

5-1-2013

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Hausleben, Heather, "Property Rights in Organs – An Argument for Commodification of the Body" (2013). *Law School Student Scholarship*. 350.

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Property Rights in Organs – An Argument for Commodification of the Body

I. Introduction

Every year thousands of people die waiting for an organ transplant in the United States. The supply of organs available for transplantation, either gifts from deceased patients or donations from a living relative, is grossly inadequate to meet the demands of the medical community with a system that remains strictly dependent on altruistic donations. Despite the inadequate supply of donated organs, the sale of human organs is still illegal in this country. Realizing the insurmountable obstacle of obtaining enough donated organs to meet the needs of patients, a commercial market in organs would offer a practical alternative.

The National Organ Transplantation Act, passed on October 19, 1984, banned the sale of organs, stating “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.”¹ The Secretary of the Department of Health and Human Services works with non-profit organizations to operate the Organ Procurement and Transplantation Network, which maintains a national list of patients who need transplants and distributes available organs based on a patient’s position on the list.² The selection of patients from the list for a transplant is “based on medical criteria that are publicly stated and fairly applied.”³ However, if two or more people are medically ready and capable of a transplant, physicians and other medical personnel make the choice as to who should receive the transplant based on weighing the patients’ social worth. This determination is purely subjective with considerations that include marital status and number of dependents, income, educational

¹ 42 U.S.C.A. § 274e(a).

² DAVID L. WEIMER, *MEDICAL GOVERNANCE* 46 (2010).

³ TASK FORCE ON ORGAN TRANSPLANTATION, *ORGANS FOR TRANSPLANT* (1986); WEIMER, *supra* note 2, at 47.

background, employment record, relationship to authority figures, past irresponsible behavior, and intelligence.⁴

This paper by no means argues that commodification of the body through the sale of organs is an ideal situation and perhaps it is not even a morally desirable one. However, this paper will attempt to dispel the concerns behind the commercialization of organs to prove that no practical, moral or philosophical concern is great enough to undermine the good that could come from a commercial market in organs. “Commodification is not always the worst-best. Sometimes it is just second best – in a world in which first best isn’t feasible, and other options are even worse than second best.”⁵

Part II of this paper proposes a potential regulatory system to oversee the commercial market in human organs. It also presents some possibilities to overcome administrative difficulties, discussed later in further detail, in establishing this market in an attempt to display the ease and effectiveness under which the market could operate. Part III will address the origin of a potential property right in human organs and the emergence of recognition of these rights by the courts and public. This section presents an account of all types of property rights identified in the human body, beginning with the familial right to a relative’s body after death and detailing rights in regenerable human tissue such as blood and other tissue. The first subsection in Part IV outlines the practical and moral concerns that commonly arise in the debate over the commodification of organs and attempts to dispel these concerns. Finally, the second section of Part IV introduces some popular philosophical arguments against an open market in organs,

⁴ Gloria J. Banks, *Legal and Ethical Safeguards: Protection of Society’s Most Vulnerable Participants in a Commercialized Organ Transplantation System*, 21 AM. J.L. & MED. 45, 47 (1995). See also NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, *TRANSPLANTATION IN NEW YORK STATE: THE PROCUREMENT AND DISTRIBUTION OF ORGANS AND TISSUES* (1988).

⁵ *RETHINKING COMMERCIALIZATION: CASES AND READINGS IN LAW AND CULTURE* 408 (Martha M. Ertman & Joan C. Williams eds., 2005).

demonstrating reasons that these theories should not stand in the way of commodification and providing philosophical approaches that support an organ market.

II. Proposal

As a practical matter, establishing a well-regulated market for organs would be a challenging feat. However, through legalization, all of the problems with the black market in live human organs can be remedied. The first step to establishing a successful commercial market is creating a framework for the regulation of the market.

Under my proposal, the pre-existing Organ Procurement and Transplantation Network, already established to maintain the waiting list of patients in need of an organ transplant, would supervise the acquisition of the organs from “vendors”. An individual who desires to sell an organ would initially be interviewed to ensure that informed consent is present. The individual would undergo medical tests to verify their health and the health of the organ in question. If approved, the Network would pay the individual a fixed price for the organ and would make arrangements for the transplantation into the recipient. The process would remain strictly anonymous to ensure both fairness and privacy for all of the involved parties. Recipients would still be chosen based on the criteria of the existing waiting list. However, the goal of the program is to eventually eradicate the need for a waiting list by having a list of willing vendors available when a patient’s need initially arises.

Concerns about the unequal access among economic classes to these paid organs would need to be addressed. The Organ Procurement and Transplantation Network would pay the anonymous donors through federal funding and charitable donations, rather than the patients paying out of their own pockets. Alternatively, medical insurance could cover the cost of the

organ in conjunction with the operation and follow-up care. Although this would create an added burden on the medical insurance companies, eliminating the patient's time period of waiting for an organ, often spanning years in duration, would reduce overall medical costs, such as costly dialysis for kidney patients, for maintaining sick patients in hospitals until a transplant is possible. The cost of obtaining the organ would be treated as another medical expense for the operation, essentially the same as the cost of anesthetic or anti-rejection medications.

Concerns of threats to health, exploitation, or coercion can easily be overcome by establishing a well-organized regulatory system. The designated body would determine if the person attempting to sell the organ is in suitable health for the operation and has freely consented to the sale. These types of quality controls will be discussed further in section IV of this paper. A fixed price, determined by the Network, for each organ will prevent exploitation and ensure all vendors are treated equally.

Even if none of the arguments for establishing a market in organs from live donors are convincing, a futures contract could be a morally non-objectionable alternative. Contracting during an individual's life for the option to harvest organs after the individual's death in exchange for a fixed price given to the person's estate eliminates the risks to the donor and the philosophical objections to disturbing a healthy body.⁶ Additionally, a futures contract encourages everyone, perhaps with the exception of those with religious objections, to become an organ donor at death.

III. Property Rights in Organs

⁶ RETHINKING COMMODIFICATION, *supra* note 5, at 355.

Property is defined as “the right to possess, use, and enjoy a determinate thing.”⁷ The determination of the character of a thing as property is often reduced to whether the “bundle” of property rights applies to the thing.⁸ The bundle of rights includes the right to possess, control, exclude others from, enjoy and dispose of the thing. Although not a popular notion for sentimental reasons, one’s body can be viewed as the property of oneself, meeting all of the characteristics of the bundle of property rights.

One of the clearest signs of the presence of property rights in a human organ is the ability to gift the organ because without a prior ownership entitlement in the organ, a person would be unauthorized to give it away, even without compensation. Rather than solely analyzing gifts in the controversial context of an organ donation, some analogies from everyday life present a clearer understanding of the implications of a gift.

In practice, gifts of all types are rarely entirely voluntary as they often stem from obligation and the threat of social consequence. Estate law provides an example of gifts that are conducted under legal supervision and closely documented, thus providing a reliable context for some examples for our analysis. If, for example, an individual is excluded from a will and can demonstrate a promise to devise property in exchange for repayment of some type of work, often the individual can prevail on a court action compelling the transfer.⁹ Additionally, the doctrine of undue influence lies on the premise that a person did not do enough for the testator during her lifetime to warrant the gift.¹⁰ Both of these legal ‘gifts’ are truly examples of exchanges of the

⁷ BLACK’S LAW DICTIONARY 1335 (Bryan A. Garner et al. eds., 9th ed. 2009).

⁸ *Ibid.*

⁹ RETHINKING COMMODIFICATION, *supra* note 5, at 117.

¹⁰ *Ibid.*

bequest for lifetime care or attention; therefore, under these principles, the same considerations that allow people to donate organs support allowing the sale.¹¹

Although a gift market and a money market are regarded as separate entities that often do not overlap, both share similar elements that, I would contend, display the possibility for a working commercial system where previously only gifts were recognized as legitimate. Similar to a bequest in a will, all exchanges, including the exchange of an organ for money, contain an element of a gift. No exchange is ever entirely equal but instead rests on the economic system of supply and demand.¹² If a person offered to trade your one dollar bill for a one dollar bill from her wallet, the exchange would not accomplish anything and thus there would be no purpose to conduct it. However, if a person offered to exchange a one dollar bill for a bar of candy, the exchange would be worthwhile depending on your goals. If you believe a bar of candy is worth sacrificing your one dollar bill, the exchange would occur. Although most people would agree this exchange is roughly equal, being that a bar of candy would generally cost about one dollar, the participants of the exchange could argue about gains and losses indefinitely depending on the individuals' views on the worth of each item. Inevitably, in any exchange, one individual will have to give something society may view as more valuable in order to accomplish what she wants out of the transaction. The exchange, however, is satisfactory to both parties because the result is that each has obtained what they desired.

Relating to the context of organ transplantation, an individual may wish to sell her organ to obtain money for any number of purposes that she views as more important than the sacrifice of the organ. Incontestably, society views the organ as precious and, to many people, invaluable.

¹¹ RONALD MUNSON, RAISING THE DEAD: ORGAN TRANSPLANTS, ETHICS AND SOCIETY 122 (2002).

¹² RETHINKING COMMODIFICATION, *supra* note 5, at 119.

However, if the “vendor” is selling a kidney to provide money to pay for life-saving treatment of their child, the exchange becomes worthwhile and the loss of the kidney seems trivial. Since both parties are better off after the exchange takes place, the monetary exchange should be treated as equally valid as any other market transaction fulfilling a supply and demand for a certain type of property.

a. Early Development of Property Rights in the Body

The common current view is that people have property rights in human cadavers.¹³ Common law recognized a familial right to bury one’s dead, as is accepted and in fact expected today.¹⁴ Rights and laws protecting the body and its products exist in the prohibition of slavery and false imprisonment, ability to contract for employment, and existence of assault and battery laws.¹⁵ Though a person is prohibited from alienating parts of her body, an individual is permitted, in fact encouraged, to donate organs to patients in need.

The introduction of a market in human organs should be analyzed in the context of the existing treatment of other parts of the body. A legal commercial market for certain types of living human tissue already exists. Blood plasma, sperm and eggs are routinely extracted from willing patients in exchange for compensation. In the United States, there are over 400 blood banks.¹⁶ The United States’ two billion dollar industry in exporting blood leads the world.¹⁷ The success of the blood market strongly supports the inference that an organ market could be productive and effective.

¹³ Paul A. Gerike, *Human Biological Material: A Proprietary Interest or Part of the Monistic Being?*, 17 OHIO N.U.L. REV. 805, 812 (1991).

¹⁴ *Ibid.*

¹⁵ Danielle M. Wagner, *Property Rights in the Human Body: The Commercialization of Organ Transplantation and Biotechnology*, 33 DUQ. L. REV. 931, 933 (1995).

¹⁶ WAGNER, *supra* note 15, at 945.

¹⁷ *Ibid.*

Many of the criticisms that are offered against commercializing human organs were once presented to prevent the blood and tissues market. However, today, the market in blood and other regenerable human tissues is openly accepted by society. One of the most common concerns before the market was instituted¹⁸ was the possibility of declining safety and health. In one of the most influential books on the topic, entitled *The Gift Relationship: From Human Blood to Social Policy*, Richard Titmuss argued that a commercial blood market enhanced the risk of hepatitis-contaminated blood over a system of voluntary donations.¹⁹ His research, however, was conducted decades ago, with the publication of his book in 1970, and his conclusions are criticized as overly broad based on the evidence obtained.²⁰ Today, due to adequate protective screening and monitoring, the blood and tissues market in the United States is now viewed as almost entirely free of risk.²¹ “The experiences with blood demonstrate that many of the charges levied against an open market in bodily organs are baseless.”²²

Although the market in human organs is not yet legal, there is an active black market for live donor organs. Wealthy people travel to foreign countries seeking organ transplantation and pay hundreds of thousands of dollars for the procedure while risking questionable healthcare standards in addition to enabling the exploitation of people willing to sell their organs in these source countries.²³ If the market were legal, the owner of the organ would receive more money rather than splitting the proceeds with middle-men who charge large commissions because of the

¹⁸ Many criticisms of the blood market existed at the time, paralleling criticisms of a market in organs. However, for my purposes here, the safety concern is most relevant to the discussion.

¹⁹ RICHARD TITMUSS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* (1971).

²⁰ Robert M. Solow, *Blood and Thunder*, 80 *YALE L. J.* 1696 (1971).

²¹ No medical treatment or procedure can be entirely free of risk.

²² David E. Jefferies, *The Body as Commodity: The Use of Markets to Cure the Organ Deficit*, 5 *IND. J. GLOBAL LEGAL STUD.* 621, 657 (1997-1998).

²³ *Growing Demand Fuels Black Market Organ Trade* (Mar. 13, 2013, 10:00 AM), <http://www.foxnews.com/health/2012/05/28/growing-demand-fuels-black-market-organ-trade/>.

assumption of the legal risks.²⁴ Because of the legal status, the organ would already be paid for through the Organ Network and the fees charged to the recipient would include only legitimate medical expenses. Additionally, there would be less safety concerns for both the “vendor” and the recipient if reputable doctors and hospitals handled the operations.

b. Modern Recognition of Property Rights in the Body

Numerous recent court cases shed light on the emergence of the acknowledgement of property rights in human bodies. Although refusing to directly acknowledge property rights in body parts, courts have begun to recognize a property interest in parts of the body through a gift doctrine.²⁵ Though the courts’ rhetoric states that individuals do not have a property interest in their bodies, the recognition that parts of the body can be gifted to a person or organization mandates that the donor had an ownership right to grant to another.

In *Moore v. Regents of University of California*, a patient brought a conversion claim for the use of bodily tissues and portions of the patient’s spleen in research to establish a cell line that was later patented.²⁶ Though the conversion claim was unsuccessful, the court reasoned that the patient did not maintain an ownership interest in excised tissues, allowing the implication that the patient had this ownership interest prior to removal of the tissue.

In *Greenburg v. Miami Children’s Hospital Res. Inst.*, patients and non-profit organizations who provided funding sued a physician who isolated the Canavan gene (present in a rare genetic disorder) and obtained a patent.²⁷ Although the court in *Greenburg* explicitly

²⁴ RETHINKING COMMODIFICATION, *supra* note 5, at 407.

²⁵ Remigius N. Nwabueze, *Donated Organs, Property Rights and the Remedial Quagmire*, 16 MED. L. REV. 201, 219.

²⁶ 51 Cal.3d 120 (1990).

²⁷ 264 F.Supp.2d 1064 (S.D. Fla. 2003).

stated that patients did not have a property interest in their body tissue, the ruling explained that the patients were the donors of the tissues.²⁸ The implication of the patients' donor status shows that they had property rights in their tissues, without which the donation of the tissue would be impossible.

In *Washington University v. Catalona*, Washington University sought a declaratory judgment that it owned human tissue that had been used in research conducted by a doctor at the University who had transferred to Northwestern University and wished to bring the tissue samples with him.²⁹ The court, after implying that patients initially had property rights in their tissues, found that *inter vivos* gifts had been made by the patients to Washington University and therefore the University was the owner of the tissue samples.³⁰

At common law, the ability to donate through a gift doctrine requires that the donor has "the necessary disposing power,"³¹ which must intrinsically be linked to the power of property because one cannot give something that one does not have.³² Despite the fact that courts have not openly recognized a property interest in bodily tissue, the finding that a donation or gift can legally be made necessarily implies a property interest of some sort in the body.

Courts are also beginning to recognize a property interest in deceased relative's body parts.³³ Although the outcome of these types of litigation often rest on the practical difficulties of medical examiners sharing all concerns with next of kin, the acceptance by courts of the idea

²⁸ NWABUEZE, *supra* note 25, at 220.

²⁹ *Washington University v. Catalona*, 437 *F.Supp.2d* 985 (Dist. Ct. Missouri 2006).

³⁰ *Id.* at 997.

³¹ *Bowman v. Secular Society Ltd.* [1917] A.C. 406.

³² For discussion, *see* NWABUEZE, *supra* note 25, at 220.

³³ *See Hainey v. Parrott*, 617 *F.Supp.2d* 668 (S.D. Ohio 2007)(settlement approved for class action for practice of corner's office to retain body parts and organs of decedents without notice to next of kin or opportunity to reclaim body parts); *See also Brotherton v. Cleveland*, 923 *F.2d* 477 (6th Cir. 1991)(recognizing a constitutionally-protected interest in a deceased person's corneas that were removed without consent and without investigative purpose).

of constitutionally protected³⁴ property rights in the body of a deceased relative displays the change of attitude recognizing that the body is the property of an individual, or the in event of death, of the individual's family.

Even where courts fail to recognize a property interest in body parts, the failure rests solely on a deficiency in state law that fails to grant a right to a decedent's body parts that are collected for forensic examination at death.³⁵ In *Albrecht v. Treon*, the Sixth Circuit Court found that a § 1983 claim could not stand because Ohio state law did not grant a property interest in body parts.³⁶ *Treon* was distinguishable from *Brotherton*, where the court found a constitutionally-protected interest in a deceased person's corneas, because the body parts were removed for forensic examination in a criminal investigation.³⁷ Despite being a relatively new issue, news media is drawing attention to the issue of body parts retained after autopsy and legislation is beginning to address the issue.³⁸ Once legislation recognizes an individual's property right in their body, either before or after death, the foundation for the commercial market in human organs will be laid.

c. Overcoming Inalienability

Even if property rights in human organs are acknowledged, another obstacle in the establishment of a commercial market in organs is the recognition that certain types of property are inalienable and cannot be bought and sold in a market-like setting. However, based on my proposed system of regulation of the market, the justifications for inalienability no longer exist and therefore do not prevent the creation of a successful commercial market in human organs.

³⁴ This right is constitutionally protected under the due process clause.

³⁵ See *Albrecht v. Treon*, 617 F.3d 890 (6th Cir. 2010)

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ Mark Hansen, THE BODY IN QUESTION, 6 No. 25 ABA J. E-REPORT 4 (discussing legislation passed by San Mateo County, CA, in 2007 that required corners to notify next of kin when body parts of a deceased relative are retained for testing or examination after an autopsy).

Susan Rose-Ackerman in her article, *Inalienability and the Theory of Property Rights*, explores possible justifications for inalienability in certain types of property rights.³⁹ Rose-Ackerman describes organ transplantation as a type of property right that falls under the category of modified inalienability, meaning that gifts are permitted but sales are not.⁴⁰ She believes externalities provide “the most commonly recognized rationale for inalienability rules.”⁴¹ Rose-Ackerman begins with the presumption that unencumbered markets are desirable and therefore limits on transferability must be justified.⁴² Thus, if these reasons are not valid, the market should be permitted to operate. The justifications offered for the modified inalienability rule include economic efficiency and “specialized distributive goals” achievable only through inalienability rules.⁴³

Rose-Ackerman believes the most important efficiency justifications for a modified inalienability rule are: (1) conservation and supply management; (2) the regulation of close substitutes; and (3) the assurance of high quality output, though these justifications apply only in selective circumstances and thus “modified inalienability should not be used to achieve distributive goals except to prevent monopolies.”⁴⁴ The underpinning of the conservation and supply management justification is that the market itself creates an inefficiency because the higher levels of supply triggered by the presence of the market would “impose external costs on society.”⁴⁵ Rose-Ackerman presents population control and the conservation of wild animals and primitive cultures as examples of this phenomenon. However, in the case of a market in human organs, the increase in supply would alleviate problems plaguing society by making more

³⁹ Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 937 (1985).

⁴⁰ *Id.* at 935.

⁴¹ *Id.* at 939.

⁴² *Id.* at 932.

⁴³ *Ibid.*

⁴⁴ ROSE-ACKERMAN, *supra* note 39, at 932.

⁴⁵ *Id.* at 942

medically necessary transplants possible. The justification of the regulation of close substitutes rests on the fact that it is difficult to enforce a law against the possession or transfer of a forbidden good where there is a close substitute, such as in the case of the Endangered Species Act and the Migratory Bird Treaties. This justification is also irrelevant to human organs because there is no substitute for an organ. In fact, if a close and meaningful substitute existed for an organ, the market in human organs would be unnecessary because the substitute would suffice to fulfill the present medical need. The final justification regarding quality control is one of the most significant criticisms of a market in organs. This problem will be dealt with in detail in the following section.

Susan Rose-Ackerman argues against the distributive arguments for inalienability of blood, which also arise in the context of human organs.⁴⁶ Rose-Ackerman suggests that the quality control arguments for modified inalienability of blood exist only on the supply side of the market and therefore donated blood could be sold to patients without concern for jeopardizing the quality of the donations. She further attempts to solve the newly-created problem of discouraged volunteers, stemming from the fact that their donations will be sold, by offering solutions such as the payment of the donors' expenses. However, she acknowledges that blood is unique in that the human body automatically replaces that which is lost and therefore the donor has not lost anything. While suggesting the opposite of Rose-Ackerman's idea by creating a market solely on the supply side, the proposal set forth in this paper dispenses with the quality control argument through a strict system of regulation and monitoring. Because the organ "vendors" are fully compensated for the organ that they sacrifice, no problem of a shortage of supply arises. Additionally, as the "vendors" are compensated, the fact that the organ, in the case

⁴⁶ *Id.* at 948

of kidneys, does not regenerate is a sacrifice that is deemed acceptable in exchange for the financial incentive received.

Criticisms of a commercial blood or organ market based on distributive reasons also oppose the sale based on the ground that it would be unfair to allocate life-saving resources on the basis of a recipient's ability to pay. Rose-Ackerman rationalizes that the distributive arguments "may not be strong enough to overcome the inefficiency of nonmarket transactions" and thus, despite practical difficulties, it may be advantageous to accept a market that will account for the problems created by a modified inalienability rule, mainly the shortage of supply.⁴⁷ Additionally, "on purely distributive grounds, it seems unfair to treat people whose problem requires a mechanical or chemical solution [such as an artificial limb] differently from those who need living tissue."⁴⁸ However, Rose-Ackerman fears a "monopoly power issue" in which a donor could require a large payment in return for donating to a person who has a rare blood type or cannot find another suitable tissue match.⁴⁹ However, in the system that I have proposed in this paper, distribution problems would be eradicated through the anonymity of the system and the fixed prices and thus cannot justify inalienability of organs.

In the article *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, Guido Calabresi and A. Douglas Melamed also argue that inalienability stems from the high external costs of allowing certain types of markets.⁵⁰ They suggest that rules of inalienability "seem most often germane in situations where moralisms are involved."⁵¹ Moralisms are external costs which "do not lend themselves to collective measurement which is

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Id.* at 949

⁵⁰ Guido Calabresi & A. Douglas Melamed, *Property Rights, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1111-14 (1972).

⁵¹ *Ibid.*

acceptably objective and non-arbitrary.”⁵² Although it may not be the current popular opinion, no moral harm should be considered more detrimental to society than the loss of life by innocent people in need of an organ transplant, as will be discussed at length later in section IV of this paper. It is inconsistent with morality to allow a needless death based on the possibility that uninvolved individuals would be morally offended by the legalization of a market in human organs, especially in a system that safeguards the well-being of all involved parties. Moral opposition to the removal of a healthy organ pales in comparison to the moral taint of allowing the death of patient in need.

Calabresi and Melamed propose that paternalism is another efficiency justification for inalienability rules.⁵³ Paternalism is based on the notion that the government (or another person) knows better than an individual as to what is in her best interests. This concept represents the belief that the government is caring for individuals by prohibiting them from selling or buying human organs for their own safety, health or moral well-being. While one of the arguments against permitting the sale of organs is that financial incentives limit the ability of the individual to make an autonomous decision (as will be discussed later in section IV), paternalism, an obvious limit on autonomy, is also used to oppose the market. In addition to its limits on autonomy, paternalism is met with many criticisms, such as the ability of individuals to identify their own best interests and the disruption of the person’s development of judgment by paternalistic views. Although government decision makers may feel that they are behaving in the best interests of those who would engage in the market by prohibiting the sale of organs, it is difficult for government officials to place themselves in the position of the potential vendors or buyers and evaluate their situations. Through my proposed regulation, the rules governing the

⁵² *Ibid.*

⁵³ *Ibid.*

Network would be capable and flexible enough to ensure the health and well-being of all involved parties. Consequently, a broad prohibition on paternalism grounds is too extreme.

IV. Concerns

An argument favoring a commercial market in organs will be met with an onslaught of concerns, both practical and moral in nature. Although each concern is valid, the benefits of a commercial market to solve the organ shortage and save countless lives seem to outweigh even the most poignant criticism. Many of the practical worries of critics can easily be addressed through strong administrative regulation. As is generally the case with unknown territory, the “what if’s” often stretch beyond imagination to a worst-case scenario that would be far from the typical experience of those engaging in the new market. Risk, danger, and crime are inescapable realities in this world but should not halt progress based on the possibility of illegal abuses that could fall through the cracks in a regulatory scheme.

a. Practical Concerns

One of the most concerning arguments against the commercialization of organ transplantation is that permitting the sale would result in lower quality organs being available and would expose the “vendors” to unnecessary health risks.⁵⁴ Susan Rose-Ackerman cites this potential problem as one of the justifications for modified inalienability, contrasting the blood market and finding it unlikely that people would donate something of high quality that does not regenerate.⁵⁵ This argument would extend to purely voluntary donations as well as sales. However, if the individual giving up his or her organ received ample incentive to undergo the procedure, be it an altruistic feeling from donation or monetary compensation, even those with

⁵⁴ MARK J. CHERRY, *KIDNEY FOR SALE: HUMAN ORGANS, TRANSPLANTATION AND THE MARKET* 13 (2005); *WHEN ALTRUISM ISN’T ENOUGH: THE CASE FOR COMPENSATING KIDNEY DONORS* 58 – 60 (Sally Satel ed. 2008).

⁵⁵ ROSE-ACKERMAN, *supra* note 39, at 947.

healthy organs would be willing. In the cases of unhealthy people wishing to either donate or sell an organ, regulation and careful screening would work to ensure all organs meet the necessary standards of quality.

Since there is no adequate example of regulation of a market in organs, critics point to India, where an illegal, unrelated market is widespread, as evidence of the phenomenon of lower quality organs made available through a commercial market. However, in India, “vendors” come from the lower strata of society where health and nutrition are already compromised by economic problems.⁵⁶ Additionally, there are problems with informed consent among Indian sellers. However, the problems reaching informed consent stem from the low levels of social and literary skill in the country.⁵⁷

A country such as India suffers from many problems that would not be present or of large concern in the United States. Although there are, of course, poor and uneducated people in the United States, it is not a problem of the magnitude that India must deal with and therefore the difficulties that have resulted from paid organ transplants in India would be easily usurped in the United States through proper screening methods and the traditional standards of medical care.

Under proper medical conditions, both for the operation and follow-up care, kidney removal or the removal of a lobe of the liver is not dangerous.⁵⁸ Mortality rates during the surgical removal of a kidney is extremely low, approximately 0.03 percent, with other major complications occurring in less than two percent of cases.⁵⁹ Although older published reports

⁵⁶ AUSTEN GARWOOD-GOWERS, LIVING DONOR ORGAN TRANSPLANTATION: KEY LEGAL AND ETHICAL ISSUES 184 (1999) (citing B.N.Colabawalla, *Commerce and Trade in Human Organs* (presented at 2nd International Conference on Organ Transplantation, Kuwait, 1990), *available at* World Health Organization).

⁵⁷ *Ibid.*

⁵⁸ CHERRY, *supra* note 54, at 3-4.

⁵⁹ *Id.* at 10.

describe a morality rate as high as 11 percent during the removal of a lobe of the liver, more recently, institutions with experienced surgeons report no donor moralities.⁶⁰

If the biggest societal concern is health, the prohibition on organ sales seems contrary to society's goals. The ban on organ sales forces people to resort to the black market, both for sellers and buyers, where proper medical procedures and follow-up care may not be available.⁶¹ If the preservation of the health of all parties is the primary target, commercialization poses minimal risks. Through legalization, organ sales could be regulated and monitored by well-organized programs that would ensure safety and health. If organ removal is deemed dangerous and thus inappropriate for a healthy person to subject themselves to, free donations would pose the same risks and therefore also be deemed wrong.⁶²

Another argument against the sale of organs is that offering compensation for organs would decrease the number of altruistic donations.⁶³ Critics believe that putting altruism in competition with a commercial market would decrease the number of purely altruistic donations. This argument presumes a number of points, primarily that promoting altruism in the world is in itself a good thing and that offering compensation for organs would undermine altruism. But "even if promoting altruism is good, is it good enough to justify the loss of thousands of lives?"⁶⁴

Because altruistic donations (during life) among strangers are almost unheard of⁶⁵, critics cannot be concerned that less of these types of donations will occur. Compensation cannot

⁶⁰ *Id.* at 4.

⁶¹ STEPHEN WILKINSON, *BODIES FOR SALE: ETHICS AND EXPLOITATION IN THE HUMAN BODY TRADE* 107 (2003).

⁶² *Id.* at 108

⁶³ CHERRY, *supra* note 54, at 14; SATEL, *supra* note 54, at 60.

⁶⁴ WILKINSON, *supra* note 61, at 115.

⁶⁵ From 1990 to 1998, only 85 kidney transplants from unrelated live donors occurred through the UK's Unrelated Live Transplant Regulatory Authority. In this time period, approximately 5,000 patients were waiting for an organ. *Id.* at 113.

undermine a pre-existing system of free donations where one does not already exist.⁶⁶ If such a system of widespread, uncompensated donations already existed, commercialization would be rendered unnecessary.⁶⁷ Though in an ideal world there would be a sufficient number of donations, the only realistic option for a world that falls short of this ideal is to offer an incentive for organs to meet the needs of the medical community and the patients whose lives depend upon transplantation. The organ market would permit an expanded range of possibilities, allowing people to reap satisfaction from being an altruistic person through free donation or granting people fiscal incentive to meet other needs in their lives.⁶⁸

This argument also presumes that a sick patient's relative would be less inclined to donate an organ to save their loved-one's life solely because compensation is available for that organ. Because of the medical reality that organ transplants from a relative provide the closest match to the patient's body and therefore the lowest chance of organ rejection, altruistic donations from family members would still be a common occurrence, with relatives hoping to provide their loved ones with the most successful medical treatment and therefore the greatest chance of survival.⁶⁹ Additionally, many family members feel a connection to one another and would voluntarily undergo an organ donation because of their desire to be a part of the medical cure of their loved one.

Lastly, the presumption that an offer of compensation would undermine the amount of altruism in the world overall overlooks the possibility of a pure, unselfish, even responsible, motive for selling the organ. For example, in 1989, there was a scandal at Humana Wellington Hospital in London after it was revealed that a purchased kidney was transplanted by doctors at

⁶⁶ *Ibid.*

⁶⁷ *Id.* at 114.

⁶⁸ *Id.* at 112.

⁶⁹ *Ibid.*

the hospital.⁷⁰ However, it was later discovered that the organ “vendor” was a Turkish peasant who sold his kidney to pay for his sick daughter’s tuberculosis medicine and save her life.⁷¹ One cannot assume a paid donation is not altruistic, just as a free donation does not guarantee altruistic motives, as is the case of a person trying to make herself feel or look generous.⁷²

b. Moral Concerns

The main moral objections stem from the belief that the sale of an organ would never be truly voluntary and that organ donation ought only to be motivated by altruism.⁷³ While altruism concerns were addressed briefly in the prior section, this section will deal with the voluntariness of an individual to undergo a compensated organ removal procedure. This paper will not address ‘voluntariness’ concerns arguing that a commercial market in organs promotes crimes such as kidnapping and physical coercion, as this argument is “like arguing against all employment on the grounds that there are some cases of slavery, or arguing against property because there are some cases of theft.”⁷⁴ Crime is ever present in society and the nature of the actions of criminals implies that whether the organ market is legal or not, these horrific crimes will be an unfortunate reality. The more legitimate dispute is whether voluntariness can ever be present when financial incentives are present.

Consent requires three things – information, competence and voluntariness.⁷⁵

Information and competence are easily obtained, even where compensation is offered. However, the voluntariness element poses three problems: (1) financial incentives encourage people to do

⁷⁰ WILKINSON, *supra* note 61, at 112.

⁷¹ *Ibid.*

⁷² *Id.* at 115.

⁷³ WORLD MEDICAL ASSOCIATION, STATEMENT ON HUMAN ORGAN AND TISSUE DONATION AND TRANSPLANTATION § 34 (2000), available at http://www.wma.net/e/policy/17-180_e.html.

⁷⁴ WILKINSON, *supra* note 61, at 116.

⁷⁵ *Ibid.*

things that they otherwise would not do and therefore make a decision less autonomous; (2) financial incentives can be coercive; and (3) financial incentives lead to exploitation. I will address each problem in turn.

Although financial incentives provide encouragement to engage in conduct a person is less likely to do without the incentive, the nature of any incentive in any context can pose the same problem. The most omnipresent financial incentive in our society is employment. Many, if not most, people would not go to work if they were not paid for their time and effort, however, society does not view a salary as impermissibly incentivizing people.⁷⁶

Paid research participants can be analogized to paid organ donors in that both individuals subject their bodies to potential health risks for compensation. Similarly, individuals in both contexts offer an invaluable service to humanity. In the context of paid research participants, a similar debate regarding the voluntariness of the participant's actions has erupted, offering a valid overlap with the argument against organ sales:

People receive inducements all the time to do things they otherwise would not do, such as parting with their goods or working under particular conditions for particular employers. There is no suggestion in the vast majority of these cases that their being paid undermines the voluntary nature of their actions.⁷⁷

Incentives do not negate voluntariness simply because a person would seek another course of action without the presence of the incentive. The underlying concept of an 'incentive' requires that people would not be inclined to act without the incentive. If a person would undertake the identical course of action in spite of the lack of incentive, incentives would be rendered both unnecessary and ineffective.

⁷⁶ *Id.* at 117.

⁷⁷ Martin Wilkinson & Andrew Moore, *Inducement in Research*, 11(5) *BIOETHICS* 373 (1997).

Financial incentives are also often viewed as impermissibly coercive. These concerns of coercion, however, cannot be limited to commercial transactions, as a person can be coerced to give up an organ for emotional or moral reasons.⁷⁸ In fact, an altruism-only system imposes coercion on family and friends who know that, without their help, their loved-one faces pain, suffering and potential death, yet this type of emotional coercive is not recognized as impermissible or even undesirable.⁷⁹

In the case of a donation, paid or otherwise, the doctor will speak to the donor to ensure that they understand the risks and truly want to donate their organ. As a medical community, it has been generally accepted that this informed consent eliminates any potential for coercion of uncompensated donors and therefore should be extended to all individuals wishing to partake in the transplantation process even if they receive compensation. The introduction of compensation is no more coercive than an ethical or moral obligation and therefore should be treated similarly. In some cases, individuals may find the moral guilt of allowing a relative to suffer rather than donating an organ to be more coercive than the offer of a financial reward. For the true cases of coercion through the offer of financial incentives, by decriminalizing organ sales, a regulatory body that would govern the organ market could screen out these cases, just as they are currently screened for uncompensated donation.⁸⁰

A major criticism of the commodification of body parts is that the financial incentives would exploit poor and less fortunate people.⁸¹ Taking advantage of a person's situation is not *per se* wrong or exploitative, as in the situation of an emergency room doctor, an emergency

⁷⁸ WILKINSON, *supra* note 61, at 126.

⁷⁹ SATEL, *supra* note 54, at 72.

⁸⁰ WILKINSON, *supra* note 61, at 126.

⁸¹ SATEL, *supra* note 54, at 82.

plumber or a roadside vehicle-repair service.⁸² Many providers of emergency services overcharge the customer. For example, if a pipe in a person's home bursts in the middle of the night or on a weekend, an emergency plumber is available to rectify the situation, but only for an outrageous price well above the normal rates a plumber would charge during ordinary business hours. While people may view the situation as unfair, these practices are permitted to continue and are even justified based on the provision of a service in a necessary and exigent circumstance.

Additionally, society does not view a demeaning job that pays minimum wage as impermissibly⁸³ exploitive simply because poor people who have no alternative form of employment will be drawn to and accept the less-than-desirable working conditions. Exploitation, rather, is taking *unfair* advantage of a person's misfortune, such as the case where an individual is overcharged, underpaid, or mistreated in some manner.⁸⁴ These concerns can be addressed by instituting a fixed price for an organ to ensure that vulnerable people are given fair value.⁸⁵

The mere fact that poor populations would be more drawn to organ sales does not render the market exploitive. Poor populations commonly accept less desirable employment, live in substandard housing and consume less than nutritious foods and yet none of these situations are viewed as exploitive to the point where these jobs, housing projects, or types of food must be improved or eliminated. Economic classes are a reality and acceptance that lower classes of people are attracted, by necessity, to less desirable ways of life does not preclude the

⁸² WILKINSON, *supra* note 61, at 131.

⁸³ As in the example of emergency service providers, people may view these situations as unfair but society does not step in to prevent these happenings based on a theory of exploitation.

⁸⁴ *Id.* at 131-132.

⁸⁵ *Id.* at 131.

establishment of a system that would help society as a whole. Though the privileged may view housing projects and organ sales as unacceptable forms of life, people from different walks of life not only accept their economic status but are grateful for a minimum wage job or housing allowance that permit them to take care of their families. Similarly, organ sales would allow another avenue that may take advantage of a poor person's situation, though not unfairly, but would not be viewed by the individuals partaking as exploitive in the traditional sense.

Though some critics of the commercial organ market argue otherwise, having no practical alternative is not *per se* exploitive or coercive. A person, no matter how dire their situation, is capable of rendering an autonomous decision after being fully informed of the consequences, risks and benefits. For example, if an ill patient's sole alternative to death is a particular treatment, the person cannot reject the treatment⁸⁶ but the choice to pursue it is still an autonomous choice because informed consent, requiring careful deliberation, correct understanding of the options and no manipulation, is possible.⁸⁷ Even where less extreme circumstances prevail, the simple fact that a decision is appealing and could improve the individual's life does not strip that person of free will. One need only look to the dying patient's medical options, the person who plays the lottery, or an employee who accepts a large salary to see that the mere fact that an offer is attractive does not mean that it cannot be voluntarily and validly accepted.⁸⁸ Similarly, choosing the sale of an organ, though it will undoubtedly be a more attractive option to certain types of people, is still a voluntary and valid choice.

⁸⁶ Of course a person could choose to reject the treatment and die but, for all practical purposes, the person has no choice if they wish to pursue life, as we would assume is the goal of the majority of people.

⁸⁷ WILKINSON & MOORE, *supra* note 77 at 377.

⁸⁸ WILKINSON, *supra* note 61, at 119.

In the eyes of many, an organ sale might be the best choice for their situation and we must accept that “commodification may be bad, but starving is worse.”⁸⁹ Although some people may not understand the choice to sell an organ, others would welcome the choice, weigh the pros and cons, and potentially act on their option if it is the best course of action for their unique situation. The mere fact that the privileged may not understand this choice does not undermine the autonomous nature of the choice by those who view it as a viable option given their circumstances. This type of paternalism, through the prevention of sales of organs, is easily justified from the comforts of a Congressman’s home but may actually harm those it seeks to protect. Rather than a strict prohibition based on moral concerns, our government’s paternal regulation should seek to protect those who would consider this a viable option, instead of pushing them towards a risky black market.

c. Philosophical Arguments

Various well-known philosophies provide additional, albeit slightly more abstract, criticism against and in support of a market in human organs. This section will discuss the positions of Thomas Aquinas (1224-1274), John Locke (1632-1704), though neither of these philosophers directly spoke about organ transplantation, given the time frame of their works, and Immanuel Kant (1724 – 1804), whose philosophical stances oppose the commodification of body parts. These traditional theories, however, as I will show, prohibit the donation of organs as well. Unless society is prepared to recognize that the removal of organs from a living person is morally impermissible for any reason, these philosophical arguments cannot be used to prohibit the establishment of an open market in organs. This section will also address the ideas of various

⁸⁹ RETHINKING COMMERCIALIZATION, *supra* note 5, at 405.

utilitarian philosophers and Robert Nozick (1938-2002), whose theories provide a justification for commercialization.

i. Philosophical Arguments Challenging Commodification

Thomas Aquinas's principle of totality requires a person to preserve the wholeness of the body.⁹⁰ In Aquinas's view, it is *prima facie* morally impermissible to remove a healthy part of the body that maintains its natural disposition because the human being as a whole biologically functioning unit is a natural good.⁹¹ This argument, however, would extend to prohibit any removal of organs from a live donor, whether a free donation or a compensated transaction. Subscribing to this principle would undermine the entire medical transplantation community.

Though the traditional principles of Aquinas would have strictly viewed organ sale or donation as morally impermissible, the principle of totality has evolved to encompass changing concerns and possibilities in society. In light of medical advances, contemporary Thomists have reinterpreted this principle to signify a need to preserve human biological functioning rather than anatomical wholeness.⁹² The natural good recognized by the principle of totality, therefore, should be viewed as the good of every aspect of life, including "bodily health and freedom from pain that betokens organic malfunctioning or injury".⁹³ "So the transplantation of a duplicated organ such as the kidney, leaving the whole substantially unimpaired, need not be regarded as doing harm for the sake of good."⁹⁴ The contemporary reinterpretation of the principle of totality is neutral as to whether the organ is donated or sold for sufficient reason. As long as the organ is

⁹⁰ AQUINAS, *SUMMA THEOLOGICA, PART II-II (SECUNDA, SECUNDAE)* 65 (Fathers of the English Dominican Province, trans. 2012).

⁹¹ *Ibid.*

⁹² JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 86 (1980).

⁹³ *Ibid.*

⁹⁴ JOHN FINNIS, *MORAL ABSOLUTES: TRADITION, REVISION, AND TRUTH* 79 (1991).

removed for a good purpose, it is irrelevant whether the organ directly fulfills the purpose (saving a relative's life through donation) or accomplishes it with an additional step (for example, obtaining funds for necessary care through the sale).

With a similar belief in the basis of morality as Aquinas, John Locke espouses theories based on natural law. The core of Locke's philosophy relevant to the discussion of organ transplantation has two aspects. First, although a person has control over herself in the state of nature, entrance into civil society requires a person to sacrifice some of the basic natural liberties afforded in the state of nature.⁹⁵ Second, Locke believes people have particular duties in exchange for living in civil society, including the duty to support the national good of individual liberty which constrains the freedoms a person has to use her body.⁹⁶ The State therefore can limit personal liberty and enforce certain moral obligations, like the duty not to kill oneself which may extend, in a modern context, to a duty not to dispose of parts of the body.⁹⁷ Locke argues against suicide, believing that the rights a person has over themselves and their body end at the limits of natural theology because only God has absolute dominion.⁹⁸

Importantly, Locke believed that, in the state of nature, "every man has a property in his own person: this nobody has any right to but himself. The labor of his body, and the work of his hands, we may say are properly his."⁹⁹ Only through fully consenting to civil society and government do people surrender these natural, personal liberties.¹⁰⁰ Society's sole purpose is to provide for the property, life and liberty of individuals and therefore these liberties are sacrificed

⁹⁵ JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 19 (Tom Crawford ed., Dover Publications 2002) (1946).

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Id.* at 70.

⁹⁹ *Id.* at 19.

¹⁰⁰ LOCKE, *supra* note 95, at 98.

only as far as need be to achieve these goals.¹⁰¹ Government must act through promulgated laws and cannot take property from a person without individual consent.¹⁰²

Under a contemporary interpretation, Locke's philosophy could equate organ transplantation to suicide, as the removal (or receipt) of an organ interferes with God's absolute dominion over the body and thus individuals do not have the right to disturb the body in any manner. However, transplantation, whether compensated or otherwise, should be viewed as the discharge of a moral duty to promote the good of society through charity and aid to those who are in need. Though some may debate whether people actually have freely consented to civil society at all as there appears to be no alternative in this modern world, consent to living in civil society cannot strip an individual of such a fundamental rights in their own body. If society's purpose is to protect the property, life and liberty of an individual, revocation of property rights in the thing that seems most our own – our body – not only does not perpetuate these goals, but seems to detract from the preservation of each one of them. Property is not adequately defended if society takes the most fundamental piece of property that even the poorest man is always ensured of the possession of. Life is not shielded if transplantation of life-saving organs is prevented. Lastly, liberty is not preserved if an individual loses the freedom to do with her body as she pleases. In the United States, people have surely not consented to allowing the government to take their bodies as it pleases¹⁰³ and therefore the State should not have jurisdiction over organ transplantation if an individual freely decides on this disposition of her body.

¹⁰¹ *Id.* at 67.

¹⁰² *Id.* at 72-74.

¹⁰³ Though it may be argued that people consent to allow the government to take their bodily freedom through imprisonment in the event that they commit a crime, the violation of social standards can account for this discrepancy. An average, law-abiding citizen cannot be taken off the street at the whim of the State.

Immanuel Kant's arguments, like Aquinas's, find both the sale and donation of human organs to be morally impermissible. Although still defending Christian ideals, Kant distances himself from the Christianity-based philosophy of Aquinas and Locke, instead viewing morality as an individual's responsible choice rather than a means to seek salvation.¹⁰⁴ Because it is intrinsically wrong to remove an organ, even a choice to donate an organ to a family member would be considered a morally inappropriate way to use oneself. Kant's argument against the removal of organs has two basic elements. First, the removal of an organ constitutes partial self-murder to the same degree as suicide.¹⁰⁵ Second, the removal uses the person impermissibly as a means rather than an end.¹⁰⁶

Kant's concept of the categorical imperative decries the obligations that people must live under and assess their motivations and actions against. The categorical imperative consists of three formulations:

Act only according to that maxim whereby you can at the same time will that it should become a universal law.

Act in such a way that you treat humanity, whether in your own person or in the person of another, always at the same time as an end and never simply as a means.

This is done in the present (third) formulation of the principle, namely, in the idea of the will of every rational being as a will that legislates universal law.¹⁰⁷

The removal of an organ would violate the categorical imperative if any of the following are true: (1) the removal puts life in danger, (2) parts of body are equivalent to oneself for morality purposes, or (3) donation or sale of organ is not associated with discharge of a duty.¹⁰⁸

¹⁰⁴ *Id.*

¹⁰⁵ IMMANUEL KANT, *GROUNDING FOR METAPHYSICS OF MORALS* (J.W. Ellington trans., Hackett Publishing Co. 2011).

¹⁰⁶ *Id.*

¹⁰⁷ KANT, *supra* note 105, at 30-38.

Two of these objections are easily dismissed. Under today's sophisticated medical technology, the removal of an organ does not pose a great danger¹⁰⁹ and thus should not be used as an argument against the donation or sale of organs, thus eliminating objection (1). I believe objection (3) would be blatantly rejected by most individuals. The donation of an organ to a dying loved one could very easily be viewed as a moral duty. Many, if not most, people would feel a moral and social obligation to donate an organ to save a loved one's life if they are able. Similarly, the sale of an organ to, referring back to the prior example of the Turkish peasant, acquire monetary funds for a lifesaving treatment for a family member could also be viewed as the duty of a loyal father. Moreover, no matter the motivation, the donation or sale of an organ for transplantation into a sick or dying individual could be viewed as a discharge of a duty to promote the general health of mankind and to help fellow citizens live a pain-free existence.

The second objection reintroduces the arguments of Aquinas and Locke requiring the preservation of the body as a natural good. Because not all body parts are essential for the body to function biologically (and presumably, only these types of "unnecessary" organs would be available for sale), morality in the person would not be compromised.¹¹⁰ Morality in the body is compromised only when the body as a functioning whole is harmed. However, if the donated organ is not essential to the well-being of the body, the body as a whole is maintained.

Similarly, Kant's term 'partial self-murder' seems to imply that the individual is harmed or 'killed' in some respect. However, based on the nature of these organs, the body can remain a functioning whole and therefore is not 'murdered' in any manner. Although it may be immoral to harm oneself for no purpose, the donation of an organ takes from one living body that can do

¹⁰⁸ CHERRY, *supra* note 54, at 135.

¹⁰⁹ Again, I will reiterate that every medical procedure poses risks. The possibility of danger is not an accepted argument against seeking medical treatment or surgical operations.

¹¹⁰ *Id.* at 136.

without the organ to give to another body that will die without the benefit of that organ; therefore, rather than a harm occurring, there is an overall benefit from the transaction. If this form of ‘partial self-murder’ will save one life by merely blemishing the body of another living individual, an abstract concept of the morality of preserving the whole of a body should not prevent this measure.

Although treating a person as a means is not permitted, it is permitted as long as they are also treated as an end.¹¹¹ According to Kant, the problem with focusing on a person’s instrumental value and usefulness is neglecting the person’s autonomous nature that is deserving of respect.¹¹² This same argument identifies the problem with slavery. Slavery treats a human being whom is worthy of respect as being worthy merely of a use.¹¹³

Kant believes that everything has either a ‘price’ or a ‘dignity’.¹¹⁴ Everything with a price can be replaced but anything that is above a price and has no equivalent has a dignity.¹¹⁵ Allowing the removal of organs would be, in Kant’s view, inappropriately ascribing a price to a person’s body, which should have a dignity rather than a price. However, treating people as fungible is not an ethical issue in many contexts, for example, it does not matter which taxi driver drives you to your destination, which barber cuts your hair, or which bellhop carries your luggage.¹¹⁶ Additionally, treating a single organ as a unit with a ‘price’ should not be viewed as morally questionable when the uniqueness of the individual as a whole is respected and preserved.

¹¹¹ WILKINSON, *supra* note 61, at 35.

¹¹² *Id.* at 37.

¹¹³ *Id.* at 32.

¹¹⁴ KANT, *supra* note 105, at 47.

¹¹⁵ *Ibid.*

¹¹⁶ WILKINSON, *supra* note 61, at 49.

Moreover, because a market in organs would increase the supply of necessary organs and eliminate risks of people who resort to the black market, the creation of the market “advantages the health and integrity of persons as ends in themselves.”¹¹⁷ Participation in the black market threatens the health of both the recipient and the donor. A well-regulated market would ensure respect for the “vendors” as persons and would promote the good of the health of the recipients. On the other hand, the current scheme forces people devoted to the idea of the sale of an organ to the black market where the individual is treated as a “means” and generally not provided adequate follow-up care that would be indicative of respect for the person. Allowing the death or substandard care of those in need of an organ transplant strips the person of the respect owed to their good health and standard of living.

ii. Philosophy Supporting Commodification

One of the clearest defenses of the sale of organs lies in utilitarianism. Jeremy Bentham, the founder of utilitarianism, based his principles on the axiom, “it is the greatest happiness of the greatest number that is the measure of right and wrong.”¹¹⁸ Happiness was defined as the predominance of “pleasure” over “pain.”¹¹⁹ Bentham establishes a set of criteria to measure the extent of pleasure or pain that will result from a particular action.¹²⁰ The criteria are categorized by intensity, duration, certainty, proximity, productiveness, purity and extent.¹²¹ In the context of organ transplantation, the greatest happiness would be achieved by allowing the transplantation of a necessary organ and permitting the vendor of the organ to receive compensation that she needs to fulfill whatever purpose is important to her. Both parties would

¹¹⁷ CHERRY, *supra* note 54, at 136.

¹¹⁸ JEREMY BENTHAM, preface to A FRAGMENT ON GOVERNMENT (Ross Harrison ed., Cambridge University Press 1988) (1781).

¹¹⁹ JEREMY BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION 1 (Nabu Press 2010) (1789).

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

receive a benefit from the fulfillment of their end of the bargain. The pain experienced during the operation and follow-up care of the vendor would be far less than that which would have been suffered by the recipient over years of organ failure and potential death.

Some critics argue that utilitarianism would permit the killing of one person to harvest organs to save the lives of many. However, Bentham believed the law would define inviolable rights, such as the fundamental right to life, which would protect the well-being of individuals.¹²²

John Stuart Mill, a proponent of Bentham's theories, focused on the freedom of the person as an individual in his work, *On Liberty*.¹²³ Mill strongly opposed state paternalism, writing, "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others;"¹²⁴ therefore, paternalism should be permitted only to govern behavior that could harm the interests of other people. Justifying his rejection of paternalism, Mill believed that allowing people to make their own decisions would create the most good.¹²⁵ Individuals not only know their best interests better than the state does but also moral equality requires that the state respect people's liberty interests.¹²⁶ Mills' emphasis on autonomy displays one of the core arguments for a market in human organs by stressing the importance of respecting an individual's decisions. The sale of an organ is not injurious to others and therefore, according to the philosophy of Mill, the state has no interest in governing this type of choice for people.

¹²² *Ibid.*

¹²³ JOHN STUART MILL, *On Liberty* in JOHN STUART MILL: ON LIBERTY AND OTHER ESSAYS 14 (John Gray, ed., 1991)(1859).

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

Another utilitarian, Felix Cohen, in the essay “Dialogue on Private Property” wrote, “property rights should be arranged to promote a proper combination of social goals such as welfare, justice and economic productivity.”¹²⁷ In accord with utilitarian ideals, the merits of an arrangement should be judged according to how well it promotes the “good life” of those affected by it.¹²⁸ As opposed to natural law which views property as a relation between an owner and the owned object, Cohen believed property should be seen as bundles of legal relations between the owner and non-owners.^{129 130} The legalization of a market in human organs would

¹²⁷ Felix Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357-87 (1957).

¹²⁸ ALTRUISM RECONSIDERED: EXPLORING NEW APPROACHES TO PROPERTY IN HUMAN TISSUE 108 (Michael Steinmann et al. eds. 2009).

¹²⁹ COHEN, *supra* note 127.

¹³⁰ As a continuation of Cohen’s analysis, Tony Honoré compiled a detailed list of the various rights and obligations that could be included in the bundle of legal relations. The list includes:

1. The right to possess;
2. The right to use;
3. The right to manage;
4. The right to receive the income or benefits of;
5. The right to the capital, in that the owner has the power to alienate the thing and the liberty to consume waste or destroy;
6. The right to security, meaning that owner can look forward to being owner indefinitely;
7. The incident of transmissibility, that the interest can be transmitted to the holder’s successors;
8. The incident of absence of term, meaning ownership does not cease to be valid at a future date or at the occurrence of an event;
9. The duty to prevent harm, requiring that the owner not use the thing to harm others and must prevent others from using it for harm;
10. Liability to executive, that it can be taken away from the owner for debt;
11. The residuary character, meaning “either immediately or ultimately, the extinction of other interests would inure to the owner’s benefit”.

Honoré admitted that people can have very strong interests in things, such as our bodies, that do not fit the traditional forms of ownership but believed these interests cannot rise to the level of ownership because people are not free to dispose of their bodies. Though suicide is technically unlawful and therefore people may be viewed as unfree to dispose of their bodies in a traditional sense, attempted suicides are not prosecuted. Nor are people prohibited from voluntarily removing body parts, such as fingers or toes, for ceremonial or even masochistic purposes, though it may be looked upon as unnatural. If people are not authorized to make decisions regarding the disposition of their bodies, wishes at death for either cremation or burial would not be respected because the individual would lack the capacity to decide the means of disposal of her body. Although a body is viewed differently after death, the ability to dispose of the body after death should be seen as a property right and extended to the living body, which also fits the requisite characteristics of property. Additionally, if we accept that people are not free to dispose of their bodies, people would never be permitted to remove an organ, for donation or otherwise, because the removal constitutes a partial disposition of the body.

promote the welfare and “good” of those involved by granting the recipient the opportunity to obtain the necessary organ much sooner than under the present system of donation and by permitting the “vendor” a chance for financial enrichment while helping someone in need.

Dispensing with the complicated scheme of moral ideals, Robert Nozick’s market theory provides a convincing, modern philosophical defense of a commercial market in live organs. In *Anarchy, State, and Utopia*, Nozick espouses the basis of morality in a transaction as the agreement by all involved parties to collaborate and grant permission.¹³¹ Therefore, all market transactions are moral if all parties consent to the transaction.¹³² For validity, parties need not have the same values, culture or religion, but need only to agree on the content of the agreement.¹³³ The agreement itself provides the moral justification for the transaction.

In contrast to the beliefs of Kant, Nozick believes that people can use an individual, but only with their consent, in order to respect them as free individuals.¹³⁴ People should be permitted to choose their conduct freely in their own best interests even if they choose in ways

Most of the legal rights and obligations from Honoré’s list can be applied to the context of an organ. A person obviously possesses, uses, and manages their organs and body. More abstractly but no less clearly, a person has the right to reap the benefits of their organs (life), can waste or destroy their organs (for example, by use of drugs or alcohol), and are assured that they will forever have their organs, unless voluntarily removed¹³⁰. The interest in an organ or the body as a whole can be subscribed to one’s successors by allowing them to choose the manner of disposal of a deceased person’s body. On a similar note, an individual forever owns their body, as the law recognizes the fact that people can decide what should happen to their body after their death. However, some of these rights and obligations do not seem applicable. For example, a person cannot do harm with their organs¹³⁰ so the duty to prevent harm is inapplicable. Although a person’s organs cannot be taken for debts, a person’s body can be restrained for commission of a crime (as in imprisonment) or entirely taken away (as in the death penalty). Though all of the characteristics of the list do not flawlessly apply to organs, Honoré wrote “the list incidents [the 11 components], though they may be together sufficient, are not individual necessary conditions for the person of inherence to be designated the owner of a particular thing.” Tony Honoré, *Ownership*, 61 COLUM. L. REV. 1384, 1386-90 (1961).

¹³¹ ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1977).

¹³² *Ibid.*

¹³³ CHERRY, *supra* note 54, at 140.

¹³⁴ NOZICK, *supra* note 131, at 57-58.

other people consider unwise.¹³⁵ Nozick's "nonpaternalistic position holds that someone may choose (or permit another) to do to himself anything, unless he has acquired an obligation to some third party not to do or allow it."¹³⁶ Rather than charging the State with the authority to implement and create moral policies, Nozick thinks that the government can only legitimately exercise power that the people freely transfer to it, requiring that actual persons give actual consent to the policy or that the policies protect the rights of persons not to be touched or used without permission.¹³⁷ As a result of the limitations imposed on government, it has no general authority to intrude on the consensual transactions of people. The market, therefore, should exist free from intrusion as a place for consensual interaction. Morality exists through this market allowing people to pursue their own goals without requiring a shared moral outlook.¹³⁸ Because morality is irrelevant, a commercial organ market would be permitted without an analysis of the moral underpinnings of the business deal as long as it can be ascertained that both individuals freely consent to the transaction.

V. Conclusion

The living human body itself is not a commodity. However, organs non-essential to basic living (or after the death of the individual) can be treated as a commodity without any threat to existence and with benefits streaming to all involved parties in the transaction. The property rights of an individual in his or her own body must be acknowledged to avoid the contradiction of acknowledgement of property rights for gift purposes but rejecting these rights for commercial purposes. Though not a popular idea, nothing can more fundamentally represent property

¹³⁵ Eric Mack, *How to Derive Libertarian Rights*, in *READING NOZICK: ESSAYS ON ANARCHY, STATE, AND UTOPIA* 286, 288 (Jeffery Paul ed., 1981).

¹³⁶ NOZICK, *supra* note 131, at 57-58.

¹³⁷ *Id.* at 118.

¹³⁸ CHERRY, *supra* note 54, at 142-43.

ownership than something that cannot be taken and that an individual has no matter where they go. Every traditional identifying characteristic of property can be applied to a human organ – an organ is possessed by¹³⁹ the body that contains it, controlled by that individual, the individual can exclude others from access to the organ, the individual enjoys the benefits and uses of the organ and can dispose of the organ through legal donation or unconventional removal. The definition of property wholly applies to human organs and that right of ownership cannot be stripped from an individual because of an abstract belief that the human body transcends ownership. Although human organs may be viewed as inalienable property, I have attempted to diffuse the underlying justifications for inalienability in this context, primarily quality control and distribution issues.

Once it is accepted that the reality of the organ shortage can only be fully addressed through a drastic measure, the establishment of a commercial market in organs should be analyzed as a viable option. Because an individual has property rights in their body, the law should not outright refuse the ability to sell organs where no interest is implicated in protecting the individual from the actual removal of the organ. Rather, legislation should ensure the well-being of those involved through regulation instead of prohibition. The practical and moral concerns presented by critics could be remedied through a well-designed regulatory system, essentially as an expansion of the current Organ Procurement and Transplantation Network which already provides the framework necessary to make the market successful. Many of the philosophical arguments prove to be contradictory in a world where organ donation is encouraged and transplantation is viewed as commonplace and desirable. Instead, some modern philosophical regimes demonstrate the moral justification for the practice.

¹³⁹ Though this may not be the traditionally terminology, because the body literally “has” or contains the organ, using the language of the bundle of property rights, the body can be seen to possess this organ.

The commercialization of body parts may seem extreme to many people for sentimental and practical reasons. However, the market for regenerable body tissue was once viewed as such but since its institution many years ago, the market has been successful and thriving. The extension of this market to include human organs would begin to address the gross shortages that cost our country thousands of innocent lives every year and an immeasurable amount of pain for those patiently waiting for an available organ. Commodification does not provide one-sided benefits only to the recipient; granting the option of a sale to the organ owners would be in the interests of all involved parties. Because all of the practical, moral and philosophical arguments against commodification can be met with an equally convincing response, the only remaining barrier to the legalization of this market is sentiment. It is indisputable that the human body is irreplaceable and precious. To maintain standards of society, the body should not be disturbed without good cause, strictly for profit. But, what better cause exists than saving a life while improving your own situation?