L.D. de Castro, *Commodification and Exploitation: Arguments in Favour of Compensated Organ Donation*, 29 J. MED. ETHICS 142, 142 (2003).

136. Cynthia Cohen, *Selling Bits and Pieces of Humans to Make Babies: The Gift of the Magi Revisited*, 24 J. MED. & PHIL. 288, 292 (1999).

137. See de Castro, *supra* note 135, at 142.

138. Crespi, *supra* note 16, at 15.

139. See *supra* Section II Part C.

140. Lori B. Andrews, *My Body, My Property*, 16 HASTINGS CENTER REP. 28, 28 (Oct. 1986).

legislatures need to reconsider policies banning the sale of human cadaveric organs, and permit a commercial market in organs to resolve the shortage.

### *B. The Organ Market*

The government recognized that organs were of such value to the public health that it founded an interstate network to regulate and ensure the procurement of organs.<sup>141</sup> In doing so, the federal government assumed a responsibility for increasing the organ supply by regulating the practice of organ donation. Unfortunately, the altruistic nature of the government's system is failing, and has been for several decades. Thus, a new stand needs to be taken to resolve this shortage.

In a commercial market for organs, the human body would not be reduced to mere property, but would be recognized as such in a legal context to ensure the protection of the individual rights in one's own body. In fact, the guiding principle behind the policy of recognizing a property interest in the human body is that "individuals 'own' their bodies as a 'possession,' and that only individuals can weigh the risks versus benefits, the pains versus pleasures, entailed in deciding whether to keep, sell, or be buried with one's organs."<sup>142</sup> This comment asserts that removing the prohibitions on the sale of organs can be accomplished while still respecting the ethical considerations associated with recognizing the integrity and dignity in the human body, and more importantly, can provide the incentives needed to increase organ supplies.

A market-based approach presents alternatives to operating in an organs market: (1) an "Open Market"<sup>143</sup> (absolute market system) or (2) a "Futures Market."<sup>144</sup> The primary goal of each alternative is to increase the organ supply and expand autonomy over one's body.<sup>145</sup> Furthermore, either approach permits the sale of organs by individuals before death or by surviving family members after death.<sup>146</sup> However, there are numerous distinctions between the two market-based approaches which suggest that the futures market would be the most in line with current law and ethics.

First, the open-market system is a policy of "unrestricted autonomy, which would allow individuals to enter into any contracts they wish for the buying-and-selling of their organs."<sup>147</sup> Such a policy would include, on its own principles, the right to sell vital organs while alive. Second, financial

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141. 42 U.S.C. § 274 (2000 & Supp. IV 2004).

142. President's Council on Bioethics, *supra* note 9.

143. *See* Goodwin, *supra* note 64, at 318.

144. *See* Crespi, *supra* note 16, at 6.

145. President's Council on Bioethics, *supra* note 9.

146. *Id.*

147. *Id.*

compensation for cadaveric donation and financial compensation for living donation are different ideas and it is quite possible to have one without the other. Third, the concept of an open market does not appropriately consider the ethical and public health concerns surrounding the promotion of life. Fourth, the primary focus of the practice of medicine is care and beneficence, which would preclude physicians from engaging in any activity that would harm the patient, especially removing vital organs from a living human.<sup>148</sup> Therefore, practical limitations on the recognition of a property interest in the living body are necessary and an open market approach would not be in line with the current law and ethics.

### C. The "Futures Market" in Human Cadavers

A futures market in cadaveric organs "would allow individuals before death, or surviving family members after death," to respectively sell the decedent's organs in a private contract.<sup>149</sup> There are several proposals set forth in this market approach including (1) benefits to the individual in life<sup>150</sup> or (2) benefits to the deceased's estate.<sup>151</sup> Specifically, scholar Henry Hansmann proposes a future market where health insurance companies would purchase the future rights to procure the policyholder's transplantable organs upon the policyholder's death.<sup>152</sup> The policyholder, in return, would receive a deduction on the insurance premium paid for that term.<sup>153</sup> The insurance company would then input the individual's name into a national registry, which the hospitals could access to find a suitable recipient through a national matching network linked to the registry.<sup>154</sup> The insurance company would receive payment from the recipient under a specified price for an organ upon accepting it for transplant.<sup>155</sup> The natural market forces of supply and demand could determine the price of the harvested organ, or the government could establish the price.<sup>156</sup> Of course, such a system would protect individual autonomy by permitting the policy

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148. See James S. Childress, *The Place of Autonomy in Bioethics*, 20 HASTINGS CENTER RPT. 12, 15 (Jan. 1990).

149. President's Council on Bioethics, *supra* note 9 (describes a spot market with surviving family members selling the decedent's organs). See HENRY HANSMANN, *Markets for Human Organs*, in A LEGAL FRAMEWORK FOR BIOETHICS 145, 147 (Cosimo Marco Mazzoni ed., Kluwer Law International 1998).

150. HANSMANN, *supra* note 149, at 147.

151. Crespi, *supra* note 16, at 35.

152. HANSMANN, *supra* note 149, at 147.

153. *Id.*

154. *Id.* at 147-48.

155. *Id.* at 148.

156. *Id.*

holder the freedom to change the agreement every time the policy came up for renewal.<sup>157</sup>

Lloyd Cohen argues that such a system is "unnecessary and undesirable" because of the loss of individual autonomy. Rather, he proposes "a system of renewable, annual organ procurement contracts."<sup>158</sup> In construct, remuneration would be paid to the decedent's estate upon the death of the organ provider in accordance with the execution of contingent or option contracts.<sup>159</sup> An options market in organs would of course allow firms to buy the rights to organs in the event of the donor's death. This comment agrees that the approach Cohen presents is most in line with the notions of individual autonomy and the right to choose, and therefore, would be the most appropriate choice for a futures market approach.

This comment also supports a futures market approach to redress organ shortage in America because it is consistent with practices in public health law concerned with the promotion of life for living donors. However, this comment does concede that it seems illogical to refuse an autonomous individual the right to sell non-vital body parts in life on an open market, while living organ donation is already permissible for non-vital organs and tissues. Is it not true that the government grants the living donor the property interest to donate a non-vital organ or tissue on the assumption that the living donor is able to balance the benefits and risks associated with such a donation? Thus, it seems that the same balance could be appropriately considered when electing to buy or sell organs for transplantation, and the relationship between autonomy and beneficence in contemporary bioethics could be maintained.

#### *D. Changing the Law to Allow a Futures Market to Operate*

This policy change will not occur in a judicial venue because even those judges who accept all of the policy arguments in favor of allowing commercialization will have great difficulty interpreting a clear statutory prohibition to mean the opposite.<sup>160</sup> However, the foundation for modern state law on organ transplantation in most jurisdictions is the 1968 version of the UAGA, which does not include provisions regarding the matter of

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157. HANSMANN, *supra* note 149, at 147.

158. Gloria J. Banks, *Legal & Ethical Safeguards: Protection of Society's Most Vulnerable Participants in a Commercialized Organ Transplantation System*, 21 AM. J. L. & MED. 45, 80 (1995) (citing Henry Hansmann, *The Economics and Ethics of Markets for Human Organs*, 14 J. HEALTH POL. POL'Y & L. 57 (1989)).

159. *Id.* (citing Schwindt & Vining, *Future Market for Organs*, 11 J. HEALTH POL. POL'Y & L. 483 (1987)).

160. Crespi, *supra* note 16, at 55.



organ sales.<sup>161</sup> Considering the central focus of the UAGA was to facilitate organ transplantation, some argue that the absence of an express provision may provide a door for courts to exercise their discretion.<sup>162</sup> This comment has proposed forceful arguments that a futures market could more effectively achieve that objective than does the existing system.

Furthermore, “[s]uch a construction could be accompanied by judicial endorsement of the concept of property rights in body parts,” which more and more bodies of legal authority are supporting.<sup>163</sup> This would “remove . . . the state law obstacles to the operation of a futures market in the significant number of states that have statutory frameworks based upon the 1968 UAGA and that have not adopted express prohibitions against commercial organ transactions.”<sup>164</sup> Nonetheless, commentators contend:

Such rulings, however, would not reach the state law restrictions in the fourteen states that have adopted the 1987 version of the UAGA with its express prohibition on organ sales, nor to the restrictions existing in those states that have augmented their 1968 UAGA-based statutes with express prohibitions. More importantly, they would not address the prohibition imposed by NOTA barring any organ sale transactions that involve the instrumentality of interstate commerce.<sup>165</sup>

However, there is a plausible textual argument that can be made concerning the “valuable consideration” definition found in NOTA. As a counter to the argument that the legislative history of NOTA evidences congressional intent to prohibit organ sales,<sup>166</sup> commentators suggest that:

[T]he “reasonable payments” language should be construed to not include compensation paid to donors for their organs, [as] one can argue that the legislative history evidences even more clearly the legislative intent to alleviate the organ shortage, and that all textual ambiguities should be resolved in a manner that furthers achievement of this primary objective.<sup>167</sup>

Nevertheless, commentators also note that it “appears that the governing statutes can not reasonably bear a favorable reinterpretation that would

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161. *Id.*

162. *Id.*

163. *Id.* at 56.

164. Crespi, *supra* note 16, at 56.

165. *Id.*

166. The Senate Report on NOTA merely stated: “It is the sense of the Committee that individuals or organizations should not profit by the sale of human organs for transplantation,” and “human body parts should not be viewed as commodities.” S. REP. NO. 98-382, 98th Cong. at 16, *as reprinted in* 1984 U.S.C.A.N. 3975, 3982.

167. *See* Crespi, *supra* note 16, at 57-58.

allow a futures market to operate, and that a complete overhaul of NOTA and the UAGA will be required."<sup>168</sup> Of course, none of the legislation needed for this program is already in place or pending. The government would need to regulate the market-based approach for public health reasons, as previously explained, to uphold the prohibition on the sale of *vital organs* from living donors. However, once organs and tissues are recognized as property, federal and state regulations on commercial transactions could police the market influences, and the current criminal statutes, currently established to face the black market forces, would police any malicious conduct.

## V. FACING THE LEGAL AND ETHICAL IMPLICATIONS

Ethicists have long debated the rightful authority over the dead and the *morally correct* way to impose this right. The concept of a futures market for organ procurement raises legal and ethical implications centering on the exploitation of the poor,<sup>169</sup> the fear that allowing commercial sales would undermine altruism,<sup>170</sup> and third-party influences.<sup>171</sup> However, proper analysis can dispel those concerns.

### A. Deprivation and Exploitation of the Indigent

Those opposed to opening the market fear that doing so would make the cost of organ transplantation so astronomical as to deprive the poor equal access, and argue that it would be a fundamental injustice to deprive those who would not financially be able to receive most organs.<sup>172</sup> However, finance should not be an issue when a realistic reflection into current public health care shows unequal access to transplantation because of monetary coverage.<sup>173</sup> In addition, the government's increased involvement in organ transplantation derives from the savings to the government health budget associated with additional patients receiving organ transplants.<sup>174</sup> With the advancements in biotechnology that preserve organs outside of the body, and the pharmaceutical developments that dramatically improve the survival rates of transplant recipients, the government hoped that the

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168. *Id.* at 58.

169. *Id.* at 25 (citing *Procurement and Allocation of Human Organs for Transplantation: Hearing Before the Subcomm. on Investigation and Oversight of the H.Comm. on Science and Technology*, 98th Cong. 269 (1983) (testimony of Oscar Salvatierra, President of the American Society of Transplant Surgeons)).

170. *Id.*

171. Chandis, *supra* note 5, at 226.

172. *Procurement and Allocation of Human Organs*, *supra* note 169, at 276.

173. CAPLAN ET AL, *supra* note 27, at 238.

174. S. REP. NO. 98-382 (1984).

increased cost of delivering these benefits would be more than offset by savings from decreased use of long-term care.<sup>175</sup> Therefore, it seems unlikely that the government would not continue to invest in organ transplantation for dependents, rather than treat these individuals through the costly medical services provided by supplementary medical insurance programs.<sup>176</sup>

Additionally, the fear of exploiting those in need of money is more or less latently counterintuitive because the laws banning the sale of organs have helped fuel the black market for those organs. In particular, prohibitions have fueled the black market for kidneys, in which the desperation of dying patients whose only hope is to obtain an organ, drives the illegal trade of organs from people who need money more than a second kidney. British Professor Nadey Hakim, a transplant surgeon at St Mary's Hospital in London, noted, "[t]he black market in organs can no longer be ignored, and the risks of the unregulated trade in organs outweighed the dangers of legalising it."<sup>177</sup> In short, introducing governmental supervision and funding will provide equity for the poor, who will get equal access to organ transplants and whose families will benefit from the sale of their organs upon death.

### B. Notions of Altruism

Another concern is that an organs market would eliminate the voluntary donation of organs during life or upon death.<sup>178</sup> However, denying a property interest in cadaveric organs will only promote the psychological barriers to donor consent as the courts continue to refuse to grant legal recourse for fraud and conversion claims against the current organ sharing network.<sup>179</sup> Also, recognizing such a right will hopefully not automatically remove the inherent nature of altruism and generosity amongst people in society because "[i]t is only a certain type of person who will donate an organ and another who will sell it."<sup>180</sup>

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175. *Id.* "Nationwide, between 6,000 and 10,000 people are being maintained on either hemodialysis or peritoneal dialysis while awaiting a kidney transplant." CAPLAN ET AL., *supra* note 27, at 143. Medicare would avoid direct dialysis costs, which routinely exceed \$55, 000 per patient, per year, for each patient transplanted. Organ Donation and Recovery Improvement Act, Pub. L. No. 108-216, 118 Stat. 584 (2004).

176. S. REP. NO. 98-382 (Pub. L. No. 98-507, National Organ Transplant Act).

177. Jeremy Laurence, *Legalise Organ Sales to Ease Severe Shortage, Says Transplant Surgeon*, INDEP. (London), October 6, 2006, at 24.

178. *See Procurement and Allocation of Human Organs*, *supra* note 169, at 270, 278-79.

179. *See Colavito v. N.Y. Organ Donor Network, Inc.*, 860 N.E.2d 713 (N.Y. 2006).

180. Magda Slabbert, *Commercialization of Human Organs for Transplantation: A View from South Africa*, 24 MED. & L. 191, 198 (2005).

*C. Third Party Influences*

The commodification of cadaveric organs opens the door to placing a price tag on a person's body parts. It is not improbable to consider that in desperate times a person or his family may need money so badly that an individual would commit suicide, or be killed by another, for the anticipated sale price. These potential situations are disheartening to say the least. However, the intentional infliction of harm upon another person is specifically addressed by criminal and civil statutes, which prohibit and punish such conduct. These protections are already in place to regulate this type of conduct, and therefore, such potential conduct should not deter the recognition of a market-based approach.

## VI. CONCLUSION

The current legal and institutional framework governing the transplantation of human bodily organs is ineffective. "Patients who die waiting for a transplant do so not because of a shortage produced by natural limits or human indifference, but rather due to an inefficiency of existing organ procurement policies."<sup>181</sup> It is well understood that a change in social norms must precede a change in the legal rule, but the legislature has the potential to save lives and lessen suffering. The initial legislative intent was to alleviate the organ shortage in America, and this national crisis should be resolved in a manner that furthers achievement of this primary objective.

Any revised procurement scheme will be met by controversy and skepticism. Nevertheless, it is apparent that the system needs transformation. The federal government has assumed responsibility for increasing the organ supply by regulating the practice of organ donation. To maintain the status quo or to adopt a presumed consent policy are both morally unacceptable. Allowing donor compensation would protect the dignity of donors and would reduce the suffering and death of the many people waiting for transplant organs.

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181. CAPLAN ET AL, *supra* note 27, at 193.