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Organs for Sale: Does Autonomy Necessitate the Right to Commodify?

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Organs for Sale: Does Autonomy Necessitate the Right to Commodify?

Introduction

The human body is held out by many to be a sacrosanct thing, both as a physical embodiment of the human person and vehicle for the soul.¹ Inextricably fundamental to the human experience, the body exists as something having metaphysical importance beyond the mere matter that makes up the physical. The commodification of the human body has been discussed, debated, practiced, and policed long before the origin of the American legal tradition.² Legally, the human body is afforded numerous protections; there are bodies of law designed specifically to preserve the safety or integrity of the body, such as mandatory seatbelt laws,³ food and drug regulations,⁴ even laws that dictate permissive handling of a dead body.⁵ Controversy inevitably arises where law dictates and places constraints on the ways in which the individual can use, and specifically where the individual seeks to commodify, their own body. Until recently, the American legal system has generally adopted the position that the human body is sacrosanct beyond allowing for voluntary commodification, such that positive law must protect the body from pressures of the economic market.⁶ This much is evident in laws prohibiting

¹ *Gen. 1:27* (King James).

² See Lesley A. Sharp, *The Commodification of the Body and Its Parts*, 29 ANN. REV. OF ANTHROPOLOGY, 287, 292-293 (2000), <https://doi.org/10.1146/annurev.anthro.29.1.287>.

³ *Seat Belts*, IIHS, [https://www.iihs.org/topics/seat-belts#:~:text=Weast%2C%202018\),Laws,are%20covered%20by%20separate%20laws](https://www.iihs.org/topics/seat-belts#:~:text=Weast%2C%202018),Laws,are%20covered%20by%20separate%20laws). With the exception of New Hampshire, all states and the District of Columbia require adult front-seat occupants to use seat belts.

⁴ *Safety*, U.S. FOOD AND DRUG ADMIN., FDA, <https://www.fda.gov/safety>.

⁵ *Rights and Obligations as to Human Remains and Burial*, STIMMEL L., <https://www.stimmel-law.com/en/articles/rights-and-obligations-human-remains-and-burial>.

⁶ *Abuse of Corpse Crimes in Other States*, ABUSE OF CORPSE CRIMES IN OTHER STATES, COLO. GENERAL ASSEMBLY, (Feb. 21, 2020), <https://leg.colorado.gov/publications/abuse-corpse-crimes-other-states>.

prostitution⁷ and commercial surrogacy,⁸ but the conversation becomes more nuanced, and ripe for controversy, when one considers the legality of earning money for plasma, platelet, and reproductive contributions,⁹ alongside the prohibition on payments for organ donations.¹⁰

The American legal system's general aversion to the commodification of the human body is a manifestation of adopted natural law principles, specifically that there are aspects of human life that are so sacrosanct that the state must be able to regulate some practices. Allowing humans to run wild with the free market would be to potentially allow for the perversion of something sacred. While freedom is a fundamental facet of human life and some natural law theorists¹¹ posit that it is the most basic of all aspects of life, around which everything else organizes, the most elemental laws of nature¹² forbid the distortion of the human body from a thing of inherent and uncommodifiable worth into a mere good to be freely sold at market value. The existing tension in bioethics law seems to arise out of the struggle to preserve ethical principles and establish moral standards in the healthcare and medical spaces,¹³ while still resisting overly paternalistic government involvement such that individuals' right to autonomy

⁷ *Prostitution*, JUSTIA, (Oct. 16, 2022), <https://www.justia.com/criminal/offenses/sex-crimes/prostitution/>.

⁸ Jean M. Sera, *Surrogacy and Prostitution: A Comparative Analysis*, AM. U. J. OF GENDER, SOC. POL'Y & THE L., <https://digitalcommons.wcl.american.edu/jgspl/>.

⁹ Lisa Raffensperger, *Why You Get Paid to Donate Plasma but Not Blood*, STAT, (Mar. 9, 2016), <https://www.statnews.com/2016/01/22/paid-plasma-not-blood/#:~:text=%80%9CEven%20though%20it's%20legal%2C%20it's,safety%20of%20the%20blood%20supply.>

¹⁰ 42 U.S.C. § 274e (2023). Section 274e(a) Prohibits any person from knowingly receiving or transferring any human organ for valuable consideration for use in human transplantation.

¹¹ Alex Tuckness, *Locke's Political Philosophy*, STAN. ENCYCLOPEDIA OF PHIL., STAN. U., (Oct. 6, 2020), <https://plato.stanford.edu/entries/locke-political/>.

¹² See, e.g., *Human Rights*, UNITED NATIONS, <https://www.un.org/en/global-issues/human-rights>. The Office of the High Commissioner on Human Rights (OHCHR) is the focal point for United Nations human rights activities. Their mission is to work for the protection of all human rights for all people, and the Office cites among universal rights “the most fundamental – the right to life” and “those [rights] that make life worth living, such as ... liberty.”

¹³ The tension within the field of bioethics can be easier illustrated by considering two extremes of patient autonomy and government regulation. In an overly paternalistic society, we might see all individual autonomy stripped from the person, such that legislation could outlaw unhealthy foods or alcohol entirely because of negative health effects.

disappears.¹⁴ As such, even though personal freedom and autonomy are two of the most basic premises we have in the American legal tradition, the reality is that, perhaps paradoxically, the human body is so above the law that we need to legislate protections to ensure it remains so.

If human life is truly sacred, though, the economic argument allowing for a free market model of organ exchange suggests that more lives could be saved if the US moves away from the current model relying exclusively on altruistic donation. If incentivizing organ contribution would lead to saving thousands of lives, an argument against commodification that is rooted in preserving bodily integrity seems to miss the forest for the trees, as it seems to sacrifice a whole human life for the perceived sanctity of one human part.

I. The World of Kidney Transplants and Sale of Organs

In the time it takes the average person to read 25 pages of academic writing, three more people will have been added to the national kidney transplant waiting list.¹⁵ In the United States alone, thirty-seven million Americans are living with chronic kidney disease (CKD),¹⁶ and more than 800,000 have end-stage kidney disease (ESKD)¹⁷ also known as end-stage renal disease (ESRD), meaning they require either a kidney transplant or maintenance dialysis just to stay alive.¹⁸ The reality of organ donation today is that there is not merely a scarcity of viable kidneys available for those in need of a transplant; rather there is a severe and tragic shortage. The

¹⁴ Conversely, if there were no regulations preventing a completely free market model, body parts might be reduced to merely severable, sellable, goods such that a wealthy individual with a deformity might pray on the destitute and contract for a purely aesthetic transplant. Without any regulation of what can be commodified, the human body could be reduced to disposable, replaceable parts; imagine such an extreme where a person may choose to drink in excess knowing that if he suffers cirrhosis in a year, he can always pay a poorer individual for a piece of his liver.

¹⁵ *Kidney Donation*, DONATE LIFE AM., <https://donatelife.net/donation/organs/kidney-donation/>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Nephrology*, CDRG, https://www.cdr.org/chronic-diseases/nephrology/?gclid=Cj0KCQjw2cWgBhDYARIsALggUhpOxtJX2O5WWzuMtfU5j3Yr34zoRT0AxHsBjLkGIV9VVIHu0BWSBl0aAldvEALw_wcB.

national transplant waiting list is compiled and managed by the United Network for Organ Sharing (UNOS), which works with the federal government to keep track of the 106,000 people in our country currently in need of an organ transplant and hoping to be matched with a donor.¹⁹ Of those 106,000 on the national transplant waiting list, 92,000, or 87%, of the individuals are waiting for a kidney.²⁰ The grave reality of an organ shortage, and specifically the staggering need for kidneys, is that the vast majority of individuals living with kidney disease are forced to turn to dialysis to help supplement kidney function.²¹ For individuals suffering kidney failure, patients will need dialysis treatments for the rest of their lives or until they are able to receive a kidney via transplant. In 2022, while 25,498 kidney transplants were performed in the United States, just 6,466 individuals became living organ donors during that year.²² Living donor kidney transplantation (LDKT) occurs when a living person agrees or offers to donate one of their healthy kidneys, to be transplanted into another person in need of a transplant.²³ While living donations most often come from family members or loved ones of the recipient,²⁴ breakthroughs

¹⁹ *Transplant Waiting List*, AM. KIDNEY FUND, (June 15, 2022), [https://www.kidneyfund.org/kidney-donation-and-transplant/transplant-waiting-list#:~:text=The%20list%20is%20managed%20by,%25\)%%20waiting%20for%20a%20kidney](https://www.kidneyfund.org/kidney-donation-and-transplant/transplant-waiting-list#:~:text=The%20list%20is%20managed%20by,%25)%%20waiting%20for%20a%20kidney).

²⁰ *Id.*

²¹ *Chronic Kidney Disease (CKD)*, AM. KIDNEY FUND, (Feb. 14, 2023), https://www.kidneyfund.org/all-about-kidneys/chronic-kidney-disease-ckd?gclid=Cj0KCQjwxMmhBhDJARIsANFGOSvxp64m9QSkcAhlQUtbr2HzldAYtdaFh-rsu_aVcVS13VrDDmAuCkaA1LAELw_wcB.

²² Cindy Young, *2022 Organ Transplants Again Set Annual Records*, UNOS, (Jan. 11, 2023), <https://unos.org/news/2022-organ-transplants-again-set-annual-records/#:~:text=More%20than%2042%2C800%20organ%20transplants,liver%2C%20heart%20and%20lung%20transplants>.

²³ *General Information on Living Donation*, NAT'L KIDNEY FOUND., (Oct. 12, 2022), <https://www.kidney.org/transplantation/livingdonors/general-information-living-donation>.

²⁴ *See Organ Donation and Transplantation Statistics*, NAT'L KIDNEY FOUND., (Sept. 28, 2022), <https://www.kidney.org/news/newsroom/factsheets/Organ-Donation-and-Transplantation-Stats>.

The first successful living donor transplant was performed between 23-year-old identical twins. Since then, while family and friends make up most donors, there is a growing number of living donors who never meet their recipient.

in medicine and available medications have rendered the genetic link between the donor and recipient no longer necessary to ensure successful transplant.²⁵

While the vast majority of kidney donations occur when organs are harvested from a deceased organ donor, a small portion of donations occur *inter vivos*. On average, a kidney donated by a living donor functions well for anywhere between twelve and twenty years, while a kidney received from a deceased donor can improve quality of life of the recipient for eight to twelve years.²⁶ So, while an overwhelming majority of kidneys used in transplantation are donated from deceased individuals, those provided by living donors yield markedly better returns on the transplant and a far better outlook for the patient receiving the donation.

Kidney failure in the United States disproportionately affects minority and low-income patients, such that, compared to White patients, Black Americans are 3.5 times more likely to suffer kidney failure, Native Americans are 1.5 times more likely, and Hispanics are likewise 1.5 times more likely to experience kidney failure.²⁷ Economically speaking, the kidney shortage is also an enormous strain on healthcare resources, since Medicare coverage is extended to any person requiring dialysis or a transplant to maintain life.²⁸ More than 24% of the total Medicare program is spent on patients with kidney disease annually, totaling roughly 130 million dollars.²⁹ At present, there are only two treatment options for kidney failure patients: transplantation from live or deceased kidney donors, or regular dialysis treatments. The disparity in mortality rates is stark when comparing these two treatment methods: those on dialysis have a 5-year survival rate

²⁵ *General Information on Living Donation*, NAT'L KIDNEY FOUND., (Oct. 12, 2022), <https://www.kidney.org/transplantation/livingdonors/general-information-living-donation>.

²⁶ *Kidney Donation*, DONATE LIFE AM., <https://donatelife.net/donation/organs/kidney-donation/>.

²⁷ *Statistics*, THE KIDNEY PROJECT, (Oct. 20, 2020), <https://pharm.ucsf.edu/kidney/need/statistics>.

²⁸ *Id.* The 800,000 people living with kidney failure are 1% of the Medicare population, yet account for roughly 7% of the Medicare budget.

²⁹ *See Federal Investment*, NAT'L KIDNEY FOUND., (June 2, 2022), <https://www.kidney.org/advocacy/legislative-priorities/federalinvestment#:~:text=The%20Medicare%20program%20spends%20more,7%20percent%20of%20Medicare%20spending>.

of under 50%, while patients that receive transplants have a survival rate of about 80% after 5 years.³⁰ Overwhelmingly, the best current treatment for kidney failure is organ transplantation from either a living or deceased donor. The transplantation process is rather involved, as successful transplantation is only possible after donor match, major surgery, and a lifetime regimen of immunosuppressant medication for the organ recipient to prevent rejection.³¹ Unfortunately, while the number of donors has slowly climbed annually, the prevalence of end-stage renal disease has continued to rise by about 21,000 cases every year, with need outpacing the addition of new donors and continuing to exacerbate the shortage.³²

In this discussion, it is important to note how the language of these transactions shapes our understanding of the exchange. In the context of kidney donation, the verbiage used yields participants called donors and recipients. When discussing sales of commodities, by contrast, typically the exchange is considered a sale where participants are labeled vendors and buyers, and the emphasis on altruism disappears from the conversation. Donations, donors, and recipients lends itself to a more altruism-centric model of giving, whereas sales, vendors, and buyers reflects the otherwise sterile world of commodity exchanges in the free market. So, current law tends to reflect a preference for altruistic exchange rather than the reduction of human organs to goods which may be bought and sold like any other inanimate object.

II. Regulation of Organ Transplant through National Organ Transplant Act (NOTA)

³⁰ *Statistics*, THE KIDNEY PROJECT, (Oct. 20, 2020), <https://pharm.ucsf.edu/kidney/need/statistics>.

³¹ *Id.*

³² Steve Gaff, *The Underrecognized Epidemic of Chronic Kidney Disease*, PENN MED., (June 4, 2019), <https://www.pennmedicine.org/news/news-blog/2019/june/the-underrecognized-epidemic-of-chronic-kidney-disease#:~:text=Today%2C%20CKD%20%E2%80%93%20a%20disease%20where,cases%20every%20year%2C%20as%20well>.

Under American law, organ donation jurisprudence is a fairly recent construction, with the legislation governing this field emerging roughly fifty years ago. In 1968 the Uniform Anatomical Gift Act (UAGA)³³ was passed as a model statute for states to adopt.³⁴ The UAGA provided an initial legal foundation upon which human organs and tissues can be donated for transplantation.³⁵ After the passage of the UAGA, a person's legal consent to donate before death was sufficient under law to allow for the facilitation of organ transplantation upon the donor's death.³⁶ Nearly twenty years after the UAGA came to be, Congress passed Public Law 98-507, or the National Organ Transplant Act (NOTA), which authorized the Secretary of Health and Human Services to make grants for organ procurement organizations, provided for the establishment of the Task Force on Organ Transplantation, and created the Organ Procurement and Transplantation Network (OPTN).³⁷ In 1998, the final rule governing the OPTN was issued and published in the Federal Register: 63 Fed. Reg. 16296.³⁸ The OPTN operates in contract with the Secretary of Health and Human Services, and its inception created the Scientific Registry of Transplant Recipients as well as an administrative unit within the Department of Health and Human Services to orchestrate these activities.³⁹ Importantly, Section 301 of NOTA includes a criminal prohibition against the exchange of organs for transplantation for 'valuable consideration'.⁴⁰ In effect, while NOTA initiated the development of a national system of organ

³³ *NOTA*, THE ORGAN DONATION AND TRANSPLANTATION ALLIANCE, (Mar. 28, 2023), <https://www.organdonationalliance.org/glossary/nota/>.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Organ Donation and Transplantation Legislation History*, (Apr. 2021), <https://www.organdonor.gov/about-us/legislation-policy/history>.

³⁸ *Glossary*, HEALTH RESOURCES & SERVICES ADMIN., (Apr. 2021), [https://www.organdonor.gov/learn/glossary#:~:text=National%20Organ%20Transplant%20Act%20\(NOTA,organs%20in%20the%20United%20States](https://www.organdonor.gov/learn/glossary#:~:text=National%20Organ%20Transplant%20Act%20(NOTA,organs%20in%20the%20United%20States).

³⁹ *Organ Donation and Transplantation Legislative History*, (Apr. 2021), <https://www.organdonor.gov/about-us/legislation-policy/history>.

⁴⁰ *Id.*

sharing and a scientific registry to collect transplant data, it also outlawed the sale of human organs in America.⁴¹

The UAGA was last amended in 2007 and has most recently been adjusted to legally bar individuals from revoking consent of a decedent donor who legally registered as a donor during their lifetime.⁴² Earlier, “The Transplant Amendments of 1990” amended the existing organ donation legislation and provided for the establishment and maintenance of a National Bone Marrow Donor Registry.⁴³ In 2004, the Organ Donation and Recovery Improvement Act (ODRIA) was passed, which expanded authorities of NOTA to include the authority to establish a grant program to provide reimbursement of travel and subsistence expenses for living organ donors.⁴⁴ While this amendment certainly shifts the previously cemented paradigm of donation, the allowance for reimbursement of expenses still does not permit payment in exchange for the organ or participation in donation.⁴⁵

Further, the Charlie W. Norwood Living Organ Donation Act clarified that paired donation, as defined in NOTA, is not considered valuable consideration for purposes of Section 301, which outlawed payment.⁴⁶ Paired donation, or more specifically kidney paired donation (KPD) for the purposes of this discussion, is a transplant option for candidates who have a living donor who is willing and medically able to donate their kidney, but unable to give to their

⁴¹ *Glossary*, HEALTH RESOURCES & SERVICES ADMIN., (Mar. 28, 2023), [https://www.organdonor.gov/learn/glossary#:~:text=National%20Organ%20Transplant%20Act%20\(NOTA,organs%20in%20the%20United%20States](https://www.organdonor.gov/learn/glossary#:~:text=National%20Organ%20Transplant%20Act%20(NOTA,organs%20in%20the%20United%20States).

⁴² *Organ Donation and Transplantation Legislative History*, HEALTH RESOURCES & SERVICES ADMIN., <https://www.organdonor.gov/about-us/legislation-policy/history>.

⁴³ *Id.*

⁴⁴ Organ Donation Recovery and Improvement Act, P.L. 108-216 (2004), <https://www.congress.gov/bill/108th-congress/house-bill/3926/text>.

⁴⁵ ODRIA directs the Secretary of Health and Human Services to award grants and establish a public education program to increase awareness about organ donation and the need to provide for an adequate rate of donations. The Act further authorizes the Secretary to make peer-reviewed grants to public and nonprofit private entities for studies and demonstration projects to increase organ donation and recovery rates, including living donations.

⁴⁶ *Id.*

intended candidate because their organs are incompatible.⁴⁷ Paired exchange then occurs when two or more kidney donor/recipient pairs trade donors so that each recipient can receive a kidney with a compatible blood type,⁴⁸ and those with a ready living donor jump the line and gain access to the next available compatible kidney in exchange for their donor's donation to another recipient. The Charlie W. Norwood Living Organ Donation Act sought to clarify the meaning of paired donation, and to distinguish such a policy from being considered 'valuable consideration' in violation of Section 301 of NOTA, to encourage the practice.⁴⁹ While compensation is not exchanged for the organs, it is important to note that in effect, the existence of a willing (albeit personally incompatible) donor does function as a means of securing an advancement in the waiting list.

The living kidney donation process currently mandates comprehensive counseling to ensure the procedure only occurs with the informed consent of the donor.⁵⁰ Informed consent is a legal doctrine that holds healthcare providers accountable for ensuring patients have sufficient information and understanding about any procedures or treatments before making any decisions about their medical care.⁵¹ While informed consent is a legal principle employed to ensure practitioner liability,⁵² the concept is also a fundamental component of biomedical ethics.⁵³ In the context of living donor kidney transplantation, the OPTN has published policies on informed

⁴⁷ *Types of Living Donation*, TRANSPLANT LIVING, UNOS, (Jan. 26, 2023), <https://transplantliving.org/living-donation/types/#kpd>.

⁴⁸ *Id.*

⁴⁹ Charlie W. Norwood Living Organ Donation Act, Title III, Public Law 110-144, 121 Stat. 1813 (2007).

⁵⁰ See Jane C Tan, et al. *Living Donor Kidney Transplantation: Facilitating Education about Live Kidney Donation*, CLINICAL J. OF THE AM. SOC'Y OF NEPHROLOGY, U.S. NAT'L LIBRARY OF MED., (Sept. 4, 2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4559504/>.

⁵¹ See Parth Shah, et al, *Informed Consent*, NAT'L CENTER FOR BIOTECHNOLOGY INFO., U.S. NAT'L LIBRARY OF MED., (June 11, 2022), <https://pubmed.ncbi.nlm.nih.gov/28613577/>.

⁵² See Ruth R. Faden and Tom L. Beauchamp, *A History and Theory of Informed Consent*, OXFORD U. PRESS, 25 (1986).

⁵³ See Lydia A Bazzano. et al. *A Modern History of Informed Consent and the Role of Key Information*, 21 THE OCHSNER J., 81, 85 (2021), <https://doi.org/10.31486/toj.19.0105>.

consent of living kidney donors, to ensure all living donors receive a comprehensive education on the realities of donation and all measures are taken to guarantee patients are willing to donate free from coercion or inducement.⁵⁴ The OPTN policies mandate recovery hospitals provide an “independent living donor advocate” to ensure the donor’s best interests are continually protected, and the educational counseling includes full transparency of potential medical or surgical risks, potential psychosocial risks, and potential financial effects on the donor, considering donation cannot include any compensation.⁵⁵ The potential medical risks for a living donor are grave but also purely speculative; on average, living donors may have a 25%-35% permanent loss of kidney function after donation, but the baseline risk of developing ESRD for living donors remains the same as the general population, and living kidney donation has not shown any effect on donor life expectancy.⁵⁶ One increased risk for living donors is that if a donor were to sustain future damage to their remaining kidney, the development of chronic kidney disease and subsequent progression to ESRD could be a faster degeneration with only one kidney as opposed to two.⁵⁷ Personal expenses of travel, housing, childcare costs and lost wages related to donation may not be reimbursed for the living donor or compensated in any way by the recipient, and for those who may qualify for assistance through the American Transplant Foundation, the maximum amount of a Living Donor Grant is just \$500.⁵⁸ The Living Donor Grant is intended to help donors who are employed and, as a result of their donation surgery, will

⁵⁴ Jane C Tan, et al. *Living Donor Kidney Transplantation: Facilitating Education about Live Kidney Donation*, CLINICAL J. OF THE AM. SOCIETY OF NEPHROLOGY: U.S. NAT’L LIBRARY OF MED., (Sept. 4, 2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4559504/>.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Patient Assistance Program*, AM. TRANSPLANT FOUND., (Apr. 18, 2023), <https://www.americantransplantfoundation.org/programs/pap/#tve-jump-1874e933385>.

experience a loss of wages and financial difficulty paying for their essential living expenses such as rent, automobile and phone bills.⁵⁹

While reimbursement of expenses is a recent introduction to the world of organ donation, there is an interesting and longstanding dichotomy between organ donation policies and those of blood plasma donation. The market for blood plasma products is part of a massive global industry, with roughly \$25 billion in sales annually.⁶⁰ The United States provides two-thirds of the world's plasma supply, as our country continues to allow contributors to receive compensation, despite the fact that the World Health Organization has advocated against compensation schemes, and the vast number of other developed countries do not participate in payment for contribution.⁶¹

Similar fears that have motivated the prohibition on compensation for organs are likewise at play in the compensable plasma contribution market. Roughly seventy percent of the nearly 900 plasma centers in the United States are located in zip codes with higher-than-average poverty rates, and there is specifically a cluster of centers down near the border of Mexico, indicating that the scheme relies on, or potentially exploits, vulnerable populations.⁶² Just as NOTA ensures that organ donation and transplantation is maintained in conjunction with the Department of Health & Human Services, plasma contribution is overseen by the FDA, which mandates that donors may give plasma twice a week, up to 104 times each year, and plasma centers are required to test donors every four months to make sure their health remains steady.⁶³ While the centers operate in accordance with FDA regulations, the plasma market operates very

⁵⁹ *Id.*

⁶⁰ Sylvie Douglis, *Blood Money*, NPR (May 14, 2021), <https://www.npr.org/transcripts/996921658>.

⁶¹ *Id.*

⁶² *Id.* The cluster of plasma centers located in the southwest of the United States, along the border of Mexico, are described as 'some of the most productive centers in the nation'; meaning they have a high output of plasma contribution in exchange for the payments, which may suggest socioeconomic factors influencing contribution.

⁶³ *Id.*

much like any other free market business industry; with centers offering \$50 referral bonuses, incentivizing donors to come in as frequently as possible via compensation hikes per additional monthly donation, and even schemes like “6 donations per month for entry into a \$200 prize raffle” to induce donation from the financially desperate.⁶⁴

Comparing the per se prohibition on compensation for organ donation with the fully lawful pandering schemes to inspire plasma donations, the legal protections seem to suggest there are fundamental differences, at least in the eyes of legislators and as reflected in donation jurisprudence, between the severability of plasma from the human person and the removal of internal organs.⁶⁵ Two clear distinctions between plasma and living kidney donation are the regenerative nature of plasma and the invasiveness or scope of the procedures. Donating plasma is about as invasive as blood donation, with blood collected via sterile needle and an IV line, typically inserted in a donor’s forearm.⁶⁶ Donating plasma and platelets takes slightly longer than whole blood donations, as the extracted blood is sent to a plasmapheresis machine with a centrifuge in it, to be spun and separated into its various components, thus specifically separating plasma and platelets for use in recipient patients, while the rest of the collected blood is returned to the donor through the IV.⁶⁷ By comparison, kidney donors undergo a ‘donor nephrectomy’, which is the surgical procedure to remove the healthy kidney from one living person and transplant the organ into a patient whose kidneys have failed.⁶⁸ Since medical technologies have advanced, kidney donation surgeries now are performed with minimally invasive methods,

⁶⁴ *Id.*

⁶⁵ Plasma here is also intended to reflect other lawfully compensable bodily donations, i.e. blood, platelets, semen, eggs, etc.

⁶⁶ *The Process for Giving Plasma, Step-by-Step*, GIVING=LIVING (Sept. 27, 2022), <https://www.hhs.gov/givingequalsliving/giveplasma/giving-process>.

⁶⁷ *Id.*

⁶⁸ *Donor Nephrectomy*, MAYO CLINIC, MAYO FOUND. FOR MED. EDUC. AND RESEARCH (May 18, 2022), <https://www.mayoclinic.org/tests-procedures/donor-nephrectomy/about/pac-20384867>.

including robot-assisted technology, such that the recuperation for a kidney donor is relatively quick, and donors can expect to be back in the office within two to three weeks following surgery.⁶⁹ Admittedly, there are clear differences between regenerative plasma and the biological reality that any living kidney donor only ever has one ‘extra’ kidney to donate. These distinctions alone may explain some of the disparity between compensable collection of plasma and the completely impermissible exchange of consideration for kidneys. Still, contemplating the philosophies underlying the jurisprudence in this field ought to continue, especially as living kidney donation becomes less invasive, and particularly because different means of commodifying the body continue to proliferate and inspire regulation.⁷⁰ Our jurisprudence suggests a fundamental difference in how sacrificing or selling organs may jeopardize the integrity of the human whole, in a way that donation does not, while the sale of other bodily fluids or parts may not corrupt the whole similarly.

III. The Jurisprudential Premises Within Contemporary Debates about NOTA and Organ Sales

When engaging the topic of organ donation and, more specifically, compensation for living kidney donors, there are several ethical concerns embedded in the jurisprudential issues the topic raises. First and foremost, as previously mentioned, the American legal system currently prohibits the exchange of “meaningful consideration” for organs.⁷¹ The jurisprudence

⁶⁹ *Id.*

⁷⁰ See Katharina Beier, and Sabine Wöhlke. *An Ethical Comparison of Living Kidney Donation and Surrogacy: Understanding the Relational Dimension*, 14 PHIL., ETHICS, AND HUMAN. IN MED., (2019). A direct comparison is made between the jurisprudence outlawing ‘valuable consideration’ in kidney transplantation and that of commercial surrogacy, where women are compensated upwards of hundreds of thousands of dollars to carry another’s biological baby to term. In one premise it is illegal to commodify an organ, whereas in another it is perfectly acceptable to pay considerable money to essentially rent reproductive capacity from another person, signaling an interesting split in the ethics underlying the legality of both practices.

⁷¹ 42 U.S.C. § 274e (2023).

regulating organ sales, therefore, assumes an ethical or moral conclusion to the question: is it morally acceptable to allow the sale of human organs? Prohibition on sale seems to reflect a belief that human organs ought not be commodifiable, yet arguments on both sides actively advocate- depending on the ethical and moral premises underlying the approach- either for or against allowing the sale of organs.

Fears of exploitation of vulnerable, impoverished individuals are also a major concern for those that advocate against the sale of organs, as there is fear that financial desperation would coerce individuals into selling their body parts, which would further widen economic disparities.

A. *The Human Body Has Inherent Worth and Dignity Above Commodification*

One fundamental theme of natural law philosophy is that there are underlying principles of morality and justice inherent in nature that are discoverable through reason.⁷² From a natural law perspective, the question of organ sales could be approached by considering the moral implications of allowing or prohibiting the commodification of the human body and grappling with the question of what makes one human. Are humans just a collection of severable parts, or is there inherent and intrinsic worth to each part that comprises the whole person? If one of the central premises of natural law is that human beings have inherent dignity and worth, then we quickly arrive at an obstacle when faced with the following question: is it morally wrong to treat the human body or its parts as mere commodities? From this perspective, treating human kidneys as objects or commodities to be sold in the free market could be seen as a violation of a central natural premise requiring dignity and bodily integrity. If the kidney is seen as more than mere

⁷² John Finnis, *Natural Law and Natural Rights*, OXFORD U. PRESS, (1980).

commodity, and instead as an integral part of the whole person, then selling one's organ would be akin to selling a part of oneself. And yet, we are allowed to sell blood, plasma, and platelets.

One fundamental issue at the heart of the conversation regarding organ donation is what human organs mean as part of a grander picture or function of the self. If selling one's organs violates some sort of pre-ordained duty of maintaining bodily integrity, then regardless of positive law either prohibiting or permitting the practice, there exists a duty to the self that forbids participation.⁷³ Kant was a believer in duties owed to oneself, and he specifically emphasized the preservation of human worth, depending on a notion of certain acts as intrinsically degrading such that if we indulge in those acts we diminish our own worth.⁷⁴ One immediate criticism of this philosophy is that there is no clearly defined picture of which acts are degrading and which may be permissible without jeopardizing or violating one's duty to oneself.⁷⁵

B. Do the Ends Justify the Means: Utilitarian Approach

Conversely, if one were to adopt the moral principle of utilitarian common good as being a more fundamental and central premise to human existence, this lens completely alters the ethical consideration of an organs-for-sale market. Proponents of the common good principle may consider the severe shortage of kidneys available to the hundreds of thousands suffering from end-stage renal failure and argue that a free (albeit regulated) market approach to organ transactions could benefit the society as a whole by increasing the supply of viable organs for transplant and thus, improving the mortality of those patients currently suffering on the waitlist.

⁷³ Ruth F. Chadwick, *The Market for Bodily Parts: Kant and Duties to Oneself*, 6 J. OF APPLIED PHIL., 129 (1989).

⁷⁴ *Id.*

⁷⁵ *Id.*

The central argument in favor of a regulated market approach to organ donation is patient autonomy. Free societies typically do not interfere with competent adults making choices that affect their lives and do not significantly harm themselves or others. Yet, the existing legal framework holds that electing to sell one's kidney is not a right but rather, is instead indicative of some moral compromise that cannot be permitted. Instead, such prohibition leads those with money to obtain necessary organs via a thriving and unregulated black market, no doubt a market that is ripe for exploitation of the poor and has few legitimate means to safeguard the personal interests of involved parties.

Despite the wide-ranging opposition to commodifying the human body via an organ free market, there is one country with this scheme already in effect, Iran. Iran is the only country in the world with a legal pseudo-market in organs from living donors, and the institution has been in effect for 24 years.⁷⁶ From this social experiment, we can see:

No evidence is perfect, but the peer-reviewed evidence we have from several sources supports the following facts: (1) for the last decade, Iran has not had a waiting list for transplantable kidneys; (2) the long-term outcomes of recipients of purchased organs is not significantly different from the outcomes of recipients of donated kidneys (a useful surrogate marker for the health of organ vendors); (3) the existence of a flourishing market has not resulted in attrition of the number of kidneys donated by biological relatives; and (4) uncompensated organ donation from the deceased has increased 10-fold since 2000, when laws recognizing brain-death as death were approved by the Iranian Parliament. On the other hand, the following is also true: (1) organ vendors are disproportionately impoverished and poorly educated; (2) the data on long-term outcomes for organ vendors is conflicting and mixed, but at any rate it is substantially incomplete.⁷⁷

Undoubtedly, the fears of exploitation are a legitimate concern, and the Iranian model does little to assuage fears of widening economic disparity in a society where the poor are incentivized to sell parts of themselves to the wealthy. However, the existing American model relying on altruism but allowing for living paired donations has likewise created gaps in socioeconomic

⁷⁶ Benjamin Hippen, et al. *Saving Lives Is More Important than Abstract Moral Concerns: Financial Incentives Should Be Used to Increase Organ Donation*, 88 THE ANNALS OF THORACIC SURGERY, 1053, 1054-1060 (2009).

⁷⁷ *Id.*

access to organs. From all this, a fundamental question continues to emerge: whose place is it to tell the healthy, rational individual who considers the opportunity to sell his organ and makes an informed decision to pursue that opportunity that he is incorrect for having chosen that path? Why is it that he has no right to accept money for his kidney, however he is free, and in fact openly encouraged, to give his kidney to someone in need for nothing in return? While the reliance on altruism is commendable, it also offers a very nuanced, even narrow distinction between what are permissible exercises of autonomy and what kind of choices violate a natural order.

C. Personal Autonomy Necessitates the Freedom to Choose to Sell

Ultimately, the question of organ sales from a natural law perspective would require an exploration and balancing of competing principles, including whether the tangible benefit of increased supply of transplantable kidneys could remain in line with principles of justice and fairness, or whether such a market would pervert the dignity of the human person and prove too great a moral or ethical concern by commodifying the human body. Another natural law premise that moral philosophers like John Stuart Mill, Robert Nozick and Peter Singer typically championed is that individual autonomy is a fundamental premise, such that the right of individuals to make choices for themselves, expressing bodily autonomy and acting engaging in free will is a central to our lives as humans.

John Stuart Mill believed in a hyper-individualized premise of personal autonomy, whereby moral philosophers arguing from a Millian framework might say it is the paramount right of the individual to make choices for themselves, whatever those may be, as long as their

decisions did not harm others.⁷⁸ If one adopts an ethical theory that posits individual autonomy above all other premises, then the sale of one's own organs would be an exercise of manifest right. Since there is little long-term harm for living kidney donors, such that we allow individuals to willingly participate in free donation of their kidneys, the compensable organ transplant model would likewise seem to fall into the category of harmless, such that Mill would likely consider the market model fully permissible and in line with personal bodily autonomy.

Similarly, Nozick believed individuals have the right to control their own bodies and make choices about how to use them. Nozick's theory of entitlement concerns individual's rights to property and their rights to self-ownership.⁷⁹ Underlying Nozick's entitlement theory is the premise that justice in exchanges merely requires justice in acquisition, justice in transfer, and rectification of injustice.⁸⁰ From this perspective, individuals should be able to sell their organs provided the transaction is consensual and, like Mill's harm principle, does not harm others. Narveson argued that individuals have a right to do whatever they want with their own bodies, including selling organs. While Narveson's 'contrarian libertarian' premise is an unfettered and seemingly hyper-individualized approach to human life, it may push beyond the bounds of what society will accept. Nevertheless, from this point of view the sale of organs may be considered an exercise of individual autonomy, allowing individuals to make choices that benefit themselves and exercise their freedom.⁸¹ From his perspective, individuals should be allowed to sell their organs if they so choose.

⁷⁸ JOHN STUART MILL, *ON LIBERTY*, (2001). Specific personal autonomy right might be best stressed when Mill writes, "to individuality should belong the part of life in which it is chiefly the individual that is interested; to society, the part which chiefly interests society."

⁷⁹ Osita Gregory Nnajiolor, and Stephen Ifeakor Chinedu, *Robert Nozick's Entitlement Theory of Justice: A Critique*, 12 OGIRISI: A NEW J. OF AFR. STUDIES, 170, 171 (2016).

⁸⁰ *Id.*

⁸¹ Jan Narveson, *The Libertarian Idea*, BROADVIEW PRESS, (2001).

At the intersection of bioethics and law exists informed consent requirements that are universal in medical practice and often regarded as a cornerstone of ethical healthcare.⁸² As mentioned in the organ donation sphere specifically, our current donation jurisprudence mandates that donors be fully informed about pre-donation health requirements, realities of the nephrectomy procedure, any lasting post-operative care regimen, risks, and, the patient must also be fully informed of their right to withdraw at any time, etc.⁸³ The requirements of informed consent are often justified as arising out of respect for patient autonomy, as the dignity of the individual necessitates that he or she be as fully informed as is appropriate to make decisions about his or her own medical treatment.⁸⁴ When considering patient autonomy, it is interesting to consider that where an individual seeks to altruistically donate their kidney to another, our current jurisprudence and healthcare standards allow for the procedure to occur, provided the above informed consent requirements are fully met. Yet, if that same individual, with the same counseling resources and knowledge of risks, sought to give their kidney in exchange for any sum of money, the procedure would be deemed not only violative of federal law, but considered an ethical violation and exploitation of the donor. Our jurisprudence, therefore, reflects a conclusion that legislatures have drawn for the masses without dialogue with the individual: any form of compensation in the organ donation sphere is considered so automatically coercive as to render an individual's will invalid. How can it be true that the same practice, procedure, and outcome, can draw such disparate conclusions with the introduction of compensation, regardless of however moderate or exorbitant the payout? Can it be said that voiding an individual's

⁸² Jonathan Pugh, *Autonomy, Rationality, and Contemporary Bioethics*, OUP ACAD., OXFORD U. PRESS, (Apr. 1 2020), <https://academic.oup.com/book/33778>.

⁸³ *The Gift of Life Living Donor Kidney Transplant*, BOSTON MED. CENTER (April 10, 2023), https://www.bmc.org/sites/default/files/Patient_Care/Specialty_Care/transplant-surgery/Living-Donor%20Patient-Guide-The-Gift-of-Life.pdf.

⁸⁴ Jonathan Pugh, *Autonomy, Rationality, and Contemporary Bioethics*, OUP ACAD., OXFORD U. PRESS, (Apr. 1 2020), <https://academic.oup.com/book/33778>.

consent per se due to the potentially coercive effects of compensation is still in keeping with respect for individual autonomy? Or, is our current jurisprudence instead functioning as a means of counseling citizens that ‘the government knows what is good for you better than you know what is good for you?’ so much so that the introduction of any consideration to the organ donation exchange removes the possibility of consent altogether?

D. The Potential Significance of Current Legislative Activity

While existing law in the organ transplant world seems to reflect an aversion to commodifying the body and a wish to protect the bodily integrity or sanctity of individuals who may otherwise be coerced into participation due to financial distress, recent proposed legislation indicates societal conceptions of sanctity and commodification may be shifting. In Massachusetts, a recently proposed law titled Bill H.2333 reads as follows:

Section 170. (a) The Commissioner of the Department of Corrections shall establish a Bone Marrow and Organ Donation Program within the Department of Correction and a Bone Marrow and Organ Donation Committee. The Bone Marrow and Organ Donation Program shall allow eligible incarcerated individuals to gain not less than 60 and not more than 365 day reduction in the length of their committed sentence in Department of Corrections facilities, or House of Correction facilities if they are serving a Department of Correction sentence in a House of Corrections facility, on the condition that the incarcerated individual has donated bone marrow or organ(s).⁸⁵

The immediate question that this proposal begs is, what does this say about our value of freedom if it may be a bargaining chip to incentivize organ donation? It is certainly interesting to note that America as a nation will not let people commodify their bodies with monetary payments, but there are proposals to allow individuals to manipulate their freedom in exchange for such donations. How sacrosanct is the body really to us if this is true, and how morally sound is this premise?

⁸⁵ *Bill H.2333 193rd (Current) - Malegislature.gov.* <https://malegislature.gov/Bills/193/HD3822>.

When considering the prohibition on “valuable consideration” in exchange for organs, per NOTA, the new Massachusetts bill also raises an issue on whether we may consider one’s freedom valuable consideration. If an incarcerated individual receives a lesser prison sentence in exchange for one of their kidneys, surely, the length of that shortened sentence can be construed as a commodification of the kidney. In this proposed scheme, not only would the state be allowing for the commodification of human kidneys via a market-like exchange, but there would also be a clear indication on how to measure and value freedom, and how coercive the manipulation of a prison sentence may be on an individual willing to part with their kidney because of this process.

The Massachusetts bill proposes to create a Bone Marrow and Organ Donation Program within the state Department of Correction to allow incarcerated individuals to receive a reduction in their sentence of between 60 days and one year on the condition that they donate bone marrow or organs.⁸⁶ Democratic state representatives Carlos Gonzalez and Judith Garcia, co-sponsors of the bill, are both members of the Massachusetts Black & Latino Legislative Caucus, and have defended their proposal, calling it a voluntary program aimed as a responsive measure to the over-incarceration of Hispanic and Black people and the need for matching donors in those communities.⁸⁷ The bill has, perhaps expectedly, been met with staunch resistance, with opponents claiming the offer of reduced sentences is not only unethical, but also functions as the

⁸⁶ Steve LeBlanc, *Organs in Exchange for Freedom? Bill Raises Ethical Concerns*, ABC NEWS NETWORK, (Feb. 8, 2023, 3:54 PM), <https://abcnews.go.com/Politics/wireStory/organs-exchange-freedom-bill-raises-ethical-concerns-96987456>.

⁸⁷ *Id.*

equivalent of a payment.⁸⁸ Interestingly, this is not the first bill of its kind;⁸⁹ in 2007 a substantially similar, and similarly contested, bill was proposed in South Carolina seeking to offer prisoners a reduced sentence in exchange for donating an organ.⁹⁰ Ultimately, the South Carolina bill was approved by the state's Senate Corrections and Penology Subcommittee, but never made it further in the legislative process once it was determined that a reduction of sentence constituted "valuable consideration" in violation of Section 301 of NOTA.⁹¹

IV. Inconsistencies within American Jurisprudence: Where is the Sacrosanct Line and How Much Does Sanctity Cost Us?

One of the more difficult aspects of engaging the topic of organ donation and the possibility of a compensable organ sharing network is that jurisprudence on related matters lacks consistency. Receiving compensation for providing a life-saving organ is outlawed, yet donors may do so free of charge, and, more confusingly, may receive compensation for bi-weekly donations of plasma and platelets, to be purchased in a government-regulated but privatized multi-billion-dollar industry with no direct life saved on the receiving end. This all begs the question of where we draw the line on what is sacrosanct, and what does that cost us socially in the grand scheme of things?

⁸⁸ *Id.* George Annas, director of the Center for Health Law, Ethics & Human Rights at Boston University School of Public Health expressed his belief that the proposed Massachusetts bill is violative of both federal law, and ethical principle.

⁸⁹ Richard Weinmeyer, *The Racially Unequal Impact of the US Organ Procurement System*, J. OF ETHICS AM. MED. ASS'N, AM. MED. ASSOCIATION, (June 1, 2014), <https://journalofethics.ama-assn.org/article/racially-unequal-impact-us-organ-procurement-system/2014-06>.

⁹⁰ Steve LeBlanc, *Organs in Exchange for Freedom? Bill Raises Ethical Concerns*, ABC NEWS NETWORK, (Feb. 8, 2023, 3:54 PM), <https://abcnews.go.com/Politics/wireStory/organs-exchange-freedom-bill-raises-ethical-concerns-96987456>.

⁹¹ Richard Weinmeyer, *The Racially Unequal Impact of the US Organ Procurement System*, JOURNAL OF ETHICS AM. MED. ASS'N, AM. MED. ASS'N, (June 1, 2014), <https://journalofethics.ama-assn.org/article/racially-unequal-impact-us-organ-procurement-system/2014-06>.

A. *Unfettered Black Market or Regulated Government Program?*

Organs are being sold, today, for thousands of dollars.⁹² Human kidneys are being cut out of poorer individuals and wealthier, sick and suffering patients are receiving those organs and being granted a second shot at survival.⁹³ Whether or not a compensation-based market for organ exchange is legalized, the market exists and is currently operating underground and outside the purview of the regulatory hands of our legislature – possibly further at the expense of our most vulnerable populations.⁹⁴ With thousands of human lives on the line and those on the kidney transplant waiting list growing desperate, it is no wonder that a black-market expediting exchange would proliferate. However, in an unregulated market there can be no standard of care or mandated protocol to ensure the wellbeing of participants. The question begs, is it safer, and can bodily integrity be preserved on a greater scale, via permissive regulation of organ sales than is currently accomplished with per se void law?

The argument against commodification of human parts hinges on bodily integrity and the notion that human beings have inherent worth and dignity such that reduction to a commodity state would violate this basic natural principle. However, the current scarcity of kidneys has created a black market where desperate individuals are importing living donors, coercing them with financial inducements, and charging recipients upwards of \$160,000 to secure the life-or-

⁹² Edecio Martinez, *Black Market Kidneys, \$160,000 a Pop*, CBS NEWS, CBS INTERACTIVE, (July 27, 2009), <https://www.cbsnews.com/news/black-market-kidneys-160000-a-pop/>. In 2011, a man by the name of Levy Izhak pled guilty in the United States' first ever federal conviction for brokering illegal kidney transplants for payments of \$120,000 or more. Rosenbaum specifically admitted to orchestrating three transplants from Israeli donors for New Jersey Residents. The transplants took place in December 2006, September 2008, and February 2009, and Rosenbaum was compensated by the recipients anywhere between \$120,000 and \$150,000 for each kidney.

⁹³ Farhan Navid Yousaf, and Bandana Purkayastha, *Social World of Organ Transplantation, Trafficking, and Policies*, 37 J. OF PUB. HEALTH POL'Y, 190, 199 (2016), <https://doi.org/10.1057/jphp.2016.2>.

⁹⁴ J S. Taylor, *Black Markets, Transplant Kidneys and Interpersonal Coercion*, J. OF MED. ETHICS, U.S. NAT'L LIBRARY OF MED., (Dec. 2006), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2563357/>.

death/dialysis organ.⁹⁵ Yet, if our aim as a society is to preserve bodily integrity and to foster a widespread flourishing of human beings, would a free will market of exchange via exercising individual autonomy be permissible since it would yield a better health outcome for thousands of individuals?

B. Paradox of Altruistic Gift Versus Coerced Sacrifice

Opponents to a compensable organ market claim compensation corrupts the consent of the participants, arguing that payment distorts the vendor's ability to rationally or truly willingly part with their organ, because the inducement of funds could coerce participation from the financially desperate.⁹⁶ An argument against the free market exchange of organs suggests no person would spontaneously wish to remove their kidney, so inducing the act with compensation must, deductively, be automatically coercive and violative. However, this criticism would completely undermine our current living donor scheme and unravels the very notion of altruism that our present system seeks to protect. It seems philosophically self-serving for our society to permit one act (donation of a kidney) if it occurs in the name of altruism, and to deem the exact same action a perversion of one's duty to self and a coerced act of desperation simply because compensation was introduced to the scheme. But does the introduction of money fundamentally alter the scheme and change it to a violative and exploitive relationship? Commodification is the antithesis of altruism, so our current system seems to encourage and enforce the receipt of life-saving organs only if they, for lack of a better term, come from the goodness of one's heart – or

⁹⁵ Edecio Martinez, *Black Market Kidneys, \$160,000 a Pop*, CBS NEWS, CBS INTERACTIVE, (July 27, 2009), <https://www.cbsnews.com/news/black-market-kidneys-160000-a-pop/>.

⁹⁶ See Lesley A. Sharp, *The Commodification of the Body and Its Parts*, 29 ANN. REV. OF ANTHROPOLOGY, 287, 364 (2000), <https://doi.org/10.1146/annurev.anthro.29.1.287>.

kidney- and not, instead, if there is any less noble motivation. The dogged adherence to protecting altruism seems to embrace the shortage of organs rather than seeking out means of expanding access. A viable organ is not, then, just one that is healthy and matches blood types with the recipient. Instead, it must meet all those biomedical matches and also be pure in the exchange process, or, given altruistically rather than bought.

C. Exploitation of the Vulnerable

One of the foremost arguments against allowing the sale of organs is the possibility, or potentially even likelihood, of the exploitation of poorer individuals, and how this might further turn organ receipt into a classist hierarchy. To be certain, the example we saw of Iran's compensable organ market certainly reflects the reality of this same fear; the poorest were disproportionately more likely to be donors.⁹⁷ But, the reality is that even in our existing system, the wealthiest are never the patients suffering on the organ transplant waitlist the longest, nor dying out before a viable option becomes available. The wealthiest Americans, who it should be noted are also disproportionately less likely to suffer from end-stage renal failure, are still better able to tap into greater networks and leverage the living pair program than poorer citizens.⁹⁸ So, the inequities exist in our current model, alongside the tragic shortage of viable organs.

On the moral and bioethical level, there is something about self-mutilation and sacrificing internal body parts that certainly causes immediate pause. Society at large balks at the idea of

⁹⁷ BENJAMIN HIPPEN, ET AL. SAVING LIVES IS MORE IMPORTANT THAN ABSTRACT MORAL CONCERNS: FINANCIAL INCENTIVES SHOULD BE USED TO INCREASE ORGAN DONATION (2009).

⁹⁸ *Wealthy More Likely to Get Organ Transplants: Study*, NAT'L POST, <https://nationalpost.com/health/wealthy-more-likely-to-get-organ-transplants-study>. Studies show wealthy people are more likely to get on multiple organ waiting lists and receive a transplant, and are less likely to die while waiting for a transplant than poorer citizens are.

farming less advantaged people for the benefit of a wealthy recipient – as we should. Yet, we allow compensation for blood, plasma, platelet, and reproductive matter. So, American law allows for poorer individuals to repeatedly give parts of themselves, sometimes upwards of over 100 times a year,⁹⁹ as evident in the discussion of blood plasma, and allows compensation for that exchange, but not for a one-off kidney transplant that will save the life of a person currently suffering from kidney failure. The moral equation there does not seem to add up, unless we can say there is something so fundamentally more sacred about a human kidney than there is about blood plasma, reproductive matter, or platelets, *and* so fundamentally more sacred that even though that contribution of a kidney would save another human life and the other donations would not, it cannot be compensated for the very reason that commodifying the organ would pervert its sanctity or the integrity of the person.

Conclusion

There is undoubtedly an important difference between a human kidney and any other inanimate object for which we freely bargain in an open market daily. There is also, however, a fundamental importance in our ability as humans to exercise our free will and our right to bodily autonomy. The limits to what we may and may not do with our body are typically influenced by moral philosophy, underlying bioethical principles, and even just political theory and natural law principles adopted by legislatures and promulgated through our existing body of law.

Currently, the inconsistency across bioethical laws is a cause for confusion, as it seems to reflect a shaky moral ground underlying our conceptions of justice, and in instances of life and death, such as the world of organ donation, it is imperative that our jurisprudence reflect a measured consideration of all forces at play. The legislated restrictions on donation must enforce

⁹⁹ *Biolife Plasma Services*, BIOLIFEPLASMA.COM, <https://www.biolifeplasma.com/become-a-donor/faqs>.

and enshrine our understanding that there are elements of the human body too sacrosanct to allow free market participation while respecting the individual sense of self-determination.

The issue, however, is that where we draw the line on sanctity and bodily integrity remains vague. The allowance of compensation for some bodily donations and prohibition on others; the introduction of state bills that would exchange organs for shortened prison sentences; even the jurisprudence in other bioethical matters all reflect irresolute standing on what exactly makes the human body too sacred to commodify, and where the bounds of personal autonomy and the right to exercise one's own decision-making must yield for the preservation of bodily integrity.