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Gifts of the Heart . . . and Other Tissues: Legalizing the Sale of Human Organs and Tissues

*“We buy and sell body parts all the time; we just don’t call it that.”*¹

I. INTRODUCTION

Imagine a scenario in which a young individual tragically dies, but in a way that preserves almost all of her internal organs.² Further, imagine that after she is declared brain dead at the hospital, her family decides to donate her organs.³ Despite this magnanimous decision which will save others’ lives, the family must bear all expenses for the funeral and other final expenses⁴ because, under current law, the family is prohibited from receiving anything in compensation for the donation.⁵ Yet, at the same time, thousands of dollars are changing hands between doctors, hospitals, medical transport companies, and insurance companies in completely legal business transactions for these donated organs.⁶

This scenario is actually not imaginary at all, but is the established system of organ and tissue transfer under current law. Federal and state laws prohibit the receipt of consideration for an organ donation.⁷ However, to say that organs are not being bought and sold is to ignore reality.⁸ While most people are somewhat aware of black market transactions in various human tissues—mostly internal organs—fewer are aware that a massive and legitimate industry has been built around the trade of human remains.⁹ The

1. Peter S. Young, *Moving to Compensate Families in Human-Organ Market: Legal Scholars and Doctors Lead Way*, N.Y. TIMES, July 8, 1994, at B7 (quoting Fred H. Cate, associate professor at Indiana University School of Law in Bloomington).

2. This scenario describes the tragic story of Susan Sutton. *Id.*

3. *Id.*

4. Susan’s family had to borrow money for the funeral, but was still unable to afford a headstone and buried Susan in an unmarked grave. *Id.*

5. *Id.*

6. *Id.*

7. National Organ Transplant Act, 42 U.S.C. § 274e (2006); UNIF. ANATOMICAL GIFT ACT §§ 1–11 (1987) (amended 2006), available at <http://uniformlaws.org/Act.aspx?title=Anatomical%20Gift%20Act%20%281987%29>.

8. See Young, *supra* note 1.

9. See Renie Schapiro, *Banking on the Gift of Tissue*, MILWAUKEE J. SENTINEL, May 2,

same federal and state laws that prohibit donors from receiving compensation for their organs and tissues facilitate this industry by providing recovery of costs to anyone who removes, stores, transports, processes, or transplants the organ or tissue.¹⁰ Understandably, these provisions are essential to facilitate organ donations as doctors, hospitals, medical transportation companies, and tissue banks need to earn money to operate. However, given that the demand for organs¹¹ and tissues¹² is greater than the supply, these same doctors, hospitals, and medical companies inflate the costs of their “services” to capture the entire value of the organ.¹³ Despite the billions of dollars changing hands in transactions for human tissues and organs,¹⁴ the donors themselves are prohibited from receiving any compensation.¹⁵

This Comment argues that the donors, as the most rightful owners of the value of their organs and tissues, have a right to participate in this industry. The literature advocating the removal of restrictions on human-organ and tissue sales has mostly done so on the grounds that it is justified by the need to eliminate the organ shortage.¹⁶ While this is a valid consideration, it sidesteps the ethical objections to the sale of human organs and tissues by arguing that the ends justify the means, and any ethical objections to organ sales are outweighed by the practical need to save lives. In contrast, this Comment attempts to focus more directly on the ethical dilemma by considering the question whether an individual should have the *right* to claim the value of his or her own body. Ultimately, this Comment concludes that while strong societal interests justify the prohibition of inter vivos sales, no such interests exist to prevent postmortem transfers. Subsequently, the current law merely transfers wealth from donors to doctors, hospitals, and medical companies and reduces individual autonomy by eliminating the contractual power of donors to control the future use of their organs. Thus, amending the law to

2005, at G1.

10. 42 U.S.C. § 274e.

11. Steve P. Calandrillo, *Cash for Kidneys? Utilizing Incentives to End America's Organ Shortage*, 13 GEO. MASON L. REV. 69, 83–86 (2004).

12. ANNIE CHENEY, *BODY BROKERS: INSIDE AMERICA'S UNDERGROUND TRADE IN HUMAN REMAINS* 8 (2006).

13. *See id.*

14. *See* Schapiro, *supra* note 9.

15. 42 U.S.C. § 274e.

16. *See, e.g.*, Calandrillo, *supra* note 11.

allow postmortem organ sales would result in a more equitable legal structure and likely save more lives.

Part II of this Comment outlines the current statutory and jurisprudential frameworks surrounding the law's treatment of organ transplantation and the human body more generally. Part III briefly discusses various proposals for organ and tissue sales and their criticisms. Part IV discusses the societal interests supporting the prohibition on organ and tissue sales. Part V analyzes these arguments in light of the current legal structure and argues that an individual should have the right to capture the market value of the rights to her body upon her death since this would provide for a more equitable distribution of wealth and would increase autonomy. Finally, Part VI concludes that the law can easily be amended to allow organ sales to achieve this more equitable result, while still protecting society's interests currently supporting the prohibition on sales.

II. LEGAL BACKGROUND

The sanctity of the human body is something that is deeply embedded in cultures worldwide. Egyptians sought to preserve the bodies of the pharaohs through mummification so that the body could be used in the afterlife.¹⁷ The Bible describes God's threat to the children of Israel that if they would not keep His commandments, animals would defile and devour their corpses.¹⁸ Ajax stood over the body of Patroclus to prevent Hector and the Trojans from beheading him and defiling his body.¹⁹ Throughout history and cultures, protecting the integrity of the dead has been an abiding duty of the living.

Thus, for the greater part of history, the human corpse has been a liability, obligating the living to ensure its proper handling. Recent technology, however, has changed this. The human corpse is now a valuable asset whose organs and tissues can heal the living, and whose limbs and parts aid researchers in developing new techniques and procedures to cure human illness and injury.²⁰ This value will

17. *See generally* JOHN H. TAYLOR, DEATH AND THE AFTERLIFE IN ANCIENT EGYPT (2001).

18. *Deuteronomy* 28:15, 26.

19. HOMER, THE ILLIAD (Ian Johnston trans., 2d ed. 2006).

20. *See infra* notes 128–31 and accompanying text.

only increase as developments in technology create more uses for human tissues. However, the emergence of value in the human cadaver, combined with the historical charge to protect the integrity of the dead, has exposed weaknesses in the laws governing what can and cannot be done with a deceased human body. Specifically, the emergence of value has created an entire industry trading in dead human tissues for health, research, and improvements in medical technology.²¹ Yet, the law has failed to determine to whom the value rightfully belongs and how far these cultural duties of protecting the dead should extend.

A. Statutory Framework

In the United States, two statutes govern the transfer of human tissue from one individual to another. The National Organ Transplant Act (“NOTA”),²² passed in 1984, is the controlling federal law. In addition, all states have passed some form of a model act entitled the Uniform Anatomical Gift Act (“UAGA”).²³ As their names suggest, NOTA deals only with organ donations,²⁴ while UAGA focuses on postmortem donations of a wider variety of human tissues.²⁵ Although there may be some flexibility in the plain language, these statutes are generally thought to prohibit any sale of almost all human tissues for any purpose.²⁶

21. See *infra* Part V.A.

22. 42 U.S.C. §§ 273–274g (2006).

23. Henry Hansmann, *The Economics and Ethics of Markets for Human Organs*, 14 J. HEALTH POL. POL’Y & L. 57, 58 (1989).

24. 42 U.S.C. §§ 273–274g. “Organ” is defined very broadly, including any “kidney, liver, heart, lung, pancreas, bone marrow, cornea, eye, bone, and skin or any subpart thereof,” *id.* § 274e(c)(1), as well as the “intestine, including the esophagus, stomach, small and/or large intestine, or any portion of the gastrointestinal tract,” 42 C.F.R. § 121.13 (2010).

25. See REVISED UNIF. ANATOMICAL GIFT ACT §§ 2(3), 3 (2006), [hereinafter RUAGA] available at <http://uniformlaws.org/Act.aspx?title=Anatomical%20Gift%20Act%20>.

26. See, e.g., *Frequently Asked Questions*, TEX. A&M HEALTH SCI. CTR., <http://medicine.tamhsc.edu/willed-body/faq.html> (last visited Jan. 17, 2012); *Dep’t of Neurobiology and Developmental Sci.*, U. OF ARK. FOR MED. SCI., http://www.uams.edu/neuroscience_cellbiology/anatomical_gift_program/ (last visited Jan. 17, 2012); *University of Michigan Anatomical Donations Program*, U. OF MICH. MED. SCH., <http://www.med.umich.edu/anatomy/donors/faq.html> (last visited Jan. 17, 2012); *University of Utah Body Donor Program: Questions and Answers*, U. OF UTAH, http://www.neuro.utah.edu/related_links/bodydonor/faq.html (last visited Jan. 17, 2012). The flexibility is a result of UAGA’s definition of “anatomical gift” encompassing transplantation, therapy, research, or education purposes, while the prohibition on sales only specifically mentions transplantation or therapy purposes, thus creating some ambiguity

Congress passed NOTA partly to encourage organ donation,²⁷ and partly to make explicit what was only an inferred prohibition on the sale of organs in the UAGA.²⁸ Advancements in organ transplant technology had dramatically increased the success rates of organ transplant procedures, but as the demand for organs correspondingly rose, donations of organs remained constant.²⁹ At the same time, and as a result of this supply and demand discrepancy, the first suggestion for an open market for organs was made.³⁰ Weighing these two somewhat competing values—increasing donation on the one hand, but prohibiting a market on the other—Congress settled on the following language in NOTA: “It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce.”³¹ Thus, by focusing on the receipt of consideration by donors, Congress explicitly banned organ sales,³² while still providing for medical and economic structures that facilitate the transfer of organs from one individual to another.³³

regarding sales for research or educational purposes. RUAGA §§ 2(3), 16. One can, however, receive compensation for blood, sperm, or ova. Calandrillo, *supra* note 11, at 97.

27. See S. REP. NO. 98-382, at 2 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3975, 3976. The Senate report notes that of the 20,000 deaths occurring in ways suitable for organ transplantation, only 15% of those resulted in a donation. *Id.*

28. Calandrillo, *supra* note 11, at 78–79. UAGA in its original form did not expressly prohibit the sale of organs, but courts inferred a prohibition due to its exclusive use of the word “gift.” *Id.* at 78.

29. *Id.* at 79.

30. Walter Sullivan, *Buying of Kidneys of Poor Attacked: Foundation Call Plan to Lure Transplant Donors Immoral and Unethical*, N.Y. TIMES, Sept. 24, 1983, at 9.

31. 42 U.S.C. § 274e(a) (2006).

32. *Id.* However, the scope of this ban is eroding with the advent of new technology. In *Flynn v. Holder*, No. 10-55643, 2011 WL 5986689 (9th Cir. Dec. 1, 2011), the Ninth Circuit recently held that the application of NOTA, as applied to a specific type of bone marrow transplant, violated the Equal Protection Clause. The case involved “peripheral blood stem cell apheresis” whereby “hematopoietic stem cells” produced in the bone marrow are extracted for donation through the donor’s blood. *Id.* at *1. The court reasoned that these cells were not a “subpart” of bone marrow, which is a listed organ in NOTA, but a product of the bone marrow resembling blood, sperm, or ova, all of which are outside of the compensation prohibition of NOTA. *Id.* at *3, *7. Consequently, the court held that no rational basis existed to prohibit the receipt of compensation for bone marrow donated through apheresis while allowing compensation for blood, sperm, and ova, and the application of NOTA violated the Equal Protection Clause. *Id.* at *3–*4.

33. 42 U.S.C. § 274e(a). Other parts of the law provide for programs encouraging and facilitating donation. Most notably, NOTA created the Organ Procurement and Transplantation Network (“OPTN”) to coordinate the nationwide effort of procurement and transplantation. *About OPTN: Organ Procurement and Transplantation Network, History*,

Although the UAGA came first, it was amended to align with and accommodate NOTA's organ transplant provisions, while still regulating other anatomical gifts with which NOTA is not concerned.³⁴ In contrast to NOTA's regulations of "any human organ,"³⁵ UAGA governs "anatomical gift[s]," defined as "donation[s] of all or part of a human body to take effect after the donor's death for the purpose of transplantation, therapy, research, or education."³⁶ This definition encompasses "tissue of a human being,"³⁷ where "tissue" is defined as "a portion of the human body other than an organ or an eye" with the exception of blood.³⁸ Consequently, in addition to incorporating NOTA's prohibitions on sales of human organs,³⁹ UAGA also restricts the receipt of valuable consideration for cadaveric donations, donations of bodies to science, and tissue donations to research institutions, universities, and hospitals.⁴⁰ For the sake of simplicity, this Comment will refer generally to "organ" as a term encompassing all human tissues regulated under UAGA or NOTA.

Despite their prohibitions on sale, neither UAGA nor NOTA proscribe economic markets for organs. Both NOTA and UAGA contain exceptions for "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 of a human organ in connection with the donation of the organ."⁴¹ These

HEALTH RESOURCES & SERVICES ADMIN., <http://optn.transplant.hrsa.gov/optn/history.asp> (last visited Jan. 17, 2012). The most recognizable task of OPTN is to maintain the lists of organ donors and organ recipients to facilitate the finding of biologically suitable matches. *See About OPTN: Organ Procurement and Transplantation Network, Profile*, HEALTH RESOURCES & SERVICES ADMIN., <http://optn.transplant.hrsa.gov/optn/profile.asp> (last visited Jan. 17, 2012).

34. Calandrillo, *supra* note 11, at 78–79; RUAGA §§ 1–23 (2006).

35. 42 U.S.C. § 274e(a).

36. RUAGA § 2(3).

37. RUAGA § 2(18).

38. RUAGA § 2(30).

39. RUAGA § 16.

40. *See supra* note 26.

41. 42 U.S.C. § 274e(c)(2) (2006). The UAGA's language is similar: "A person may charge a reasonable amount for the removal, processing, preservation, quality control, storage, transportation, implantation, or disposal of a part." RUAGA § 16(b). NOTA also contains an exception for compensation of donors' "travel, housing, and lost wages." 42 U.S.C. § 274e(c)(2).

exceptions allow doctors, hospitals, and tissue banks to collect compensation for the services they provide. In other words, after an organ is donated, the medical team involved in its removal, the hospital where the donation took place, any medical transportation company involved in transporting the organ, and any tissue bank involved in processing the organ can each attach the cost of their services to the organ and collect either from the organ recipient or, more likely, the organ recipient's insurance company.⁴² Therefore, even though the initial sale of an organ is prohibited, the path from donor to recipient comprises a series of transactions in which money changes hands.

B. The Legal Status of Human Body Parts

The jurisprudence underpinning the legal status of human body parts is, at best, confused. This, in part, is due to the various legal theories that interact when discussing the transfer of human organs. The common law tradition that has protected some interests in body parts is now inadequate since the value in a dead body has only recently been—and is continually being—established by modern technology. Additionally, statutes concerned with tissue transfer have sought to preserve a distinction between the body and property, but with unintended consequences. Finally, this debate implicates recent doctrines of the constitutional right of privacy, adding yet another wrinkle to the legal framework.

Traditionally, common law recognized no property rights in a corpse,⁴³ and technology did not exist to preserve any viable use of an organ outside a living body. Courts did recognize some limited quasi-property rights held by the next of kin, allowing family members to oversee the proper burial of the deceased.⁴⁴ Additionally,

42. See Young, *supra* note 1. Presumably, the hospital where the transplantation takes place and the medical team involved in transplanting the organ into the recipient would charge the insurance company directly rather than tack their charges onto the organ. See *id.* In the context of a postmortem anatomical gift, these exceptions allow the hospital where the individual died, morgues, medical transportation companies, and tissue banks processing the cadaver to attach their costs to the cadaver and collect from the research institution or biotech company purchasing a cadaver or parts thereof. See CHENEY, *supra* note 12, at 7–8.

43. See Laurel R. Siegel, Comment, *Re-Engineering the Laws of Organ Transplantation*, 49 EMORY L.J. 917, 927 (2000).

44. See, e.g., *Brotherton v. Cleveland*, 923 F.2d 477, 481 (6th Cir. 1991); *Spiegel v. Evergreen Cemetery Co.*, 186 A. 585, 586 (N.J. 1936); *Everman v. Davis*, 561 N.E.2d 547, 550 (Ohio Ct. App. 1989).

American courts recognized the right of the individual to specify through a testamentary instrument the manner and method of disposal of her dead body.⁴⁵ However, most courts enforced these rights only indirectly through claims for infliction of emotional distress brought by the family.⁴⁶ Thus, while courts sought to respect and protect the wishes of the deceased, they avoided labeling the body as property.

Yet, as technology has made possible more viable uses for body parts and cadavers, courts have struggled to define the division of rights between individuals, family members, and the government. The Sixth Circuit has recognized, for example, that the Due Process Clause of the Fourteenth Amendment protects a widow's interest in her deceased husband's corneas,⁴⁷ but the Georgia Supreme Court has also held that the state legislature could override this interest.⁴⁸ Additionally, the federal court for the District of Kansas held that conversion was an inappropriate cause of action for parents seeking redress when their son's organs were not returned after an autopsy.⁴⁹ The court reasoned that because damages could not be proved, "partial remains of a human body[] ha[ve] no compensable value."⁵⁰ These decisions tend to be controversial because the refusal to frame these issues in terms of property often leaves distressed family members without an adequate remedy—or a remedy available only through more difficult to prove theories of liability—in the face of tragic actions of others.⁵¹

45. Siegel, *supra* note 43, at 928.

46. See Michelle Bourianoff Bray, Note, *Personalizing Personalty: Toward a Property Right in Human Bodies*, 69 TEX. L. REV. 209, 230–31 (1990).

47. *Brotherton*, 923 F.2d at 482 (holding that Ohio law had created a property interest which could not be removed without a hearing).

48. *Georgia Lions Eye Bank, Inc. v. Lavant*, 335 S.E.2d 127, 128–29 (Ga. 1985) (holding that the state's presumed consent statute permitted the removal of a boy's corneas without the express consent of the boy's parents).

49. *Shults v. United States*, 995 F. Supp. 1270, 1271–72, 1275–76 (D. Kan. 1998).

50. *Id.* at 1276.

51. See, e.g., *Culpepper v. Pearl St. Bldg., Inc.*, 877 P.2d 877 (Colo. 1994). In this case, the body of a young man was wrongly cremated. *Id.* at 878–79. The court held that there was no cause of action for conversion; rather, the family had to sue for infliction of emotional distress. *Id.* at 882. The court then granted the defendant's motion to dismiss because the family could not prove that the defendant's conduct was outrageous, nor could they show intent to cause emotional distress. *Id.* at 883.

The most famous example in this area is *Moore v. Regents of the University of California*.⁵² In *Moore*, a doctor treating a patient suffering from hairy-cell leukemia removed the patient's spleen and several other tissues as part of the treatment.⁵³ The physician sold the tissues to a researcher who subsequently used them to develop a patented cell line worth billions of dollars.⁵⁴ The patient received nothing in compensation, and even paid for his own treatment and travel over seven years.⁵⁵ In deciding the case, the court dismissed the plaintiff's conversion claim, holding that there is no ownership in an individual's removed tissues.⁵⁶ While the patient prevailed on his breach of fiduciary duty claim,⁵⁷ the damages awarded could not approximate the potential royalties from the patent. Thus, the court's decision recognized the *physician's* (quasi) property rights in the tissues since the sale from the physician to the researcher was unquestioned, but refused to recognize any property rights for the individual from whom the cell line originated. This bifurcated view of property rights granted a windfall to the defendants while severely undercompensating the patient.⁵⁸

In addition to the common law, statutes specifically regulating organ transfers have resulted in similar unintended consequences. Blood Shield Statutes⁵⁹ and other state health and safety legislation categorically treat the transfer of organs from one individual to another as a service rather than a transaction for goods or products.⁶⁰ In other words, even though a tangible, physical item (the organ) is traded between doctors, hospitals, and medical companies, and is

52. 793 P.2d 479 (Cal. 1990).

53. *Id.* at 480–81.

54. *See id.* at 482; *see also* Michele Goodwin, *Expressive Minimalism and Fuzzy Signals: The Judiciary and the Role of Law*, 84 CHI.-KENT L. REV. 19, 32 (2009).

55. *See Moore*, 793 P.2d at 481. The patient was induced—arguably fraudulently—throughout this time to make several trips from Seattle to the UCLA medical center. Goodwin, *supra* note 54, at 32 (citing *Moore*, 793 P.2d at 481).

56. *Moore*, 793 P.2d at 489.

57. *Id.* at 485.

58. *See* Goodwin, *supra* note 54, at 33.

59. Blood Shield Statutes, as the name implies, were enacted to shield health institutions providing blood transfusions from strict product liability claims. However, these statutes have been interpreted not only to apply to blood transfusions, but to human tissue transplants as well. *See, e.g.*, *Condos v. Musculoskeletal Transplant Found.*, 208 F. Supp. 2d 1226, 1229–30 (D. Utah 2002).

60. *See, e.g.*, *Condos*, 208 F. Supp. 2d at 1230; *Cryolife, Inc. v. Superior Court*, 2 Cal. Rptr. 3d 396, 405 (Cal. Ct. App. 2003).

treated as a good for the purposes of *those* transactions, when the end recipient enters the equation, the organ is deemed a service.⁶¹ The end result of this classification is to preclude products liability claims, essentially exculpating tissue banks whose negligence may result in contaminated products.⁶² Because the tissue is not a good, tissue recipients are not protected by the standard product warranties that might otherwise deter tissue banks from negligently supplying infected tissue.⁶³ Further, because the tissue is a service, an injured party's primary recourse is through medical malpractice suits against the doctors and hospitals involved in the transplant.⁶⁴ Thus, the law shifts the burden of ensuring that tissue is safe for implantation from tissue banks and other suppliers, who are in the best position to test for disease and ensure proper handling of tissues, to doctors and hospitals, who have much less control over the quality of tissues they receive.⁶⁵

Such negligent treatment of tissue transplants can result in tragic consequences.⁶⁶ Bryan Lykins stands as a poignant example. Bryan received a cadaveric tendon as part of a knee surgery.⁶⁷ Although the surgery was common, and in many ways routine, the tendon Bryan received was from a cadaver that had been unrefrigerated for nineteen hours.⁶⁸ The bacteria that had been allowed to grow during that time resulted in Bryan's death only four days after the surgery.⁶⁹ Even worse is the fact that Bryan's story is not a singular or isolated incident.⁷⁰ Yet, even though tissue banks may negligently place contaminated tissue on the market, they cannot be held liable if their products result in illness or even death.⁷¹ Further, insofar as lawmakers have been slow to act,⁷² tissue banks have little incentive

61. See Goodwin, *supra* note 54, at 41.

62. See *id.* at 42.

63. See *id.*

64. See *id.* at 43.

65. See *id.*

66. See *id.* at 41–42.

67. *Id.* at 41.

68. *Id.*

69. *Id.* at 42.

70. See M.A.J. McKenna, *Tissue Transplant Firm Linked to 14 Infections*, ATLANTA J. CONST., Mar. 15, 2002, at A1.

71. Goodwin, *supra* note 54, at 41.

72. See Robert Pear, *F.D.A. Delays Regulation of Tissue Transplants*, N.Y. TIMES, May 14, 2003, at A18.

to change their behavior, and some have been continually careless in the products and “services” they are providing.⁷³

Finally, adding a constitutional wrinkle to the already complicated common law and statutory schemes, some scholars have suggested that the disposition of one’s own body after death implicates a fundamental privacy right and that actions of the government should require a compelling justification with laws narrowly tailored to achieving their intended purposes.⁷⁴ These scholars argue that the right to determine what one does with his or her own organs falls along the same continuum of rights articulated in the Supreme Court’s modern right of privacy doctrine.⁷⁵ Under this current doctrine, decisions “involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment,”⁷⁶ and an individual should “be free from unwarranted governmental intrusion into matters so fundamentally affecting a person.”⁷⁷ Further, where individual health or bodily integrity is involved, “courts have held that personal decisions are the sole prerogative of the person whose body will be affected,”⁷⁸ and even when those decisions carry potentially fatal consequences, courts have still deferred to the individual.⁷⁹ Thus, since an individual’s decision regarding the disposition of his or her organs is intimate, personal, and tied to bodily integrity, so the argument goes, it implicates a fundamental right and any government involvement in that decision must be supported by a compelling government interest and laws must be narrowly tailored to that end.

Alternatively, some have argued that organ donation restrictions interfere with personal economic liberties in such a way that triggers

73. See McKenna, *supra* note 70.

74. Karen L. Johnson, Note, *The Sale of Human Organs: Implicating a Privacy Right*, 21 VAL. U. L. REV. 741, 761–62 (1987).

75. See *id.* at 751–55.

76. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

77. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

78. *Brophy v. New England Sinai Hosp. Inc.*, 497 N.E.2d 626, 633 (Mass. 1986); Johnson, *supra* note 74, at 753.

79. See *In re Quinlan*, 355 A.2d 647, 663–64 (N.J. 1976). *But see* *Washington v. Glucksberg*, 521 U.S. 702 (1997) (rejecting the argument that the fundamental right to refuse treatment encompasses a right to assisted suicide).

intermediate scrutiny.⁸⁰ While most economic legislation is granted the presumption of constitutionality, in *Plyler v. Doe*⁸¹ the Supreme Court eliminated that presumption and required a showing of an important government interest with laws substantially fit to meet that interest where economic legislation infringes on personal rights not strong enough to be considered constitutionally fundamental, but still valued by society in a greater or different way than other liberties.⁸² Accordingly, in the context of organ sales, the right to determine the disposition of one's own corpse might not rise to the level of a fundamental right under the constitution; nonetheless, it is still valued by society at a higher degree than other liberties so as to prohibit arbitrary governmental restrictions.⁸³ Therefore, some argue that any law restricting the sale of organs should be subject to intermediate scrutiny, requiring the law to substantially relate to an important government interest.⁸⁴

While no court has held that organ sales are a constitutionally protected interest, there is some jurisprudence supporting the heightened scrutiny theory. In cases challenging statutes authorizing the removal of corneas without the consent of the next of kin, courts have justified these statutes by characterizing the state's interest as compelling.⁸⁵ These cases seem to indicate that because some enhanced right is implicated, courts are inclined to take a harder look at laws overriding an individual's choice regarding what to do with her own organs.

III. PROPOSED MARKET MECHANISMS

Proposals of compensation models for donors of organs are many and varied. Each of these various proposals has advantages and drawbacks that cannot be discussed at length here. There are,

80. See Johnson, *supra* note 74, at 755–57.

81. 457 U.S. 202 (1982).

82. See *id.* at 221. In *Plyler*, the Court analyzed a Texas statute restricting public education from the children of illegal immigrants. *Id.* at 205–06. Although it explicitly stated that public education was not a fundamental right, the Court applied a stricter scrutiny to the law, ultimately striking down the restrictions because the personal interest in, and society's valuation of, public education was simply too great for rational basis review. See *id.* at 221.

83. Johnson, *supra* note 74, at 755–57.

84. *Id.*

85. See *State v. Powell*, 497 So. 2d 1188, 1190 (Fla. 1986) (providing sight to blind citizens); *Georgia Lions Eye Bank, Inc. v. Lavant*, 335 S.E.2d 127, 129 (Ga. 1985) (maintaining public health).

however, general categories under which various proposals fall. This section seeks to provide a general overview of the overarching categories as a backdrop for discussion. Specifically, this section briefly discusses open markets (with various levels of government regulation), futures contracts, and government tax or fee rebates.

First, the most prevalent suggestion—and the most controversial—is to permit an open market for organ sales. Under this model, individuals would contract with each other for the transfer of an organ. While the prospect of purchasing an organ off of eBay⁸⁶ seems unsettling, such a scenario is not likely. Because of the need for biological matching and the necessary involvement of hospitals, the open market proposal would still be subject to a great deal of government regulation. Proposed regulations have ranged from government-imposed price discrimination or subsidies based on income levels,⁸⁷ to mandating that donors complete educational courses on the risks of donation,⁸⁸ to requiring donors to purchase “donor insurance” to mitigate any unforeseeable health complications that may arise in the future.⁸⁹ All of these regulations aim to forestall any bad consequences of a too-hasty decision.⁹⁰

Second, the futures contracts proposal advocates a system in which a donor contracts with an entity, such as an organ procurement company, tissue bank, or research institution, for the rights to his or her corpse upon death.⁹¹ At death, the deceased body would be appraised and a named beneficiary would receive compensation for the donor’s corpse.⁹² Alternatively, donors could receive the payment of premiums, or a reduction in health insurance premiums for opting into an annual futures contract.⁹³ Estimates

86. In 1999, a kidney appeared on ebay.com for auction. Amy Harmon, *Auction for a Kidney Pops up on eBay’s Site*, N.Y. TIMES, Sept. 3, 1999, at A13. The starting bid was \$25,000, and reached \$5,750,100 before eBay terminated the auction. *Id.*

87. See, e.g., Gregory S. Crespi, *Overcoming the Legal Obstacles to the Creation of a Futures Market in Bodily Organs*, 55 OHIO ST. L.J. 1, 52 (1994).

88. Calandrillo, *supra* note 11, at 102–03.

89. *Id.* at 104–05.

90. See *infra* Part IV.

91. Calandrillo, *supra* note 11, at 108.

92. Lloyd Cohen, *Increasing the Supply of Transplant Organs: The Virtues of a Futures Market*, 58 GEO. WASH. L. REV. 1, 2 (1989). The appraisal would be required since the manner and time of death would affect its total value.

93. Hansmann, *supra* note 23, at 61–71. Premium reductions would be calculated by multiplying the risk of the individual’s death by the probability that their organs would be harvestable and the value of those organs. *Id.* at 66–67. Each individual would opt in annually,

show that these proposals could significantly reduce organ shortages, even though all increases in the organ market would be cadaveric.⁹⁴ Additionally, by avoiding living sales, concerns that the poor will be exploited are alleviated while still increasing the supply of organs.⁹⁵

Third, some scholars have proposed—and in fact some states have tried⁹⁶—to increase organ donations through government rebates.⁹⁷ The most common proposals are tax breaks, discounted driver's license fees, and reimbursed burial expenses.⁹⁸ This approach assumes that most people support organ donation, but do not donate themselves because donation requires some positive effort on their part; it is simply easier not to. Thus, by providing small incentives, like a reduced driver's license renewal fee that must be paid anyway, people will find donation more efficient than inaction.

IV. SOCIETAL INTERESTS IN THE PROHIBITION OF ORGAN SALES

The arguments that the societal benefits of prohibiting organ sales outweigh the benefits of individual choice are centered in ethical and moral objections to the sale of human organs. These objections are somewhat hard to articulate, and often are based on an emotional reaction that cannot be expressed in altogether logical terms. Describing this side of the debate in these terms may be a mischaracterization, but the emotional nature of these objections has been grounds for some criticism,⁹⁹ and the arguments for prohibiting organ sales are often simply summarized and dismissed in academic literature.¹⁰⁰

essentially granting the other contracting party the rights to harvest organs if death should occur that year. *Id.* at 63.

94. Currently, most transplants are cadaveric, and many transplants, such as hearts and lungs, are *only* cadaveric. *Id.* at 60. Annually, 20,000 Americans die in ways that would make their organs harvestable. *Id.* Only 15% of those deaths are of people who agreed previously to be organ donors. *Id.* Thus, the potential of futures contracts is an increase greater than 650% in cadaveric donations.

95. Calandrillo, *supra* note 11, at 108.

96. Robert Steinbuch, *Kidneys, Cash, and Kashrut: A Legal, Economic, and Religious Analysis of Selling Kidneys*, 25 HOUS. L. REV. 1529, 1557 (2009).

97. *See* Calandrillo, *supra* note 11, at 108–18.

98. *See id.* at 111–17.

99. *See* J. Radcliffe-Richards et al., *The Case for Allowing Kidney Sales*, 351 LANCET 1950, 1951 (1998) (arguing that opposition to organ sales derives from “deep feelings of repugnance,” which “cannot justify removing the only hope of the destitute and dying”).

100. *See, e.g.*, Calandrillo, *supra* note 11, at 91–93.

However, even if one characterizes these arguments as emotional and hasty, they still raise reason for serious pause. After all, every country in the world, with the exception of two,¹⁰¹ has laws that prohibit the sale of human organs.¹⁰² Further, while definitive statements are somewhat difficult to find, it seems that most major world religions oppose the sale of organs.¹⁰³ Thus, the prohibition of the sale of organs enjoys almost unanimous support across various cultures, legal systems, and ethical frameworks.

This section attempts to articulate the driving forces behind these arguments. In doing so, it addresses arguments directed at the rights of individuals rather than the various objections to specific, proposed methods of organ sales. Ultimately, this section focuses on three arguments: 1) the sale of organs would have a disparate impact upon the poor; 2) the commoditization of the body has a dehumanizing effect on an individual's perception of others; and 3) anything other than an altruistic gift of the body would eliminate the idea that life has infinite value.

First, perhaps the most prevalent argument is that if organ sales were allowed, those choosing to sell organs would be predominantly poor, and those receiving organs would be predominantly wealthy.¹⁰⁴ This bifurcation raises concerns of distributive justice since the poor would disproportionately supply organs, but because of a lack of resources, they would be excluded from purchasing them.¹⁰⁵ In addition to allocation concerns, laissez-faire systems tend to benefit sophisticated actors in the market at the expense of weaker, less sophisticated parties who hold much less bargaining power. Hence, the impoverished, driven by their financial plight to sell their kidneys, might be coerced or intimidated into suboptimal deals by profiteering organ brokers.¹⁰⁶ Such transactions across society would

101. Iran and Pakistan. *Id.* at 86.

102. *Id.* Enforcement of these laws varies greatly from country to country. *Id.* at 87. Still the fact that, at least nominally, almost all nations oppose organ sales is something to consider.

103. See Steinbuch, *supra* note 96, at 1566–68. Mr. Steinbuch cites statements from the U.S. Conference of Catholic Bishops, Catholic theologians Benedict Ashley and Kevin O'Rourke, Bishop Dimitrios of Xanthos of the Greek Orthodox Church, the Board of Social Responsibility at the Church of Scotland, Bishop Tom Breidenthal (Episcopalian), and a committee of scholars from all the major Muslim Schools of Law in Great Britain. *Id.* However, Mr. Steinbuch ultimately concludes that Jewish law may permit the sale of human organs, relying on statements from Yisrael Meir Lau, former Chief Rabbi of Israel. *Id.* at 1577.

104. Calandrillo, *supra* note 11, at 93.

105. *Id.*

106. See *id.* at 89–90.

only widen the gap between the rich and the poor in terms of health, power, and wealth. Thus, assuming that one role of government is to protect these weaker actors from entering into disadvantageous transactions resulting from their lack of information, experience, or bargaining power, the prohibition of organ sales is justified as a means to protect the rights of the underprivileged.

Additionally, the health consequences from selling body parts for desperately needed money may justify government restraint on individual liberty as well.¹⁰⁷ Desperation might drive a potential donor to focus too much on the benefit and fail to seek enough information about the risks, resulting in hasty decisions that do not account for potential future health costs.¹⁰⁸ These potential future costs include not only the physical and mental health complications for the donor, but costs for recipients as well, should donors seek to conceal disease or health conditions from procurement companies in order to bargain for higher prices for their organs.¹⁰⁹ Thus, the benefits gained from an increased supply of organs would be diminished by the future health costs resulting from uninformed decisions.¹¹⁰

These distributive justice concerns are, in many respects, supported by the available data. A 2001 study of black-market kidney sales in India showed that 96% of “donors” underwent the process to relieve debt.¹¹¹ However, the same study showed that among these individuals, the number below the official poverty level actually increased.¹¹² After the surgery, average family income fell by one third, and 86% of donors reported a decline in health.¹¹³ Additionally, the lack of bargaining power of these individuals is exemplified by the fact that many of the donors were paid significantly less than promised.¹¹⁴ Further, the decision to sell an organ can also entail severe psychological consequences, including

107. See Madhav Goyal et al., *Economic and Health Consequences of Selling a Kidney in India*, 288 J. AM. MED. ASS'N 1589, 1592 (2002).

108. Calandrillo, *supra* note 11, at 94.

109. See *id.* at 94–95.

110. See *id.* at 94–96.

111. Goyal et al., *supra* note 107, at 1591 tbl. 2.

112. *Id.* at 1591. Individuals in the study averaged six years between the selling of a kidney and participating in the survey. *Id.* at 1589.

113. *Id.* at 1591.

114. *Id.* This is a significant detriment when considering that donors in India now accept less than \$2,000 for a kidney. See Steinbuch, *supra* note 96, at 1561.

anger, hostility, anxiety, and depression,¹¹⁵ conditions that were not even measured by the study. While the results of a legitimate market may not be as drastic, this study shows that concerns of distributive justice are certainly warranted.

Second, opponents of legalizing organ sales believe that the commoditization of the body is an affront to human dignity and degrades the meaning of “human.”¹¹⁶ Indeed, this was one of Congress’s main motivations in passing NOTA.¹¹⁷ Then-Congressman Al Gore—the main proponent of the bill—stated that the sale of human organs would “blur[] the distinction between people and things, as human organs become simply another commodity to be bought and sold in the marketplace.”¹¹⁸ The fear underlying this argument is that if price tags were attached to body parts, individuals would begin to view others as having a quantifiable value.¹¹⁹ Consequently, the value of humanity would simply become the sum of all of its parts.

The feared result of such perceptions is that interactions between individuals would deteriorate and civility would be lost. Throughout history, society has witnessed many atrocities when humans were treated as a tradable commodity,¹²⁰ or even when the value of an individual was viewed through too utilitarian a lens.¹²¹ As such,

115. See Lyndsay S. Baines & Rahul M. Jindal, *Letters: Consequences of Selling a Kidney in India*, 289 J. AM. MED. ASS’N 697, 697 (2003). Studies have shown anxiety, depression, and feelings of guilt in recipients of organs. See L.S. Baines, D.N. Hamilton, and R.M. Jindal, *Compliance with Hemodialysis and Kidney Transplantation: A Psychotherapeutic Perspective*, 33 TRANSPLANTATION PROC. 1895, 1895 (2001). It is reasonable to conclude that organ donations—even absent dire circumstances—could result in similar symptoms. See *id.*

116. See LEON R. KASS, LIFE, LIBERTY, AND THE DEFENSE OF DIGNITY: THE CHALLENGE FOR BIOETHICS 177–85 (2002); Melissa M. Perry, Comment, *Fragmented Bodies, Legal Privilege, and Commodification in Science and Medicine*, 51 ME. L. REV. 169, 174, 183–96 (1999).

117. See Gail L. Daubert, Note, *Politics, Policies, and Problems with Organ Transplantation: Government Regulation Needed to Ration Organs Equitably*, 50 ADMIN. L. REV. 459, 466 (1998).

118. *Id.* at 466 n.43 (internal quotation marks omitted) (citing *Procurement and Allocation of Human Organs for Transplantation: Hearings Before the Subcommittee on Investigations and Oversight of the Committee on Science & Technology*, 98th Cong. 307–18, 248 (1983), reprinted in 2 NATIONAL ORGAN TRANSPLANT ACT OF 1984, LEGISLATIVE HISTORY OF PUB. L. NO. 98-507 (1990)).

119. See *id.*

120. See Johnson, *supra* note 74, at 750–51 (discussing testimony before Congress before the passage of NOTA comparing organ sales to slavery).

121. See, e.g., Leo Alexander, *Medical Science Under Dictatorship*, 241 NEW ENG. J. MED. 39, 39–41 (1949) (describing the euthanasia programs of the Nazis when people were

society's interest in maintaining humane interactions between people justifies any prohibitions on systems that treat the body or any part of it as a tradable commodity.

Third, and perhaps the most difficult to articulate, opponents of organ sales argue that the body is a gift, therefore not owned, and an individual is not permitted to do as she pleases with it.¹²² This is the common position for most religions that view the body as owned by God, with the individual having limited stewardship over its use.¹²³ This argument also shares common ground with the commoditization argument because it suggests that while organ donations promote good will, the introduction of monetary incentives would corrupt proper social interactions between individuals.¹²⁴ Essentially, the gift of an organ is a gift of life and is, therefore, infinite in value. The receipt of monetary compensation for this gift, in effect, reduces the value of life by reducing the gift of life to a quantifiable amount. Only an altruistic act can preserve the infinite value of life, given originally to the donor and transferred to the recipient.

V. THE CASE FOR MARKETS

These societal concerns rest on the assumption that restricting a donor from receiving compensation for her organs in turn restricts all market transactions for those organs. In fact, the opposite is true;

no longer useful to society).

122. See Erika Blacksher, *On Ova Commerce*, 30 HASTINGS CENTER REP. 29, 29–30 (2000), reprinted in MARSHA GARRISON & CARL E. SCHNEIDER, *THE LAW OF BIOETHICS: INDIVIDUAL AUTONOMY AND SOCIAL REGULATION* 678 (2d ed. 2009) (“My eggs . . . did not seem mine, in the sense of ownership . . . Somehow these eggs were mine, yet not. Not unlike a gift. Gifts are given to us, by friends and family, and become ours. But we are not permitted to do just anything with them.”).

123. Richard V. Grazi & Joel B. Wolowelsky, *Jewish Medical Ethics: Monetary Compensation for Donating Kidneys*, 6 ISR. MED. ASS'N J. 185, 185 (2004) (“If the tissue or organ to be donated is the gift of G[o]d and if the imperative of the Gospel is to love our neighbor unconditionally, then donation must be made freely on the grounds of need, not conditionally on the grounds of creed, or lucratively on the grounds of greed.” (quoting *Extract of the Report of Board of Social Responsibility of the Church of Scotland*, CHURCH OF SCOTLAND (1990)) (internal quotation marks omitted)).

124. See Grazi & Wolowelsky, *supra* note 123, at 185 (“[I]f society is to live in a humane manner, generosity and charity, rather than monetary gain and greed, must serve as the basis for donation of functioning organs.” (quoting ASHLEY BM & O’ROURKE KD, *HEALTH CARE ETHICS: A CATHOLIC THEOLOGICAL ANALYSIS* 411 (4th ed. 1997)) (internal quotation marks omitted)).

the market for human organs is both booming and lucrative.¹²⁵ As such, the societal concerns justifying prohibition are undermined by the fact that society feels few qualms about the flourishing organ market under the current legal scheme.¹²⁶ This section analyzes these societal concerns in the context of the industry created by current law and shows that they are not nearly as compelling when viewed in isolation. Further, this section argues that while some prohibitions are warranted, the ban on organ sales inequitably distributes wealth and autonomy between donors and third parties involved in transplantation.

A. The Industry

The market for human parts is a billion-dollar industry.¹²⁷ While most people think of this market as transacting only in kidneys, hearts, and livers for the purpose of transplantation, modern advances in medicine have provided many more uses for the human body. Cadaveric skin is used to treat burn victims; bone is used in oncology, as well as orthopedic and dental surgery, to treat bone loss resulting from tumors; skin tissue is used to repair vocal chords damaged by radiation treatment; tendons, cartilage, and ligaments are used to repair joints in treating sports injuries; and cadaveric heart valves are used to replace faulty valves in living hearts.¹²⁸ In fact, over one million of these and similar transplants are performed annually in the United States.¹²⁹ Furthermore, human tissues are used in research to train medical students and to develop new treatments for injuries and surgical techniques.¹³⁰ In all, these new technologies, treatments, and techniques have increased the value of a human cadaver to over \$250,000.¹³¹ This value is only increasing as technology finds more and better uses for human tissues.

125. Schapiro, *supra* note 9, at G1.

126. *See* Calandrillo, *supra* note 11, at 97.

127. Schapiro, *supra* note 9, at G1. This estimate focuses specifically on tissue transplant and does not even include whole-organ transplants. *See id.*

128. *Id.*

129. Goodwin, *supra* note 54, at 49.

130. *See* *Brokering Body Parts*, USATODAY.COM, http://www.usatoday.com/money/graphics/body_parts/flash.htm (last visited Jan. 18, 2012).

131. Goodwin, *supra* note 54, at 50.

Moreover, this dollar estimation is not hypothetical but is based on how much end consumers are paying for human parts.¹³² In order to facilitate organ donations and transplants, both NOTA and UAGA allow parties involved in the “removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ” to collect “reasonable payments” for the services they provide.¹³³ So, while the donor gives an organ free of charge, the doctor who removes the organ, the hospital where the operating room is located, the medical transportation company who transports the organ, and the tissue bank that processes and tests the organ for disease each attach charges to the organ. These charges are ultimately paid by the recipient’s insurance company (in the case of a transplant) or a research institution (in the case of a tissue purchase). Therefore, while federal and state laws prevent the initial sale of an organ, the end user of an organ must still purchase it.

While this may seem ironic, it is important to remember that this feature of the law is essential to the organ transplantation system. Society cannot encourage and increase the number of organ donations if it requires doctors, hospitals, and medical companies to donate their time and resources alongside the individual donating an organ. Indeed, many companies whose income is solely generated by providing organ transplantation services could not operate without someone footing the bill. Further, the most logical person to bear the cost of these services is the recipient, who is receiving the benefit. Requiring either the donor or doctors and hospitals to bear the costs of these services would halt all operations in the transplantation system.

That being said, as rational actors in a market seek to maximize profits, transplantation service providers increase their prices to capture the maximum amount purchasers are willing to pay.¹³⁴ In other words, if a surgeon usually charges \$4,000 for the removal of an organ, and the hospital charges \$4,000 for the operating room, staff, and equipment, but an organ recipient is willing to pay \$50,000 to receive an organ, the charges that the surgeon and hospital attach to that organ are quickly increased to \$25,000

132. See Schapiro, *supra* note 9, at G1.

133. 42 U.S.C. § 274e(c)(2) (2006); *see also* RUAGA § 16(b) (2006).

134. Calandrillo, *supra* note 11, at 99–100; *see also* Emanuel Thorne & Gilah Langer, *The Body’s Value Has Gone Up: Who Should Profit from Organs?*, N.Y. TIMES, Sept. 9, 1986, at A23; Young, *supra* note 1.

each.¹³⁵ Consequently, because of the volume of transplantations performed annually and the extremely high willingness to pay for many organs,¹³⁶ the industry has become incredibly profitable.

B. Commoditization Has Already Happened

The societal interests supporting the prohibition of organ sales also assume that quantifying the value of the human body is bad.¹³⁷ However, the current system, to which no ethical qualms are raised, in fact quantifies the value of the human body.¹³⁸ As such, an analysis of the consequences of quantification does not have to be simply hypothetical, but can be based on current observation. In the context of this current commoditization, the ethical objections to the sale are simply not as grave as when viewed in isolation.

On an empirical level, there is no disputing that the human corpse now has a substantial economic value.¹³⁹ And while the law has prohibited at least the initial sale of organs, it has not prohibited the purchase of an organ.¹⁴⁰ Simply put, to say that the law prohibits attaching a price tag to a donated organ is to ignore reality.¹⁴¹

The high demand and willingness to pay for organs, coupled with the short supply, has created a lucrative business for organ-brokering middlemen, who flip essentially costless, donated organs for large profits.¹⁴² In fact, the prices at which organs are traded are

135. See Calandrillo, *supra* note 11, at 99–100. These numbers are completely hypothetical for purpose of illustration.

136. See Steinbuch, *supra* note 96, at 1562. The price of a kidney has reached \$90,000. *Id.* This figure is “all-inclusive,” meaning it entails the travel costs of both the recipient and the donor, in addition to all medical charges. *Id.* Presumably, a more efficient market structure could reduce this price. See *id.*

137. See *supra* Part IV.

138. See Calandrillo, *supra* note 11, at 97.

139. See *supra* Part V.A.

140. See *supra* Part V.A.

141. See CHENEY, *supra* note 12, at xv. Cheney details a price list of various body parts used for research purposes. The list includes:

Head \$550–\$900, Head w/o brain \$500–\$900, Brain \$500–\$600, Shoulder \$375–\$650 (each), Torso \$1,200–\$3,000, Forearm \$350–\$850 (each), Elbow \$350–\$850 (each), Wrist \$350–\$850 (each), Hand \$350–\$850 (each), Leg \$700–\$1000 (each), Knee \$450–\$650 (each), Foot \$200–\$400 (each), Whole Cadaver \$4,000–\$5,000, Eviscerated torso \$1,100–\$1,290, Cervical spine \$835–\$1,825, Torso to toe \$3,650–\$4,050, Pelvis to toe \$2,100–\$2,900, Temporal bones \$370–\$550, Misc. organs \$280–\$500 (each).

Id.

142. See *id.* at 7–10, 125–60.

so high that they have enticed many to undertake more creative methods of procurement.¹⁴³

Further, organs are often subject to a string of transactions in which they are appraised and exchanged for money. Organs are first donated by individuals, then sold by hospitals to tissue banks, then sold by tissue banks to biotech companies, then processed and refurbished before being sold to hospitals and dentists, and finally implanted into the “end-consumer.”¹⁴⁴ At each of these transfers—with the exception of the very first—money is exchanged for the organ.¹⁴⁵ Perhaps more importantly, current jurisprudence recognizes a legal interest in the organ of each of these players in each transaction—again with the exception of the first—and has validated sales contracts for human tissue.¹⁴⁶ Thus, both markets and the law itself treat organs as a commodity in all but one of the series of transactions from donor to recipient.

Empirical evidence aside, the more fundamental cause of commoditization of organs lies in the distinction between goods and services. Services are valuable only through performance. Therefore, by prohibiting performance, laws can remove all value since no one is willing to pay for nonperformance.¹⁴⁷ Contrarily, goods have inherent value that exists prior to any transaction because the good itself is useful. Laws can stop a sale, and therefore the *realization* of the value, but the value still exists. Thus, laws regulating goods can only serve as wealth distribution mechanisms, determining who has access to the value of a good and who is restricted from it.¹⁴⁸ Therefore, in the context of a transaction for an organ, while services such as removal, transportation, processing, and implanting may facilitate the transaction, the organ itself is the useful item and has inherent value. However, because the law treats organs as a

143. See Michele Goodwin, *Empires of the Flesh: Tissue and Organ Taboos*, 60 ALA. L. REV. 1219, 1219–21 (2009); Michele Goodwin, *Commerce in Cadavers Is an Open Secret*, L.A. TIMES, Mar. 11, 2004, at B15; see generally, CHENEY, *supra* note 12.

144. See Goodwin, *supra* note 54, at 49.

145. See *id.*

146. See *id.* at 32–33.

147. This, of course, assumes 100% enforcement.

148. One useful way to conceptualize this is the contrast between the prohibition on prostitution, where the law prohibits the thing itself, and the prohibition on the use, possession, or distribution of illegal drugs. The law cannot eliminate the utility of a good, and therefore, to remove value it must prohibit instead an individual's access to the utility.

service,¹⁴⁹ the law assumes that by proscribing the initial sale of an organ it can remove all of the organ's value. Also, it does not restrict access to that value from any of the actors in the transaction—with the exception of the donor. The end result is that the value of the organ, unassigned by the law, is commoditized as other actors in the market divide that value among themselves.¹⁵⁰

Analyzing societal concerns in this context shows that the current commoditization of the human body has not led to degradation of the term “human.” Rather, both the increase in the number of transplantations performed,¹⁵¹ and the social acceptance of organ transplantation,¹⁵² seem to indicate that individuals are able to distinguish between a person, individual, or soul and the parts, organs, and tissues that comprise the physical body. The fear that the value of human life would be reduced to the sum of the value of the body's parts has, in large part, not proven true, even in the face of extreme increases in the monetary value of human parts. Worldwide, society remains disgusted and shocked with the small subset of people who do, in fact, view humanity in such base terms.¹⁵³

Likewise, the interest of preserving altruism also breaks down in light of the current system's commoditization. Currently, transplants are still seen as gifts of life, even though recipients pay large amounts to receive them. One explanation for this could be that this “gift of

149. See *supra* Part II.

150. As mentioned previously, the price for a kidney has reached \$90,000. Steinbuch, *supra* note 96, at 1562. Further, research institutions pay large sums of money for fresh and frozen cadavers or parts thereof. CHENEY, *supra* note 12, at xv. For an interactive display based on the same information, see *Body Parts Pipeline*, USA TODAY, http://www.usatoday.com/money/graphics/body_parts/flash.htm (last visited Jan. 18, 2012). Also, one website has set up a cadaver calculator whereby, after answering a series of questions regarding lifestyle, one can find out how much her body would be worth in the event of her death. *The Cadaver Calculator: How Much Is Your Body Worth?*, CADAVER CALCULATOR, <http://www.oneplusyou.com/bb/cadaver> (last visited Jan. 18, 2012).

151. Organ donation rates have generally increased in America across the last decade. SCIENTIFIC REGISTRY OF TRANSPLANT RECIPIENTS, 2010 SRTR & OPTN ANNUAL DATA REPORT, available at http://www.srtr.org/annual_reports/2010/flash/01_intro/index.html.

152. Sidney E. Cleveland, *Personality Characteristics, Body Image and Social Attitudes of Organ Transplant Donors Versus Nondonors*, 37 PSYCHOSOMATIC MED. 313, 318 (1975) (“[T]issue donation offers prospective donors a convenient and socially acceptable source for expression of humanitarian needs.”).

153. See Paul Lewis, *Kosovo Physicians Accused of Illegal Organs Removal Racket: Medicus Clinic Linked in Council of Europe Report to Alleged Kosovo Liberation Army Organ Harvesting Atrocities*, GUARDIAN (Dec. 14, 2010, 10:17 AM), <http://www.guardian.co.uk/world/2010/dec/14/illegal-organ-removals-charges-kosovo>.

life” is of infinite value, so even if one has to pay several thousand dollars, the surplus is still infinite. Under this assumption, allowing organ donors to collect part of the price paid for an organ would still award an infinite surplus to organ recipients, and thus still be altruistic.¹⁵⁴ Indeed, even where a donor receives compensation for the organ, both the donor and the recipient can have positive psychological experiences.¹⁵⁵

It should also be noted that allowing the sale of organs would not preclude someone from donating without compensation.¹⁵⁶ Currently, the sale of blood and ova is allowed under law, but many of the donations of these tissues take place without compensation.¹⁵⁷ In fact, giving the donor the right to sell could actually increase the value of an uncompensated donation by providing donors with more power to ensure the recipient receives the surplus value of the organ through contractually stipulated prices to prevent any inflation by middlemen.

What is left, then, of the societal interests in prohibiting organ sales is the concern about distributive justice. However, this argument begins to cut both ways when taking into account that, under the current system, the poor are cut off from the value of their organs while wealthy doctors and hospitals are able to claim that value.¹⁵⁸ Further, despite the intentions of Congress and current law, the allocation of organs for transplantation is still highly dependent on the ability to pay.¹⁵⁹ Thus, the current system still discriminates between the rich and the poor.

Of course, there still remains the concern that the ability to sell organs would entice the financially desperate into making poor decisions. While government intrusion into these decisions is certainly paternalistic,¹⁶⁰ data on black markets indicates that such an

154. Recipients of life-saving medical procedures and treatments, such as open heart surgery or chemotherapy, are also given “gifts of life.” Their gratitude is not diminished by the fact that they have to pay for those services, nor do they quantify the value of life proportionate to the price of their operation. See Calandrillo, *supra* note 11, at 98.

155. See Steinbuch, *supra* note 96, at 1579–80 (discussing how transplant surgeons often feel gratified after saving someone’s life, even though they receive compensation).

156. *Id.* at 1579.

157. *Id.* at 1579–80.

158. See Calandrillo, *supra* note 11, at 99–100.

159. *Id.*

160. *Id.* at 100.

intrusion may be warranted.¹⁶¹ In fact, it is within the context of the desperate sale of organs by the poor that the fears about commoditization have actually been realized.¹⁶² Middlemen take advantage of the poor and their desperate situation to negotiate cheaper prices and gain larger profits, while the poor donors often end up worse off.¹⁶³ This is at least something that the current system prevents.¹⁶⁴

These remaining concerns, however, would be alleviated by prohibiting inter vivos sales while still allowing sales through futures contracts. While there may still be a disproportionate number of poor than rich willing to sell the rights to their cadaveric organs, the secondary effects of postoperative health and psychological consequences simply do not exist in the postmortem context. Consequently, the risks of unsophisticated actors making decisions that they might regret later—or given more information would not make—are greatly reduced if not eliminated. In fact, negotiating rights upon the death of an individual actually gives more bargaining power to the individual since the necessary delay between negotiation and execution of the contract does not permit hasty decisions. Further, the poor would also have access to the value of their organs and would not simply forfeit that value to doctors and hospitals upon donation. The futures contracts system alleviates both disparate impact concerns by allowing equal access to the value of organs while eliminating the consequences of poor decision making.

C. The Right to Sell

Yet, the decrease in societal interests supporting the prohibition of organ sales does not, by itself, provide positive justification for allowing sales. The literature proposing legalization of organ sales typically justifies its position by arguing the resulting benefit to others; opening sales could potentially solve the organ shortage crisis and provide longer lives for potentially 110,000 Americans,¹⁶⁵ while

161. See *supra* Part IV.

162. See Eamonn O’Neill, *The Cost of Living*, SCOTSMAN, Mar. 10, 2001, at 14, available at <http://tinyurl.com/7hqz4e2> (detailing horrific incidences of the murders of the homeless in Argentina and South Africa for their organs).

163. Calandrillo, *supra* note 11, at 102.

164. Although, ironically, it still is eerily similar to the current system under which middlemen still reap all the profits.

165. See OPTN: *Organ Procurement and Transplantation Network*, HEALTH RESOURCES

eliminating the atrocities happening on the black market by implementing a legitimate and—more importantly—regulated market.¹⁶⁶ The argument presented by this Comment, however, is that organ sales should be allowed in order to achieve a more equitable distribution of wealth and individual autonomy. The current law merely transfers value and autonomy from well-meaning donors to third parties in the transplantation process. By recognizing donors' interests in their own organs and giving them power to control who may receive value from their organs, as well as where and how their organs may be used, a more equitable system can be achieved.

The refusal of the law to recognize any interests of donors in their own tissues not only restricts donors from realizing the value of their organs, but also strips them of the power to determine who should receive that value.¹⁶⁷ Organ donations can be construed not as a gift to the recipient, but as a monetary donation to doctors, hospital, and medical companies.¹⁶⁸ Because the market treats organs as goods, the naiveté of the law in treating them as a service assumes that by prohibiting sales under a service-for-money model, it can remove the legitimate value of organ and tissue donation. However, restriction of a monetary transaction at the “point of sale” does not

AND SERVICES ADMIN., <http://optn.transplant.hrsa.gov/> (last visited Nov. 10, 2011). However, there is no way of definitively knowing how such a change would impact the national organ shortage, especially when some data indicate that it may make the problem worse. See Calandrillo, *supra* note 11, at 92 n.118. In a 1993 study, 80% of respondents said that they would not be more likely to donate if money were offered, and 5% said that they would be less likely. *Id.* Also, organ sales may, in many cases, treat the symptom but not the disease. GARRISON & SCHNEIDER, *supra* note 122, at 757–58. Garrison and Schneider note that the increase in demand for kidney transplants is correlated with the increase in rates of diabetes, which, in turn, is highly correlated with increasing rates of obesity. *Id.* Thus, the best approach for society to end the organ shortage may be to focus on prevention and cure of diseases that cause organ failure in the first place rather than to open markets for swapping organs. *See id.*

166. See *e.g.*, Calandrillo, *supra* note 11, at 86–91. Indeed, each of the arguments opposing sale of human organs is playing out with horrific consequences in the black market. These consequences are only exacerbated by the fact that anyone participating in these markets has no recourse or protections available through courts or legislatures. *See id.* Of course, arguments to permit something on the grounds that it is happening anyway are not new and would apply equally to issues such as prostitution and drug use as well. Such arguments ignore that laws shape society's concept of what is right or wrong and merely preach to the choir; those who do not feel an act is immoral are persuaded by the fact that it is already happening anyway, and those who do feel it is immoral are wholly unpersuaded.

167. *See supra* Part II.

168. *See supra* Part V.A.

eliminate the value of a good, but merely displaces it. By ignoring the inherent and pre-existing value of organs, the law has created an ownership vacuum for these goods; the goods are transferred, and the law makes it unclear how to distribute the value of those goods. In this situation, the donor has no contractual power to designate who should receive the value, and third parties are able to siphon off value from the good, eventually capturing the entirety, even though no one can argue that they have a property interest in the good.¹⁶⁹ Thus, under the current system, donors can neither receive value nor appoint the value to the recipient; rather, the suspended value is captured in the profits of middlemen.¹⁷⁰

Arguably, one solution to this problem is government regulation of the prices that middlemen are allowed to charge. While in theory this would eliminate the ability of middlemen to capture the value of the organ as a good, it is practically flawed in two respects. First, if something has value and goes through a series of transactions, each of which is allowed to take some of that value, inevitably—no matter what the law is—the system will be structured in a way to extract all the value. In one sense, this is a cynical view of the world, but in another, it is an efficient market at work. The law is a very blunt instrument, and people are very good at constructing nuanced systems that sidestep it. Second, the law is costly, and private self-ordering would be much more efficient. Giving donors the power of sale would put them in the dominant contracting position and enable them to police the system both up front through contract provisions and on the back end through litigation, should bad behavior arise.

Further, granting the power of sale and subsequently the power of contract to the donor allows donors to designate not only who should receive the value of their organs, but also for what purposes their organs are to be used. Currently, under most states' laws, a donor cannot direct, in full measure, how and where his organs will be used.¹⁷¹ Rather, this discretion is given to doctors and hospitals who sell the organs to various tissue banks and research institutions.¹⁷² Consequently, the individual most interested in where

169. See Young, *supra* note 1.

170. See *supra* Part V.A.

171. See Schapiro, *supra* note 9. This does not refer to many living donations in which a person may specify the recipient of a donated organ. See *id.*

172. See *id.*

his organs go or how they are treated is made powerless in those decisions. Many donors today are surprised that “life-saving” donations are often used for penile enhancements or other cosmetic purposes.¹⁷³ Determining how a donated organ will be used is essential to the autonomy of the individual. Allowing the postmortem sale of organs would subsequently allow donors to utilize contractual covenants to ensure their organs are used in a manner they see most fit.

Despite the fact that allowing the sale of organs would vest the value and right of disposition in the donor himself, such a change could have practical consequences that need to be considered. It could be argued that allowing donors to collect compensation for their donation would increase the costs to recipients by adding yet another price tag. While this would be true in a cost-driven market, it does not hold true where middlemen are inflating costs to capture excess willingness to pay.¹⁷⁴ The price for organs is set by the demand, which would remain constant.¹⁷⁵ Allowing donors to receive compensation along with doctors, hospitals, and biotech companies would only shift the surplus currently collected by these middlemen.

Additionally, it could be argued that the elimination of the bright-line rule and moving from disallowing all sales to allowing some while prohibiting others would require more regulation and higher costs. However, more regulation is arguably needed in the current system.¹⁷⁶ Moreover, allowing one more transaction in a system already comprising several transactions would have little, ultimate impact. Perhaps most compelling, however, is that by allowing organ sales, donors would have the contractual power to determine where and how their organs are used. Utilizing market forces to police the industry would reduce government costs and provide a more efficient system.

173. *See id.*

174. *See supra* Part V.A.

175. And given that the supply would increase, costs to recipients would actually go down.

176. *See supra* Part II.B.

VI. CONCLUSION

The law has struggled to define rights to one's own body in the face of increasing value created by new medical technologies. The lack of appreciation for the new value of the body in the current law's prohibition of organ sales has created a system whereby control, rights, and value are severed from the donor and recipient and transferred to third parties. While there may be substantial reasons to continue to prohibit the inter vivos sale of human organs, the broader prohibition on all sales—including futures contracts—is not supported by these reasons. While many have suggested drastic changes to the legal structure surrounding the human body, existing laws need only to be amended to restrict their prohibitions to inter vivos sales. Such changes would not require the finding of a new controversial fundamental right with a potentially expansive holding and unforeseen consequences, nor would it require an enormity of legislative action to invent a new statutory framework. These limited changes would, however, recognize that individuals do have legal interests in their own tissues, giving them recourse should the tissues be misused. Most importantly, these limited changes would vest the power to designate who receives value and where and how organs should be used in the individual with the most at stake in these transactions. Such changes would lead to more efficient and just results in this increasingly important market.

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