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## Redefining Stewardship over Body Parts

Elizabeth E. Appel Blue

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# REDEFINING STEWARDSHIP OVER BODY PARTS

ELIZABETH E. APPEL BLUE\*

“And the question will then arise whether we are still willing to use the concept . . . or whether in such circumstances it has lost its purpose, because the phenomena gravitate towards another paradigm . . .”

Ludwig Wittgenstein, *Philosophical Investigations* (3d ed. 1958) (translated by G.E.M. Anscombe), at ¶ 385 (p.118e).

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## I. INTRODUCTION

Today’s society struggles with organ shortages.<sup>1</sup> Exacerbating the problem is the absence of a universally accepted paradigm for how justly to treat body parts, such as

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<sup>1</sup>The United Network for Organ Sharing (UNOS), for example, reported a waiting list of 92,587 as of August 15, 2006, with a total of 12,002 transplants from January to May of 2006 and 6122 donors in that same period. See <http://www.unos.org>. These numbers are “dynamic

organs and tissue. Scholarly tomes are filled with articles addressing this subject. Yet confusion still reigns. Limited framing of the question that requires acceptance of either a property/market paradigm or altruistic donor paradigm has failed to lead to a solution, as neither the property nor altruistic solutions are universally accepted. Further, many compromise solutions also fall short as they are either impractical legislative solutions with no realistic chance of implementation or small, piecemeal, too little, too late experiments. Similarly, the case law addressing body parts imparts a sense of disorder and bewilderment. The law is at a loss as to how to address body parts consistently. This failure to reach a generally acceptable solution to the treatment of body parts can be seen as a “failure of [our] imagination.”<sup>2</sup>

This paper proposes one possible avenue for defining a framework to address body parts. I begin with the presumption that given the increasing use of body parts outside of our bodies, either after death or during life, society requires a framework with institutions and rules to govern our body parts. Yet there is no settled framework. Much of the controversy over differing approaches stems from whether people should be able to sell body parts. Thus, each potential framework implicitly addresses the question of monetary value. While multiple possibilities exist, the predominant models are (1) property, most often meaning ownership that permits monetary compensation; (2) stewardship, implying altruism and no monetary compensation to the donor; and (3) a compromise solution involving regulatory bodies, which could assign monetary value under certain circumstances.

Each approach suffers from multiple shortcomings. Yet each has its strengths. For example, the need for rules drives, in part, the attraction to a market and property paradigm, with its long-standing and familiar institutions and rules.<sup>3</sup> Yet property is not an exact match, and significant long-term problems regarding how we conceive of ourselves may develop if our legal conceptions of property are mapped directly onto our bodies. Stewardship is a competing concept often relied upon, but it lacks the institutions and rules that the property concept provides. As a vague and amorphous ethical concept, stewardship is poorly suited to be a consistent guide in

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and change[] throughout the year.” INST. OF MEDICINE, ORGAN DONATION, 1, 46 (James F. Childress & Catharyn T. Liverman, eds., 2006) [hereinafter ORGAN DONATION]. While some candidates may have multiple registrations, regardless of how numbers are tallied, plainly, in economic terms, organ supply falls far short of demand, and each year many individuals die waiting for a transplant. *Id.* at 1-2, 45-46. The vast majority of these individuals—more than 70 percent—are in need of kidneys. *Id.* at 2, 46.

<sup>2</sup>Salman Rushdie used this phrase in discussing the Islamic and Judeo-Christian word’s understandings of each other in an interview with Bill Moyers in Public Broadcasting’s Reason and Faith series. Interview by Bill Moyers with Salman Rushdie (June 23, 2006) (transcript available at [http://www.pbs.org/moyers/faithandreason/print/faithandreason101\\_print.html](http://www.pbs.org/moyers/faithandreason/print/faithandreason101_print.html)). See also DANIEL C. DENNETT, CONSCIOUSNESS EXPLAINED 17 (1991) (explaining how “paradoxes that beset traditional philosophical debates about . . . the nature of the self or ego and its relation to thoughts and sensations . . . arise from *failures of the imagination*”) (italics in original).

<sup>3</sup>And, as discussed, *infra* in Sections III.A and IV, we also use our bodies, in part, as a way of defining both our privacy and property rights in relationship to others and to the state. See Radhika Rao, *Property, Privacy and the Human Body*, 80 B.U. L. REV. 359, 365 n.15 (2000). For that reason, there is a natural inclination to associate them as “ours.” And, in some sense, they are more ours than any other object in the world. The dilemma is that they are more than an object that belongs to us—they also constitute our subjectivity.

the evolving reality of a marketplace of human tissue and other body parts.<sup>4</sup> Markets and other distribution systems require consistent off-the-rack rules, as well as ethics. This paper, therefore, seeks to look creatively at other bodies of law to see if they can be reimagined and used to give stewardship some backbone, meaning concrete principles that can be applied to the use of body parts. In doing so, it seeks to provide a place for compensation and incentives which property provides but avoid some of the pitfalls of property by preserving the special place that the body has in defining ourselves and our humanity. It seeks to do this by using, as a starting point, one of the law's older bodies of law, agency law. While, like so many other concepts, there is not an exact match with this concept either, there is the potential to take agency law as a starting point and fashion certain principles into a better fit than either property or undefined stewardship.

The first step in the process is to review today's treatment of body parts. Thus, the second section of this paper looks at the markets surrounding the use of body parts. Next it reviews a variety of approaches taken to body parts to discern what is appealing and what is lacking in each approach. Then, after reviewing existing law and literature, this paper asks what a paradigm addressing body parts must accomplish. Finally, it begins to outline how certain aspects of agency law could be relied upon and modified to meet the challenges facing any governing framework.

## II. BODY PARTS IN CONTEMPORARY SOCIETY

"In recent history, we have seen the human body assume astonishing aspects of [commercial] value."<sup>5</sup>

Within the past several decades, modern medicine and bio-technology have revolutionized the uses of the human body. Notwithstanding efforts to protect the body and its parts as a sacrosanct realm, markets have evolved in tissue, organs, and other body parts, as these "human" parts constitute the raw material in multiple industries. The tissue industry over the course of a decade, for example, has evolved from approximately a \$20 million dollar industry in the early 1990s to a billion dollar industry in 2003.<sup>6</sup> And the raw component for this industry is the human body, which continues to increase in market value. On average a cadaver generates between \$30,000 to \$50,000 in value, but a single cadaver can generate over \$200,000.<sup>7</sup>

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<sup>4</sup>Indeed, "stewardship" as a word and concept does not even have its own entry in any dictionary I could find. See *infra* note 237 (discussing dictionaries' treatment of stewardship).

<sup>5</sup>*Moore v. Regents of the Univ. of Cal.*, 249 Cal. Rptr. 494, 504 (Cal. Ct. App. 1988), *rev'd*, 793 P.2d 479 (Cal. 1990).

<sup>6</sup>TRANSPLANTING HUMAN TISSUE: ETHICS, POLICY AND PRACTICE xi (Stuart J. Younger, *et al.*, eds., 2004); see also Michele Goodwin, *Altruism's Limits: Law, Capacity, and Organ Commodification*, 56 RUTGERS L. REV. 305, 387 n. 406 (2004).

<sup>7</sup>Younger, *et al. supra* note 6, at 13. See also Goodwin, *Altruism's Limits, supra* note 6, at 387 n.407 (2004) (citing Investigating Regeneration Technologies Report). Tissue-based products used in spinal surgery, for example, generated approximately 300 million in revenues to tissue banks in 2001. Martha W. Anderson & Scott Bottenfield, *Tissue Banking—Past, Present, and Future*, in YOUNGER, *ET AL. supra* note 6, at 17.

There are thriving markets, both licit and illicit, in the United States and abroad.<sup>8</sup> Regulation of these markets varies, running the spectrum from extensive to nonexistent.<sup>9</sup>

Complicating the industry's ethics is the unfortunate fact that the source of much of its raw material for commercial transactions is derived from body parts often donated by individuals or their families with altruistic motives.<sup>10</sup> As the Inspector General of Health and Human Resources noted, these altruistic feelings conflict with the reality that their donations are the backbone of large-scale commercialized and often profit-driven or, at a minimum, bottom line driven industries.<sup>11</sup> In the tissue industry, for example, donated skin becomes a commodity and is often applied to cosmetic higher dollar value products instead of what might have been envisioned by the donor as the most need driven purpose of, for example, aiding a burn victim.<sup>12</sup>

Moreover, financial incentives have led to many abuses of the system.<sup>13</sup> Multiple scandals have surfaced in which non-consenting donor tissue has been used to generate profits.<sup>14</sup> In 1997, for example, the Los Angeles Times uncovered evidence that the Los Angeles coroner was illegally trafficking in body parts by selling corneas without consent for \$335 per pair, which were then resold at \$3400 per pair by a tissue transplant bank.<sup>15</sup> In 2004, the David Geffen School of Medicine at UCLA found itself in the middle of a scandal in which cadavers donated by families for medical purposes (*e.g.*, anatomy class) were being sawed into pieces and sold on

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<sup>8</sup>For example, while, as discussed below, the sale of organs is illegal in the United States, foreign organ sales occur on a black market. *See, e.g.*, ORGAN DONATION, *supra* note 1, at 274 (describing study of 305 individuals in Chennai, India who sold their kidneys—the vast majority doing so in order to pay off debt); Goodwin, *supra* note 6, at 309; Craig S. Smith, *Quandary in U.S. Over Use of Organs of Chinese Inmates*, NEW YORK TIMES, Nov. 11, 2001 (describing anecdotal evidence of increasing numbers of Americans receiving transplants in China with organs from executed Chinese prisoners and then returning to the United States for follow-up care).

<sup>9</sup>The Food and Drug Administration, for example, has only recently started registration and inspection requirements for tissue banks. Goodwin, *supra* note 6, at 386.

<sup>10</sup>Younger, *et al.*, *supra* note 6, at 85-98. Eighty-five percent of tissue retrieved today, especially bone, is processed into paste, powder, chips, and many additional configurations for use that the public does not traditionally associate with transplant and donor products. Jeffrey Prottas, *Ethics of Allocation, Lessons from Organ Procurement History*, 120-138 in TRANSPLANTING HUMAN TISSUE, *supra* note 6.

<sup>11</sup>Even non-profit entities have bottom lines that must be met.

<sup>12</sup>Goodwin, *supra* note 6, at 382 n.381. While many uses of tissue are legitimate and may be foreseen, the fact that cadaver skin is used to “enhance penis size, puff up lips, or erase laugh lines” and that “[p]lastic surgeons have not reported trouble obtaining skin for plastic surgery, but burn centers across the country are struggling to find skin to treat burn victims,” may not be envisioned by most donors. *Id.*

<sup>13</sup>*See infra* notes 13-20 and accompanying text.

<sup>14</sup>*Id.*

<sup>15</sup>Michelle Goodwin, Op-Ed., *Commerce in Cadavers Open Secret*, LOS ANGELES TIMES, March 11, 2004.

the open market.<sup>16</sup> As many as 800 cadavers donated to the institution for medical research had been transferred to private companies for use in the medical parts and device industry in exchange for monetary fees.<sup>17</sup> There is no shortage of similar scandals. For example, just last year, a New York dentist, two of his workers, and an embalmer were charged with having illegally taken and traded \$4.6 million worth of body parts from corpses in funeral homes.<sup>18</sup> Local prosecutors alleged that these four men had illegally sold human tissue taken from more than 1,000 cadavers at various funeral homes where consent had been forged on papers by the owners of the home without the next of kin's knowledge or consent.<sup>19</sup>

Use of cadaveric tissue is not the only industry arising out of human body parts. Private sales of eggs for tens of thousands of dollars have been reported.<sup>20</sup> Sperm is regularly purchased and sold by fertility clinics.<sup>21</sup> In Texas, a company now offers for sale fertilized eggs that potential parents can select after reviewing the college board scores, race, and genetic background of the egg and sperm donors.<sup>22</sup> Yet, despite the reproductive industry's growth, there is virtually no regulation of fertility clinics and their use of reproductive body parts.

Similarly, research participants or patients undergoing surgery are treated as donors (with no remuneration) when their tissue or other parts are extracted during medical treatment.<sup>23</sup> Those body parts may then be used for biomedical research and product development.<sup>24</sup> In the most famous case to date, John Moore filed suit after discovering that his doctor had developed and patented an extremely profitable cell

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<sup>16</sup>*Id.*

<sup>17</sup>*Id.*

<sup>18</sup>Robyn S. Shapiro, *Mining the Human Body: Biotech advances demand new laws regulating the trade in cadavers*, LEGAL TIMES, May 17, 2004.

<sup>19</sup>Michael Brick, *4 Men Charged in What Officials Call a \$4.6 Million Trade in Human Body Parts*, N.Y. TIMES, Feb. 24, 2006. Perhaps even more disturbing than the lack of consent is the fact that "no medical precautions were taken to ensure that these transplants were free from disease," and these men often lowered the age of the deceased and altered the cause of death "to make the tissue appear more promising for transplant or therapy." *Id.*

Such scandals are by no means new. England and the United States faced similar scandals in the Nineteenth Century when a market for cadavers for anatomy lab developed. Two Scotsmen, William Burke and William Hare even went so far as to commit murder (not just disinter the recently buried) in order to provide fresh bodies to anatomists and universities. RUSSELL SCOTT, *THE BODY AS PROPERTY* 9-10 (1981); Shapiro, *supra* note 18.

<sup>20</sup>Goodwin, *supra* note 6, at 390-91 (describing the purchase of eggs in the United States from a website selling model eggs for as much as \$50,000 and United Kingdom egg sales)..

<sup>21</sup>*Id.*

<sup>22</sup>Rob Stein, *'Embryo Bank' Stirs Ethics Fears: Firm Lets Clients Pick Among Fertilized Eggs*, WASHINGTON POST, Jan. 6, 2007, at A1.

<sup>23</sup>Donna Gitter, *Ownership of Human Tissue: A Proposal for Federal Recognition of Human Research Participant's Property Rights in Their Biological Material*, 61 W. & L. L. REV. 257, 270 (2004). See also LORI ANDREWS AND DOROTHY NELKIN, *BODY BIZARRE: THE MARKET FOR HUMAN TISSUE* 24-41 (2001).

<sup>24</sup>*Id.*

line initially named after him as the Mo-cell line,<sup>25</sup> which had a market potential to generate up to \$3 billion in proceeds by 1990.<sup>26</sup> His cells had been taken and used for research without his knowledge or consent during his treatment for hairy cell leukemia at the University of California, Los Angeles Medical Center. When Moore sued alleging an ownership right in his body parts, a strongly divided California Supreme Court sided with the emerging biotech industry and awarded him no legal ownership interest in his body parts.<sup>27</sup>

Organs represent one of the most highly regulated of the fields using body parts and one of the more publicly visible uses of body parts.<sup>28</sup> The first successful organ transplantation between living brothers took place in 1954 and the first from a deceased donor took place in 1962.<sup>29</sup> Organ transplantation over the last fifty years has prolonged thousands of lives. As of the spring of 2006, medical teams had transplanted over 390,000 organs since 1988.<sup>30</sup> During 2005, 7593 deceased donors “provided 23,249 transplanted organs in the United States alone, and there were 6,896 living donors.”<sup>31</sup> The waiting list, however, continues to grow, and the difference between supply and demand keeps widening as a result.<sup>32</sup> In 2005 alone, for example, 44,619 candidates were added to the kidney transplant waiting list.<sup>33</sup> Many individuals die each year while waiting for a transplant. These deaths, which

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<sup>25</sup>Defendants later renamed the cell line to avoid detection by John Moore. *Moore*, 249 Cal. Rptr. at 500; *see also* Gitter, *supra* note 23, at n. 63.

<sup>26</sup>*Moore*, 249 Cal. Rptr. at 498; *see also* Gitter, *supra* note 23, at n. 274.

<sup>27</sup>*Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479 (Cal. 1990); *see also* discussion of *Moore* in ANDREWS & NELKIN, *BODY BIZARRE*, *supra* note 23, at 27-36, and discussion in Rao, *supra* note 3. More recently, the National Research Council (“NRC”) in 2005 issued Guidelines for Human Embryonic Stem Cell Research which recommend that researchers make no payment “in cash or in kind, to any person who donates tissue for stem cell research, including eggs, sperm, adult cells, or frozen early-stage embryos stored at in vitro fertilization clinics.” Russell Korobkin, *Buying and Selling Human Tissues for Stem Cell Research*, 49 ARIZ. L. REV. 45, 45 (2007).

<sup>28</sup>Blood, through its use in transfusions, is obviously far more common and, therefore, more visible. Despite some controversy over paying for blood, the systems for blood donation and disbursement through the Red Cross and other blood banks are fairly well established and uncontroversial at this moment in time—with most blood donated today; whereas, prior to the 1970s, most blood was purchased. But payment for blood is still not unheard of and has continued under certain circumstances. Jennifer Mahoney, *The Market for Human Tissue*, 86 VA. L. REV. 163, 172 (2000) (citing several studies).

<sup>29</sup>ORGAN DONATION, *supra* note 1, at 18.

<sup>30</sup>*Id.* at 15.

<sup>31</sup>*Id.* at 15, 46 (citing National Data Reports on OPTN website, at <http://www.optn.org>). This data is continuously updated and revised.

<sup>32</sup>*Id.* at 1-2, 15-16, 46.

<sup>33</sup>*Id.* at 16. Those awaiting kidney transplants make up approximately seventy plus percent of the waiting list and, thus, are the dominant factor in the growing need for organs. *Id.* at 46.

result from the inadequate organ supply, have led to multiple calls for reforming the donation system, as well as an international black market in organs.<sup>34</sup>

Currently in the United States, a deceased donor's eligibility requires meeting neurological death criteria plus opting-in through consent given by the deceased prior to death or from the next of kin after death.<sup>35</sup> Depending on the study, only a small percentage of deaths each year in the United States meet the neurological death criteria. The figures are approximately between 12,000 to 16,000. Within this pool of potential donors, consent to donate rates vary among Organ Procurement Organizations ("OPOs") from somewhere in between thirty and seventy percent.<sup>36</sup> Consent rates are increasing slowly with improvements in identifying candidates and processes for approaching and asking family members to participate in organ donation. By law, hospitals must request permission from relatives to recover organs from deceased candidates, but there is no presumption of consent, and in the absence of consent, organs cannot be collected.<sup>37</sup>

Multiple avenues for increasing the supply are being pursued. Best practices for approaching families and seeking donations are constantly being refined and implemented. Furthermore, gift of life initiatives are being encouraged in schools and workplaces and through driver education programs. The Institute of Medicine ("IOM") is advocating expanding the pool of potential donors by changing the criteria from neurological death to cardiovascular death.<sup>38</sup> Yet the supply today remains inadequate to meet the ever increasing demand.

Direct sale of organs for transplant is illegal.<sup>39</sup> The Uniform Anatomical Gift Act ("UAGA"), adopted in 1968 by the National Conference of Commissioners on Uniform State Laws and amended in 1987, permits donation from cadavers for transplants and medical research. All fifty states have adopted the UAGA in some part. While the UAGA does not address the sale of organs or other body parts, the National Organ Transplant Act, enacted by the United States Congress in 1984,

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<sup>34</sup>See *supra* note 8.

<sup>35</sup>ORGAN DONATION, *supra* note 1, at 22.

<sup>36</sup>*Id.* at 22-25 (discussing dramatically differing consent rates among OPOs). Each organ transplant center is associated with an OPO. See discussion *infra* note 38 and accompanying text for discussion of the organ distribution system in the United States.

<sup>37</sup>Omnibus Budget Reconciliation Act, 7 U.S.C.A. §§ 1314-1445 (West 1986) (requiring all hospitals receiving Medicare or Medicaid funds to institute "required request" policies). Hospital accreditation standards also require request and referral policies as part of accreditation. ORGAN DONATION, *supra* note 1, at 101.

<sup>38</sup>ORGAN DONATION, *supra* note 1, at 281-82. Expanding the pool by expanding eligibility to include circulatory criteria could dramatically increase the pool size, but there are numerous challenges that must be met in order to accomplish such an expansion. *Id.* at 22-25, 127-74.

<sup>39</sup>National Organ Transplant Act of 1984, Pub. Law 98-507, 42 U.S.C. Sections 273-274(f) make it illegal "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." For discussion of events leading up to the NOTA, see ORGAN DONATION, *supra* note 1, at 230-32. Many states also have enacted state laws making the sale of organs illegal. But note that the sale of other body parts that are renewable, such as sperm and blood, is not illegal. *Id.* at 230.



expressly prohibits the sale of organs for transplant. It does not address the sale of organs for other purposes or body parts other than organs, although some states expressly ban the sale of organs for any purpose and the sale of body parts. Virginia, for example, bans the sale of any natural body part for any reason but excepts hair, blood, and other self-replicating body fluids.<sup>40</sup>

Despite these efforts, organs are bought and sold on black markets. Traffic in organs from executed Chinese prisoners or the poor and desperate in Brazil, Russia, India, and other less developed, poor nations is well documented.<sup>41</sup> The IOM's 2006 report on organ donation discusses a study of individuals in Chennai, India, who sold kidneys to pay off debt. Ultimately, these organ transplants resulted in poor outcomes for all involved. There were complications, including sepsis, hepatitis B, and liver cirrhosis, as well as other complications in those who received the organs, and there were no long-term benefits to the donors, as their health deteriorated without adequate follow-up care.<sup>42</sup> Moreover, the ability of donors to work or take care of their families deteriorated even further from where it had been prior to the loss of an organ.<sup>43</sup>

As to the legal distribution systems, significant logistical and ethical difficulties arise with distributing the inadequate supply of organs in this country. Consequently, Congress created a highly organized system of OPOs associated with transplant centers. The OPOs receive all donated organs through a distribution system run by a private organization under contract with the Health and Human Services Administration—currently, the United Network for Organ Sharing (“UNOS”).<sup>44</sup>

UNOS and the OPOs have made continuous efforts to improve donor rates and distribute organs in a just and fair manner. They have made slow but steady progress.<sup>45</sup> Because of the slow progress, the fact that need outstrips demand, and the desperation of those in need, numerous alternatives in addition to the black

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<sup>40</sup>VA CODE § 32.1-291.16.

<sup>41</sup>See *supra* note 8; see also Goodwin, *supra* note 6, at 309 (citing *Organs for Sale: China's Growing Trade and Ultimate Violation of Prisoners' Rights: Hearing Before the Subcomm. on Int'l Operations and Human Rights of the Comm. on Int'l Relations*, 107th Cong. 24 (2001) (testimony that “the traffic in human organs, tissues, and body parts” is extensive and occurring in China, India, Brazil, and other countries); see also Michael Finkel, *Complications*, N.Y. TIMES, May 27, 2001 (detailing extensive international trade of organs from executed Chinese prisoners supplying organs to American patients).

<sup>42</sup>ORGAN DONATION, *supra* note 1, at 274.

<sup>43</sup>*Id.*

<sup>44</sup>The UNOS, a non-profit private organization, has administered the Organ Procurement and Transplantation Network (OPTN) since its inception. ORGAN DONATION, *supra* note 1, at 20-21. Under federal law, all OPOs and transplant centers must participate in the OPTN. *Id.* at 20. UNOS employs complex algorithms to allocate organs based on numerous factors, which it revises and updates as needed. *Id.* However, the OPTN has little involvement with living donor transplants and does not oversee tissue donation. *Id.* at 31.

<sup>45</sup>*Id.* at 104-20; 189-99. UNOS is constantly seeking to make its system more fair. See, e.g., Laura Meckler, *Picking Willers: More Kidneys for Transplants May Go to Young - Policy to Stress Benefit to Patient Over Length of Time on Waiting List*, WALL ST. J., Mar. 10, 2007, at A1.

market arose over time. In the case of kidneys and livers (a small section can be used), for example, live donor transplants have become increasingly common.<sup>46</sup>

While the most obvious living donors are relatives, living donations from complete strangers are increasing. The Internet has proved to be a ripe universe for desperate individuals on the waiting list, and Internet matching websites have become more common.<sup>47</sup> Desperate individuals with resources can post donor requests on the Internet and engage in publicity campaigns through billboards and local media.<sup>48</sup> These individuals essentially throw all their resources into finding a willing live donor. While, technically, they cannot pay the donor, they can compensate the donor for lost work time and travel, as well as hospital, medical, and other similar out-of-pocket expenses. Such tactics have proved successful in a limited number of known cases.<sup>49</sup>

States are starting to experiment with a variety of tactics for increasing both cadaveric and live donor rates. Wisconsin gives state tax breaks to benefit organ donors, and dozens of states are following Wisconsin's lead by granting \$10,000 in tax deductions for expenses such as travel, hotel bills, and lost wages.<sup>50</sup> Pennsylvania passed legislation which creates a fund from \$1 donations collected voluntarily at the time a person applies for a driver's license or registers a vehicle.<sup>51</sup>

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<sup>46</sup>A part of a lung lobe, the intestine, and the pancreas can also be transplanted from a living donor. Also domino heart transplants can occur. See UNOS, <http://unos.org/in the News/factsheets.asp?fs=2> (last visited Oct. 25, 2007).

<sup>47</sup>See, e.g., *Internet Kidney Op Gets Go-Ahead*, BBC NEWS, Oct. 20, 2004, available at <http://news.bbc.co.uk/go/pr/fr/-/2/hi/americas/3758392.stm>.

<sup>48</sup>See, e.g., Scott Dodd, *Wanted: Kidney Donor, Chance for Health; Mom's Desperate Ad Nets Calls for Ailing Daughter*, CHARLOTTE OBSERVER, Nov. 20, 2004, at 1A (describing a mother running an ad in the Sunday classifieds for more than a month for a kidney for her daughter and complete strangers calling and going for testing to see if they were a match); Tim Eaton, *A Public Plea Woman with Liver Disease Seeks Help Through Billboard*, CORPUS CHRISTI CALLER-TIMES, Sept. 23, 2004, at A1; Paul Harasim, *I Need An Organ Donor*, LAS VEGAS REVIEW-JOURNAL, Aug. 25, 2004, at 1A (describing use of personal website, media interviews, and billboards by individuals in need of an organ); A.J. Hostetler, *UNOS Opposes Transplant Appeals; Board Says It's Not Fair When Patients Solicit Organs for Themselves*, RICHMOND TIMES DISPATCH, Nov. 20, 2004, at A-1; Anne Marie Kilday, *Organ Network Moves To End "Cutting In Line" Houston Man's Use of Billboards Spurs a Push To Halt Donor Solicitation*, HOUSTON CHRONICLE, Nov. 20, 2004, at A1.

<sup>49</sup>Forty-six donors have been matched with recipients through one website, MatchingDonors.com. Joann Klimkiewicz, *The Kindness of Strangers: Foes Don't Stop MatchingDonors.com from Connecting the Needy with the Generous*, HARTFORD COURANT, Aug. 12, 2007, at Lifestyle. Increasingly, such websites are gaining acceptance. UNOS, for instance, has stepped back from its initial opposition to such matches and now takes no stance on how donors and recipients meet. *Id.*

<sup>50</sup>Amanda Paulson, *More States Explore Tax Breaks To Benefit Organ Donors*, THE CHRISTIAN SCIENCE MONITOR, Oct. 19, 2004, at 2. Federal legislation which authorized grants to support similar reimbursement plans tacitly endorses such experimentation with non-direct compensation schemes. *Id.*

<sup>51</sup>Gregory Boyd, *Considering a Market in Human Organs*, 4 NC J.L. & TECH. 417, 459 (2003).

The fund is designed to provide up to \$3,000 per cadaveric donor to help the family with reasonable hospital, medical, and funeral expenses.<sup>52</sup> The expenses are paid directly to the provider to avoid conflicting with the ban on payment for organs.<sup>53</sup> In January 2002, the state fund became operational and paid \$3,000 in such expenses to nineteen families who applied in the first six months.<sup>54</sup> Most recently, a legislator in South Carolina introduced legislation that would shorten the term of a prisoner's sentence if she chooses to donate an organ.<sup>55</sup>

These methods are not without controversy. Living donation is still ethically controversial because it violates one of the primary tenets of medical ethics: "Above all [or first] do no harm."<sup>56</sup> Technically, a living donor is doing harm to herself, and many medical ethicists and doctors are uncomfortable with living donation unless it is a family member.<sup>57</sup> Financial incentives of any sort, whether tax deductions or reimbursement of expenses, are also controversial because they are seen as a step toward commodification of the body.

Conversely, the failure to encourage more living donation is also controversial. The economics of kidney transplant over dialysis is clear; despite the significant costs of a kidney transplant, it is significantly less expensive than ongoing dialysis for a patient. Iran, for example, engaged in a program of purchasing kidneys for transplant.<sup>58</sup> And, in the United States, there are many proposals for increasing supply through permitting monetary and other incentives.<sup>59</sup> It is unclear, however, whether such incentives would increase the supply.<sup>60</sup>

In summary, the United States enforces altruism for most donors but permits some minor forms of compensation. Thus, it has allowed significant markets to evolve on the backs of enforced altruism. Underneath this somewhat conflicting system of altruism and markets, multiple alternative systems, including black markets, have developed. It is a system described as a blend of "altruism and commerce, . . . voluntarism and coercion; of gift, barter, and theft."<sup>61</sup> Unfortunately,

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<sup>52</sup>*Id.*

<sup>53</sup>*Id.*

<sup>54</sup>*Id.*

<sup>55</sup>Seanna Adcox, *South Carolina Looks at Giving Inmates Reduced Sentences for Organ Donations*, THE A.P., Mar. 9, 2007, at 3A.

<sup>56</sup>TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 113 (5th ed. 2001).

<sup>57</sup>While it is controversial in that it violates the do no harm ethic of doctors, from the donor's perspective it is a self-regarding act that is not harming others, but helping others, and would be permissible under the social philosophy of John Stuart Mill, for example. JOHN STUART MILL, *ON LIBERTY* (Curran V. Shields ed., 1956) (1859).

<sup>58</sup>ORGAN DONATION, *supra* note 1, at 29, 34.

<sup>59</sup>The list of alternatives suggested is quite broad and ranges from creating futures markets, to granting preferences on waiting lists to those who have consented to organ donation, to granting discounted insurance premiums or an estate tax credit for donors.

<sup>60</sup>ORGAN DONATION, *supra* note 1, at 242-44.

<sup>61</sup>Michele Goodwin, *Altruism's Limits*, *supra* note 6, at 307 (citing Nancy Scheper-Huges, *The Organ of Last Resort*, UNESCO COURIER, July/Aug. 2001, at 50-51).

at times, within this system, “[i]nformation is poorly distributed if not concealed, and the failure to develop a social policy for the many is mitigated only by the self-help of the few—in particular, those few who are fittest for bargaining or litigation.”<sup>62</sup> Aggravating this state of affairs is the absence of a clearly articulated legal and ethical approach to body parts. How to treat body parts, however, is far from obvious, as the case law and scholarly literature addressing body parts is considerably conflicted over the best approach to apply. Each potential framework offers something that is appealing, but each also has difficulty in meeting all of the concerns that surround the body.

### III. DIFFERING APPROACHES TO BODY PARTS

A variety of frameworks for body parts are reviewed in turn below.

#### A. *The Body As Owned Property: Creating Markets in Body Parts*

Whether to treat the body and its parts as property has been a consistent source of controversy since bioethics arose as an academic field in the late 1950s and early 1960s. Paul Ramsey, an early bioethicist, argued that the “body is so inseparable from the person that people should not trade in it.” On the other hand, Joseph Fletcher, another renowned early bioethicist, argued that the sale of body parts does not necessarily implicate the overall dignity of the person because personhood is more than just the body: “self-awareness, curiosity, concern for others.”<sup>63</sup> Fletcher concluded, therefore, that the sale of body parts is not necessarily ethically objectionable.<sup>64</sup>

Literature supporting these contradictory positions is abundant, and the debate continues without resolution.<sup>65</sup> Those in favor point to the reality of a marketplace, commercial exchanges, and profits being made in body parts.<sup>66</sup> Given this reality, supporters of property rights in the body make many justice arguments in favor of

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<sup>62</sup>Gitter, *supra* note 23, at 338-39.

<sup>63</sup>71 UNITED STATES OFFICE OF TECHNOLOGY ASSESSMENT: NEW DEVELOPMENTS IN BIOTECHNOLOGY: OWNERSHIP OF HUMAN TISSUES AND CELLS 131-32 (1987).

<sup>64</sup>*Id.*

<sup>65</sup>Many authors have argued in favor of treating the body as property or the proper subject of market treatment. *See, e.g.*, Jennifer Mahoney, *supra* note 28; James F. Blumstein, *Federal Organ Transplantation, A Time for Reassessment*, 22 U.C. DAVIS L. REV. 451 (1989); Lloyd R. Cohen, *Increasing the Supply of Transplant Organs: The Virtues of a Futures Market*, 58 GEO. WASH. L. REV. 1 (1989); Henry Hansmann, *The Economics and Ethics of Markets for Human Organs*, 14 J. HEALTH POL. POL’Y & L. 57 (1989); Lori Andrews, *My Body, My Property*, 16 HAST. CTR. REP. 28 (1986). On the other hand, many authors just as strenuously argue that the body should not be treated as property. *See, e.g.*, Radhika Rao, *supra* note 3, at 365 (arguing for privacy treatment but, in footnote 15, listing the following opposing property treatment: Stephen Munzer, *An Uneasy Case Against, Property Rights in Body Parts*, 11 SOC. PHIL. & POL’Y NO. 2, 259 (1994); LEON R. KASS, TOWARD A MORE NATURAL SCIENCE 283 (1985); and Richard Gold, *Owning our Bodies: An Examination of Property Law and Biotechnology*, 32 SAN DIEGO L. REV. 1167 (1995)); Paul P. Lee, *The Organ Supply Dilemma, Acute Responses to a Chronic Shortage*, 20 COLUM. J. L. & SOC. PROBS. 363 (1986); ALAN HYDE, BODIES OF LAW 3 (1997).

<sup>66</sup>*Id.*

treating the body parts as owned products that could be exchanged for value in markets.<sup>67</sup> Others, seeking to increase limited supplies of organs, argue that monetary or other market-based incentives are long overdue, as markets create more efficient delivery and distribution mechanisms and will increase a too small supply. Finally, philosophical and policy arguments regarding the special place property rights have in our legal landscape and their linkage to our notions of liberty are also drawn upon to support the property rights paradigm.

On the other hand, treating body parts as property poses significant risk to our notions of what it means to be human by starting us on a path that virtually commodifies everything. The body is one of the last places of sanctuary from a commodified world. Many individuals experience visceral reactions against payment for human body parts. The root of those feelings can be difficult to discern. For some, they may stem from a strong notion that human body parts should be held sacrosanct and protected from the realm of our market economy. Regardless of their root, however, those feelings reveal that we are in terrain that is difficult to negotiate when dealing with the human body given the layers of meaning we impose on our bodies.

Arguments and feelings against commodification of body parts are, in some sense, similar to arguments raised centuries ago against commodifying labor as economies in Europe moved from feudal to market systems.<sup>68</sup> Fighting against such commodification is in all likelihood equally doomed given the inevitable march of markets. Nonetheless, this paper seeks to protect the threatened values and to prevent the seemingly inevitable reification of the body as a tradeable object within our markets by preserving a space for something entitled to more dignity than that accorded widgets while accommodating the evolving and very real markets and trade in body parts.

### 1. Benefits of Property and Market Treatment

Many strong arguments support those who argue in favor of a property-like treatment of body parts: (1) the reality of existing markets in body parts; (2) the concrete and well understood rules associated with property; (3) the malleability and flexibility of the legal concept of property; (4) market efficiency in allocating supply to meet demand as well as market incentives' potential for increasing supply; (5) property's compatibility with our underlying liberal political philosophies; (6) making it fairer to the donors who are the only ones in a long stream of transactions not receiving compensation; and finally, (7) potentially enhancing the value accorded body parts in our market-based society.

First, the notion that there are no markets in body parts has been debunked by numerous scholars. Recent data shows that such markets not only exist, but are thriving. Organ transplants, for example, have a cost. Medicare alone spent \$0.8 billion on organ acquisition and transplantation in 2003.<sup>69</sup> Of the fifty-nine organ procurement agencies operating today, at least forty sell body parts directly to for-

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<sup>67</sup>*Id.*

<sup>68</sup>*See, e.g.,* JOHN MILTON, *PARADISE LOST* (1667), AND INTRODUCTION TO PUBLICATION BY DAVID HAWKES (2004).

<sup>69</sup>OTA NEW DEVELOPMENTS, *supra* note 63, at 98.

profit firms.<sup>70</sup> Payment is made for eggs and sperm, and, under limited circumstances, blood. The tissue industry has become a billion dollar industry, not to mention the biotechnology industry which also derives many products, such as cell lines, from human body parts. These rapidly evolving and very real markets demand clear and understood rules. Part of the attraction of using property concepts is that it is a familiar legal field developed over centuries with ready-made concrete rules associated with it that can be pulled off the rack and applied to different situations.

Supporters of a property/ownership based paradigm argue that the concept of property is not fixed or immutable but rather flexible enough to accommodate new functions.<sup>71</sup> Property has evolved from a reified absolute thing, as understood by the eighteenth century English legal scholar Blackstone,<sup>72</sup> to the notion commonly taught in law school today of a “bundle of sticks,” representing relationships between a subject vis-à-vis an object.<sup>73</sup> But property is not limited to these conceptions, for other theorists seek to expand it further.<sup>74</sup>

Given property’s flexibility, some legal scholars argue that property and associated contractual rights are best suited to protect individuals and patients today; whereas, the current predominant protection, the fiduciary duty owed by a doctor to

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<sup>70</sup>Michelle Goodwin, *Altruism’s Limits*, *supra* note 6, at 383.

<sup>71</sup>See Mahoney, *supra* note 28, at 202; *see also* Danaya C. Wright, *A New Time for Denominators: Toward a Dynamic Theory of Property in the Regulatory Takings Relevant Parcel Analysis*, 34 ENVTL. L. 175, 193 (2004) (“property rights are dynamic, ever changing. . . .”); Danaya C. Wright & Jeffrey M. Hester, *Pipes, Wires, and Bicycles: Rails-to-Trails, Utility Licenses, and The Shifting Scope of Railroad Easements from the Nineteenth to the Twenty-First Centuries*, 27 ECOLOGY L. Q. 351 (2000); STEPHEN MUNZER, *A THEORY OF PROPERTY* (1990) (property is “not a universal and immutable concept.”).

<sup>72</sup>See Carol Rose, *Canons of Property Talk, or Blackstone’s Anxiety*, 108 YALE L. J. 601, 601 (1998) (quoting Blackstone as stating: “There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”). Rose does show, however, that Blackstone’s understanding of property was more nuanced than the absolutist proposition. Nonetheless, this conception of property is frequently attributed to his Commentaries and scholarship.

<sup>73</sup>There are many differing theories and schools of property. There are the absolutists who advocate a concept of property as a static reified thing; there is the prevailing model of a bundle of sticks; there are the essentialists who advocate that there is one single variable essential as a foundational principle; there are the multiple variable essentialists; and there are the anominalists who contend that there is no fixed content to property, but rather that it is a fluid concept. *See* Rose, *supra* note 62; *see also* A. M. Honore, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 112-28 (Oxford 1961); W.N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16 (1913).

<sup>74</sup>See, e.g., Laura S. Underkuffler, *On Property: An Essay* 100 YALE L. J. 127, 129 (1990) (listing a variety of property theories and also explaining her idea of a broader property theory based on what she contends also existed in the past that included not only “external objects and people’s relationships to them, but also all of those human rights, liberties, powers and immunities that are important for human well-being” and encompassed the inherent tension between the “individual and the collective”); *see also* MUNZER, *supra* note 71.

his or her patient, is woefully inadequate. The patient/doctor fiduciary duty is limited to the relationship between the physician and the patient, and that relationship is fairly circumscribed by the patient's medical needs.<sup>75</sup> Given the multiple additional layers of relationships that can exist in the research and biomedical industry context, which extend far beyond the traditional patient/doctor relationship to the hospitals, health maintenance organizations, research institutions, tissue banks, and the like, something with more teeth than the traditional fiduciary duty, like property, is appealing.

Moreover, property is linked in our political philosophy with our autonomy and freedom. John Locke developed a theory of property that lies at the foundation of our vision of society and our markets. Property becomes ours, under Locke's reasoning, when we mix our labor with something. That the individual "owns" his body is essential to this theory.<sup>76</sup> This same theory lies at the foundation of our social contract that individual human beings own their own bodies and the products of the body such as labor, for example.<sup>77</sup> That unique ownership creates a barrier between the individual and the state, a line that requires individual consent and acceptance of the state's power. Because one of our society's bedrock foundational principles is a sense of autonomy derived from the same principles regarding the individual's rights of ownership over the body and mixed labor products, it is easy—by extension—to develop arguments that individuals own their bodies and can dispose of its parts just as they dispose of its labor. Such a theory is attractive to many.<sup>78</sup>

Similarly, our constitutional theories of privacy rely on earlier case law finding an ownership right of sorts over our persons.<sup>79</sup> We tend to use the same spatial metaphors to describe our privacy and our property rights and to create "boundaries"

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<sup>75</sup>See Gitter, *supra* note 23, at 306; see also Marc A. Rodwin, *Strains in the Fiduciary Metaphor: Divided Physician Loyalties and Obligations in a Changing Health Care System*, 21 AM. J. L. AND MED. 241, 250 (1995).

<sup>76</sup>See Rao, *supra* note 3, at 367-68. (quoting Locke as stating, "Through the Earth and all inferior Creatures be common to all men, yet every Man has a Property in his own Person. This is no Body has any Right to but himself."). Through this ownership, Locke reasoned the individual owns external things that are the product of his or her body's labor. Yet, Locke viewed the ownership of the body itself as more of an inalienable trust than ownership of a thing. But it was through that right that Man created things and then owned those things external to the body. *See id.*

<sup>77</sup>Jacob Dahl Rendtorff, *Biobanks and the Rights to Human Body*, in THE USE OF HUMAN BIOBANKS—ETHICAL, SOCIAL, ECONOMICAL AND LEGAL ASPECTS REPORT I, 55, 58 (M.G. Hansson, ed., 2001).

<sup>78</sup>Rao, *supra* note 3, at 367-68. By contrast, Kant critiqued Locke and his brand of utilitarianism arguing that turning the human into an object of ownership violates individual dignity and turns ends into objects. *Id.*

<sup>79</sup>The first case officially finding a privacy right in the Constitution is *Griswold v. Connecticut*, 381 U.S. 479 (1965). In the abortion case *Roe v. Wade*, the Supreme Court traced the privacy right back to 19th century case law, *Union Pacific Ry. Co. v. Botsford*, 141 U.S. 250 (1891). See *Roe v. Wade*, 410 U.S. 113, 152 (1973). The Court in *Union* found a "right of every individual to the possession and control of his own person, free from all restraint or interference by others." *Union*, 141 U.S. at 251.

between us and the state and others.<sup>80</sup> Thus, our liberal values of personal freedom and self-determination push us towards a theory of ownership in our bodies and, by extension, to allowing trade in our bodies.

And in many senses we already treat body parts, such as organs and tissue, as property, simply incommensurable property. We can devise in our will our body parts as gifts. We cannot sell them, but we may give them away in a will, just as we give property away. Such treatment in wills is typically reserved for what we deem to be property.<sup>81</sup>

But perhaps most powerful are the justice arguments made in favor of the property rights regime. Everyone, other than the original donor in the tissue and organ market, exchanges money and benefits. What justification is there for segmenting out one portion of the transaction and making it non-compensable with money when every other transaction in the chain involves an exchange of money?<sup>82</sup> Some view this as simply unjust to the donor in that it is unnecessarily paternalistic in denying the poor, for example, the ability to exploit one of the few resources they may have and, thus, their freedom to use this resource as they deem fit.<sup>83</sup>

Moreover, the poor face a double injustice in the case of organs because they often cannot afford or obtain insurance, and the UNOS distribution system requires both insurance and the ability to purchase the expensive immunosuppressant drugs required to prevent organ rejection.<sup>84</sup> Thus, the poor (1) are denied payment for an organ if they choose to donate one and (2) cannot receive an organ if they need one.<sup>85</sup> Plainly, avoiding all compensation because of concerns regarding luring poor individuals with improper inducement does not solve the problem. Moreover, alternatives for protecting individuals' interests exist. For example, we already pay research subjects for participating in studies and control for undue inducement with detailed informed consent procedures, thus allowing individuals to exercise their freedom of choice.<sup>86</sup>

Supporters of the property paradigm further point to markets as the most efficient distribution system—that is a method of matching supply and demand. They contend that markets have proven themselves as the most efficient distributors of goods.<sup>87</sup> Price systems provide proven methods to solve information and coordination problems.<sup>88</sup> The current regime, in contrast, creates an anti-commons problem where there are multiple rights to veto donation. “[W]here more than one entity has the

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<sup>80</sup>Rao, *supra* note 3, at 423-28.

<sup>81</sup>See Mahoney, *supra* note 28, at 203-04.

<sup>82</sup>See Mahoney, *supra* note 28.

<sup>83</sup>*Id.*; see also Gitter, *supra* note 23. See MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996).

<sup>84</sup>ORGAN DONATION, *supra* note 1, at 236-37 (describing the “Green Screen” applied to potential organ recipients).

<sup>85</sup>Gitter, *supra* note 23.

<sup>86</sup>*Id.*

<sup>87</sup>See Mahoney, *supra* note 28.

<sup>88</sup>*Id.* at 197-98.



power to exclude others from the use of a resource,” the chances that a value-enhancing transaction will occur is significantly decreased and an anti-commons problem arises.<sup>89</sup> In essence, the recognition of too many rights hinders discoveries, research, and the most efficient use of resources. If payment is permitted, however, those who pay are virtually always the most likely to put the paid-for resource to the most efficient use.<sup>90</sup>

Moreover, alternatives to outright bans on payment exist. For example, instead of banning hazardous work, we regulate it to reduce the risk. Such regulations typically require clear disclosure and consent.<sup>91</sup> But in the cordoned-off realm of organs, by relying on altruism alone, not only do we limit the supply to the extreme detriment of many, but we also bestow significant commercial gains on others.<sup>92</sup>

Given the clear mismatch between demand and supply, some argue that experimentation with other paradigms, such as property, is necessary. Clear rules, they argue, can prevent exploitation and respect individuals’ autonomy, just as the rules regarding payment to research subjects protect those subjects.

Proponents of a property-like treatment further contend that it is far from obvious that payment will diminish our respect for ourselves; whereas, naysayers tend to argue the opposite effect.<sup>93</sup> Many body parts such as sperm, blood, and hair can be and are commodified and exchanged for monetary value without violating our human dignity. Monetary value is assigned to many things that have greater value than just the dollars and cents exchanged. For example, we assign value to wedding rings, wrongful death actions, negligent diagnostic tests, and life insurance.<sup>94</sup> We do not reduce these things to their monetary features alone. To most of us their value is not solely commensurable in a one-to-one relationship with the monetary value assigned to these items. Consequently, proponents of property treatment contend little in our experience suggests that we devalue something by merely attaching a monetary value to it. Indeed, to the contrary, given the prevalence of market exchange in our society as the thread which holds us together, placing monetary value suggests we value it even though the monetary value may not represent its full meaning and value to us. Monetary compensation, therefore, can potentially enhance the dignity and value of body parts.<sup>95</sup>

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<sup>89</sup>*Id.* at 203; *see also* Wright, *supra* note 61. Of course, this argument applies also if a property right is recognized, as many individuals may overvalue their parts and become holdouts—*see infra* note 135 and accompanying text.

<sup>90</sup>Gitter, *supra* note 23.

<sup>91</sup>Mahoney, *supra* note 28, at 213.

<sup>92</sup>*Id.*

<sup>93</sup>Troy Jensen, *Organ procurement: Various Legal Systems and Their Effectiveness*, 22 HOUS. J. INT’L L. 555 (2000).

<sup>94</sup>Gitter, *supra* note 23, at 301; Gitter argues that those who object to putting a value on tissue are like those who adamantly opposed life insurance when it was first proposed as cheapening the value of life, yet life insurance is broadly accepted today. *Id.*

<sup>95</sup>*Id.* at 301-02. Indeed, there is a “strongly competing truism suggesting that which we reward with money is that which we value.” *Id.* (citing Majorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 336 (1990)).

## 2. Shortcomings of a Property Regime for Body Parts

Those who argue against treating the body as property are primarily concerned about the (1) devaluation through commodification of something that is priceless; (2) reification and objectification of that which is inherently subjective, and hence, the long-term consequences for how we view and relate to ourselves; (3) perpetuating injustices through accentuating the oppression of the poor or other marginal social groups; and (4) encouraging the sick and desperate to donate diseased parts, thus tainting the supply.<sup>96</sup> Moreover, there is a primal visceral and well documented disgust factor regarding commerce in body parts that cannot be ignored, as it speaks to our feelings about ourselves as human beings.<sup>97</sup> Each of these arguments needs to be fleshed out so to speak.

The human body “is a social, ritual and metaphorical entity . . . layered with ideas, images, cultural meanings and personal associations.”<sup>98</sup> Layered on top of those meanings is the biotechnology revolution, which is increasingly enabling the alteration by scientists of what we previously considered off limits to manipulation: nature–life and death processes.<sup>99</sup> As this occurs, parts of what are essential for life are increasingly becoming modified and commodified. For example, the United States Patent Office has allowed the patenting of DNA sequences,<sup>100</sup> the building blocks of life itself; however, Europe steadfastly continues to disallow the patenting of genes.

We sense that the very thing that makes us human is becoming commodified. Through that commodification it becomes a “thing”—a reified object. While those in favor of property argue that this is an outdated absolutist conception of property and that property really describes a set of relationships (the proverbial bundle of sticks) between a subject and a thing, this does not comport with everyday lived experiences. In everyday life, most people relate to property as a thing or something to acquire, to use, and to put on display, such as an object that is to be manipulated and coveted. But even accepting the bundle of sticks conception poses problems. If applied to the body, viewing property as a bundle of different relationships among persons or other entities with respect to things is a way of disaggregating–fragmenting the body and distributing its discrete components. Literally and figuratively this conception of property alienates us from our bodies and selves as wholes, turning them into discrete alienable parts.<sup>101</sup>

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<sup>96</sup>See, e.g., RICHARD TITMUS, *THE GIFT RELATIONSHIP: FROM HUMAN BODY TO SOCIAL POLICY* 12-13 (1971) (arguing human sources of blood are better both on practical and ethical grounds if no compensation is given to the donor).

<sup>97</sup>Mahoney, *supra* note 28, at 197. Indeed, one might wonder why the NOTA’s prohibition on the selling of organs has not been challenged as an unconstitutional violation of a person’s privacy and property rights in his or her body. The answer may arise from our primal feelings that the body should not be sold.

<sup>98</sup>ANDREWS & NELKIN, *BODY BAZAAR*, *supra* note 23, at 17.

<sup>99</sup>Andrew Trew, *Regulating Life and Death: The Modification and Commodification of Nature*, 29 U. TOL. L. REV. 271 (1998).

<sup>100</sup>*Diamond v. Charkabarty*, 447 U.S. 303 (1980).

<sup>101</sup>See Rao, *supra* note 3.

The importance of our relationships with our bodies cannot be underestimated, for we are embodied consciousness. We relate to the world, experience it, and understand it all through our bodies. All of our experience is mediated through our senses and our brains (neurological processing and interpreting of the information our five senses take in through our bodies).<sup>102</sup> Through the blood stream carrying chemical signals (*e.g.*, hormones and neurotransmitters) and the sensory and motor peripheral nerves carrying signals to our brains, we depend upon our bodies for data to interpret and to understand the world.<sup>103</sup> “Our minds, our consciousness, our thought patterns, and behavior—our very being—is ‘embodied,’ in the full sense of the term.”<sup>104</sup> The body provides the very “content” that constitutes “the workings of a normal mind.”<sup>105</sup> We are our bodies.<sup>106</sup>

The IOM opines that if body parts, such as organs, are not “donated,” they are then “sold,” thereby becoming a “commodity.”<sup>107</sup> When an object becomes a product in the market, “a social construction process occurs” as the object is “commoditized.”<sup>108</sup> Legal scholar Margaret Jane Radin describes body parts as “contested commodities” because “we experience personal and social conflict about the process and the result.”<sup>109</sup> Because our “minds exist in and for an integrated organism,”<sup>110</sup> when something becomes “commodified” and a price is associated

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<sup>102</sup>ANTONIO R. DAMASIO, *DESCARTE’S ERROR, EMOTION, REASON AND THE HUMAN BRAIN* 90-93 (1994).

<sup>103</sup>*Id.* at 87-88.

<sup>104</sup>*Id.* at 118, 234. While there is no consensus or complete account of consciousness yet, there is a general consensus that consciousness is derived from our neurological systems and that our “experiences are embodied, and thus realized in some kind of material process.” MARTHA C. NUSSBAUM, *UPHEAVALS OF THOUGHT* 58 (2001). In other words, materialism is the dominant view today of how we think and feel. As Nussbaum states, “[w]e can happily state that in human beings thought and emotion are, even necessarily are, enmattered forms.” *Id.* at 59.

<sup>105</sup>DAMASIO, *supra* note 102, at 226.

<sup>106</sup>Yet, the old dualism of a separation between mind and body still exists in our thinking. Some argue that the failure of courts (discussed *infra* in section IV) and others to satisfactorily answer the problem of whether and, if so, what types of rights exist in the body is rooted in Descarte’s mind/body dichotomy. See, *e.g.*, Peter Halewood, *Law’s Bodies: Disembodiment and the Structure of Liberal Property Rights*, 81 IOWA L. REV. 1331 (1996) (explaining that leaving the old mind/body dichotomy behind and thinking of the self as situated in the body and its parts poses significant challenges to the intellectual origins of our legal system).

<sup>107</sup>ORGAN DONATION, *supra* note 1, at 11.

<sup>108</sup>RADIN, *CONTESTED COMMODITIES*, *supra* note 83, at xi; see also HYDE, *BODIES OF LAW*, *supra* note 65 (arguing that legal thinkers should recognize and confront the constructed nature of their representations of the body).

<sup>109</sup>Perhaps because “certain things outside our control are important to us and important to our flourishing,” such as our emotions and the feelings attached to them,” and because “undoubtedly some of us have such feelings toward our body parts,” we are conflicted. NUSSBAUM, *supra* note 94, at 22.

<sup>110</sup>RADIN, *CONTESTED COMMODITIES*, *supra* note 83.

with it as an objective good in a market place, our mind associates many different things with that process.<sup>111</sup>

What are social meanings associated with trade and commerce in “goods”? Markets are the center and backbone of our societies. They are a significant achievement of human freedom and, as many scholars have demonstrated, intimately connected to democratic government forms.<sup>112</sup> Yet markets also represent the concept of “maximizing individual gains from trade.”<sup>113</sup> Efficiency is the ideal and achieved through cost-benefit trade-offs. What are the ramifications of associating notions of efficiency and cost benefit analysis to our bodies and selves for our understanding of our freedom, personhood, and politics?<sup>114</sup> In Radin’s words, adding our bodies to the category of commensurable in monetary terms poses significant challenges to our conceptions of self and what it means to be human.<sup>115</sup> It imposes a view of society where everything is commoditized.<sup>116</sup> The long-term impact on our understandings of our relationships with ourselves and others is bound to change in significant and, perhaps, unforeseeable ways. “Commodification is a kind of objectification or reductionism that may lead people to see themselves and each other as repositories of body parts with market worth rather than entities with dignity.”<sup>117</sup> In other words, applying the language and concepts of the marketplace with which property is intimately bound to ourselves “diminish[es] our sense of particularity and uniqueness” and impacts “our perceptions . . . about who we are and what is important in our lives.”<sup>118</sup>

In sum, the tension between personhood and thing hood is hard to reconcile or negotiate.<sup>119</sup> This tension illustrates that property, while a very flexible and useful legal concept, is not flexible enough given its market orientation to accommodate our more “emotional and spiritual concerns” which are associated with the legal characterization of personal control over one’s body, both before and after death.<sup>120</sup>

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<sup>111</sup>*Id.* at xi-xi.

<sup>112</sup>*Id.* at 5.

<sup>113</sup>*Id.*

<sup>114</sup>*Id.* at 3.

<sup>115</sup>*Id.* at 5.

<sup>116</sup>*Id.* at 6-7.

<sup>117</sup>Stephen Munzer, *An Uneasy Case Against Property Rights in Body Parts*, *supra* note 65, at 286; *see also* Wendy Gordan and Sam Postbrief, Book Review, *On Commodifying Intangibles*, 10 *YALE J. L. & HUMAN.* 135 (1998).

<sup>118</sup>Mahoney, *supra* note 28, at 207. Yet those supporting the market theory argue that what we currently do is tolerate market activity but disallow market discourse. *Id.* This inconsistency leads to, in their views, unscrutinized and unregulated market activity that is ultimately more harmful and unjust than that which the discourse seeks to prevent. *Id.*

<sup>119</sup>*See, e.g.,* Rendtorff, *supra* note 67 (discussing the tension between the connotations of commodification of the human body versus an individual’s rights over his or her body and its labor products).

<sup>120</sup>R. Alto Charo, *Legal Characterizations of Human Tissue*, in *TRANSPLANTING HUMAN TISSUE*, *supra* note 6, at 101, 102. Ironically, this same loss of a bright line between body and mind which makes us so uncomfortable with placing prices on objects is also probably what is

Property does not map onto the human body in a “one to one match.”<sup>121</sup> Because of these very real concerns, the IOM counsels against even pilot studies offering compensation for organs or tissue, as once body parts become a commodity, these meanings change, and there may be no turning back.<sup>122</sup>

The property paradigm’s problems are not limited to the long-term understanding of ourselves as humans but also include justice and supply problems. The justice arguments cut both ways. While there are significant concerns that it is too paternalistic to impose limitations on what the poor or disenfranchised may do with their bodies by denying them one of the few assets they may have, there are equal concerns that, by permitting sales of body parts, the poor will be further disenfranchised and injustices will simply be perpetuated. The poor may value money too much as they have so little of it and, thus, put their health at risk by selling organs while alive.<sup>123</sup> Justice concerns cut strongly both ways, and it is difficult to discern which argument ought to prevail.

As to supply issues, there are arguments that compensation encourages the sick to donate diseased organs, thereby tainting the supply. Testing, which must be done in any event, somewhat overcomes this argument.

There is little hard data available as to whether the supply increases or decreases with compensation.<sup>124</sup> The efficient market arguments rely on free markets and their underpinning axiom that if demand is high, prices rise, and output rises to meet the higher price. But if the price rises too far, demand will curtail itself until the demand, supply, and price reach an equilibrium. Plainly, certain basic assumptions underlying a free market analysis do not apply to markets for body parts.<sup>125</sup> Demand for organs, for example, is controlled by individuals’ health, and very few individuals would “choose” to die rather than pay too much for an organ. Moreover, many do not perceive healthcare as a product that should be rationed out based on the ability to pay. And even the desperately poor may decide not to sell their relatives’ organs or body parts given feelings discussed above about our bodies. Thus, supply is not necessarily driven by price.

Moreover, we have a limited understanding of peoples’ motives regarding donation as demonstrated by the struggle to increase donation rates. Payment and compensation could cause some to give and some not to give. Indeed, the IOM is concerned that payment or compensation would “crowd out” altruistic giving, leading families that might donate to refuse to donate because their gift had been

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causing our inescapable march towards universal commodifications. Without an obvious subject/object dichotomy, we cannot find an obvious stopping point for commodification. Gordan & Postbrief, *supra* note 107, at 140-41; Radin, *supra* note 73.

<sup>121</sup>*Id.*

<sup>122</sup>ORGAN DONATION, *supra* note 1, at 11. While it is “difficult to articulate, concerns about the degradation of human dignity may explain the revulsion and repugnance that some experience at the prospect of the buying and selling of transplantable organs.” *Id.* at 86 (citation omitted).

<sup>123</sup>*See, id.* at 231.

<sup>124</sup>*Id.* at 243-44.

<sup>125</sup>*Id.* at 231.

somehow cheapened.<sup>126</sup> But aside from donors, doctors and nurses express significant discomfort in asking for organs from a grieving family through offering compensation.<sup>127</sup> The skills and comfort level of those asking may impact actual donation more than the motives of those consenting.<sup>128</sup> We just do not know, and we understand motivations poorly, as they vary significantly from person to person.

Ultimately, the irreconcilability of the advocates and opponents of property rights positions, along with pressing justice and efficiency concerns, requires rethinking the problem beyond simply a property right or not and imagining alternative new legal structures.<sup>129</sup> Many alternatives have been proposed. Like property, they too have their advantages and disadvantages.

### B. Partial Commoditization—Legislative and Regulatory Schemes

Proposals to address human body parts are by no means limited to a pure free market property/commodification versus no compensation scheme. Radin and others demonstrate that whether to treat body parts as a commodity is not an all or nothing proposition. We have, in our current society, many instances of incomplete or partial commodification in that our reality is “far more complex” than just the polar extremes.<sup>130</sup> Moreover, both of the extremes arguably force disrespect of personhood.<sup>131</sup> Commodification does so by devaluing it, and non-commodification does so by reinforcing powerlessness, narrowing choices, and threatening freedom over one’s own body.<sup>132</sup> Our “traditional liberal compartmentalization is at best oversimplified and cannot lead to the kind of answer” that is called for to solve our dilemma over body parts.<sup>133</sup>

Examples of alternative compensatory schemes exist. Our tort system and our workers’ compensation systems, for example, compensate individuals by attaching price compensation to bodies. These systems, however, operate under liability rules,

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<sup>126</sup>*Id.* This argument is somewhat unpersuasive, as there is still a choice to make the gift without compensation. An individual or family does not have to accept payment but can still donate. Compensation as an incentive does not eliminate altruistic giving necessarily. Our entire non-profit system, for example, is based on a benefit given to individuals who donate to charities—a tax deduction—in return for their gift. If tax deductions for charitable giving were eliminated, there are few who would argue that this would not dramatically lessen charitable giving.

<sup>127</sup>*Id.* at 245.

<sup>128</sup>Donations rates between OPOs, for example, vary significantly. *See supra* note 31 and accompanying text. Whether the motivations of the donors differ significantly by region or whether the skill of those making the requests varies is unknown, but it is more likely that the latter impacts donation rates more than the former.

<sup>129</sup>Gerald Dworkin & Ian Kennedy, *Human Tissue: Rights in the Body and Its Parts*, 1 *Med. L. Rev.* 291 (1993).

<sup>130</sup>*Id.*

<sup>131</sup>*Id.* at 126-27.

<sup>132</sup>RADIN, *CONTESTED COMMODITIES*, *supra* note 83.

<sup>133</sup>*Id.* at xiii.

not property rules.<sup>134</sup> Labor markets are another example. Labor of the human body, a by-product, is bought and sold. Yet we regulate our labor markets to balance the value of the work with our acknowledgement of the personhood and community of the participants.<sup>135</sup>

Radin and others suggest a similarly balanced regulatory system for human body parts.<sup>136</sup> In theory, some of these proposals rely on a traditional distinction drawn on our relationship to certain things and rights and how they are governed by either property rules, liability rules (*e.g.*, tort system), or inalienability rules (cannot be sold or alienated).<sup>137</sup> There is an important fourth category of things which can be separated and given, but not sold. These are things that are not outside our realm of social intercourse but are outside of the market because they are incommensurable with monetary value. This is exactly where the initial transfer of organs and tissue falls currently.<sup>138</sup> However, markets operate by making things, such as objects or labor, commensurable with money or other items that can be exchanged. But there are all sorts of market failures, such as information and coordination problems and free riders and holdouts, which require alternative methods of handling situations.

Much regulation, including price regulation, safety regulation, product quality, and the like, addresses market failures and can be seen as “in essence partial commodification.”<sup>139</sup> Within the last decade, there have been several proposals for more just systems that regulate body parts. They attempt to meet both justice concerns regarding sharing benefits derived from body parts and, perhaps, encourage more efficient distribution systems while ideally avoiding some of the problems inherent in markets. These proposals are legislative in nature and typically are hybrid models, combining property, inalienability, and liability rules.

The proponents of government regulation contend that these proposals put to rest or lessen some of the arguments against commodification because government regulation through transparent socially articulated policies (1) lessens concerns regarding undue inducement of the poor by putting in place protective measures and (2) is less threatening to human dignity, altruism, and communitarian solidarity.<sup>140</sup>

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<sup>134</sup>See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). See also Charlotte H. Harrison, *Neither Moore nor the Market: Alternative Models for Compensating Contributors of Human Tissue*, 28 AM. J. L. & MED. 77 (2002) (applying the three rules from Calabresi and Melamed's article to body parts).

<sup>135</sup>See generally CONTESTED COMMODITIES, *supra* note 83; Harrison, *supra* note 134.

<sup>136</sup>Unlike some of the regulatory proposals discussed below Radin is wary of drawing such bright lines. CONTESTED COMMODITIES, *supra* note 83, at 46-54.

<sup>137</sup>*Id.* at 16-18; Harrison, *supra* note 134. Alienation means that a right, attribute, or entitlement of some sort can be separated from its holder. If something is inalienable it cannot be lost or extinguished or held by someone else.

<sup>138</sup>CONTESTED COMMODITIES, *supra* note 83; see also generally MICHAEL WALTZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983) (discussing incommensurability).

<sup>139</sup>Calabresi & Kennedy, *supra* note 134. See also Harrison, *supra* note 134 (applying the three rules from Calabresi and Melamed's article to body parts).

<sup>140</sup>Dworkin & Kennedy, *supra* note 129, at 319.

Most of these proposals rest on the notion that monetary payment does not necessarily entail commodification if price is assessed on a collective non-market basis rather than in private negotiations. Such a process applies a liability rule along the lines of workers' compensation instead of a property rule.<sup>141</sup>

Charlotte Harrison, for example, advocates a general default rule of donation for all research tissue but with an objective, non-market mechanism built-in after research use for the unusual case where samples prove to have significant commercial value, such as in the case of John Moore discussed in Sections II and IV.<sup>142</sup> Consequently, research derived from the donated raw materials which results in valuable medical products would be rewarded proportionately, not simply included always nor excluded always.

To reach this result, Harrison advocates a legislative solution, as she argues legislatures stand in the best position to make the tradeoffs between complicated uncertainties through a transparent process of gathering empirical evidence, soliciting expert advice, and holding hearings.<sup>143</sup> This stands in contrast to the current process in which much tissue is donated without knowledge or consent, which she argues is an affront to human dignity and autonomy.<sup>144</sup> People are treated as means, not ends, thereby violating many different religious and philosophical systems of respect for human dignity. Through a legislative oriented process, however, all parties can be represented at hearings and a transparent consensus settled upon. Moreover, creating some sort of transparent compensation system avoids the increased scrutiny and skepticism attached to a market-inalienability model due to the significant commercial gains and profits being reaped from human tissue, genetics, and other body parts. It can eliminate the sense of injustice felt today where certain companies gain financial rewards by imposing some sort of return to the donor.<sup>145</sup>

Legislative solutions, such as Harrison's proposal, address some of the economic inefficiencies that might occur if private property rights were awarded to each individual in his or her respective body parts and which worried the *Moore* court.<sup>146</sup> Those inefficiencies are similar to a reverse tragedy of the commons. Too many people holding private rights might prevent researchers and others from using the property in a way that mutually benefits the whole community, hence stifling research and development.<sup>147</sup> Also, requiring individual negotiations with each

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<sup>141</sup>NEW DEVELOPMENTS IN BIOTECHNOLOGY, *supra* note 55, at 131-33; *see also* Munzer, *supra* note 71 (even as far back as the 7th and 9th century, English statutes provided specific amounts of financial compensation or amends in the event of a tortuous or criminal injury to the body).

<sup>142</sup>Harrison, *supra* note 134.

<sup>143</sup>*Id.*

<sup>144</sup>*Id.*

<sup>145</sup>*See* Donna Gitter, *supra* note 23.

<sup>146</sup>*See* discussion of *Moore* in Sections II, *supra* and IV, *infra*.

<sup>147</sup>*Compare* Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968) with Michael Heller and Rebecca Eisenberg's theory on an anti-commons problem with intellectual property rights and the undue burden it places on biotechnology research (1988). Michael A.



individual, many who might have limited competence in the field and hold cognitive biases overvaluing their assets, could create huge transaction costs, enormous inefficiencies, and holdouts.<sup>148</sup>

Moreover, a good deal of research uses samples from numerous individuals worldwide. Identities are often unknown, making bargaining next to impossible. Thus, the time necessary to individually negotiate with each patient if he or she held an outright property right would simply foreclose much research being done today which requires multiple tissue samples.

Confirming the transaction costs, the United States Office of Technology Assessment reported that actual compensation costs would not have a large impact on research but that the transaction costs would dwarf payment costs and negatively impact research.<sup>149</sup> Thus, allowing or requiring individual permission from individuals whose tissue is used in research would be too costly from a transactional cost perspective. Negotiating time and effort, compliance staff costs, and the likelihood of hold-outs all contribute to those costs. Adopting a model endorsing pure property rights could, therefore, create transaction costs at the inception of the research that could seriously harm the industry and also non-profit research.<sup>150</sup> Proposals, like Harrison's, attempt to address those initial costs by creating an alternative legislatively directed process that is not applied at the inception of research but after the research outcomes are known.<sup>151</sup>

Absent some legislative or other solution, ad hoc savvy patient groups and individuals are implementing their own self-help contractual property rights regime. In one instance, for example, a group of families whose children suffered from a rare genetic disorder (Canavan's disease) supplied combinations of tissue, autopsies, blood, urine, personal data, other pathological samples, and funding to researchers.<sup>152</sup> The group and the hospital, however, ultimately had significant disagreements over the patenting and licensing of the resulting genetic test and the manner in which it would be made available to the public. Plaintiffs sued alleging unjust enrichment, conversion of plaintiffs' property, fraudulent concealment, and misappropriations of trade secrets. The district court, relying on *Moore*, rejected the conversion claim outright on a motion to dismiss, holding that there is no "property right in tissue."<sup>153</sup>

In response to this result, groups are no longer relying on informal commitments but requiring contractual relationships with researchers.<sup>154</sup> For example, a non-profit group serving parents and individuals with a rare genetic disorder, PXE International, identified individuals with the disease or carriers and collected and

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Heller & Rebecca S. Eisenburg, *Can Patents Deter Innovations? The Anticommons in Biomedical Research*, 280 SCIENCE 698 (1998).

<sup>148</sup>Heller & Eisenburg, *supra* note 147, at 698.

<sup>149</sup>Gitter, *supra* note 23, at n.19 (citing OTA Report).

<sup>150</sup>*Id.*

<sup>151</sup>Harrison, *supra* note 134.

<sup>152</sup>Gitter, *supra* note 23.

<sup>153</sup>*Greenberg v. Miami Children's Hosp. Research Inst.*, 164 F. Supp. 2d 1064 (S.D. Fla. 2003).

<sup>154</sup>Gitter, *supra* note 23.

banked tissues.<sup>155</sup> The group entered into a contractual relationship with the researchers in which it would retain ownership rights in any patents.<sup>156</sup> The group's goal was to ensure broad and affordable genetic testing.<sup>157</sup> Not surprisingly, there were some disputes ultimately between the university where the researchers were based and the PXE group. Ultimately, they reached an agreement where they split royalties and PXE makes all licensing decisions.<sup>158</sup> While such an arrangement was unprecedented, other groups are expected to follow suit. The Juvenile Diabetes Foundation, for example, is pooling samples and creating a bio-repository.<sup>159</sup>

This private self-help remedy is a unique public-private model that is gaining traction. It can improve public health by identifying and recruiting participants by those most knowledgeable about the diseases. But it assumes in the absence of legislation a contractual right of sorts in individuals' tissue samples. This model overcomes problems with individual negotiations by allocating the burden of negotiations to privately organized non-profits, which presumably benefit the entire group through their research. By creating a collective benefit and not allowing all of the profits to be commercially reaped, but turning the profits back to the group through either broadly based affordable tests or other additionally funded research for cures, such groups potentially strengthen a sense of community and avoid the unseemly appearance of individuals profiting from their disease.<sup>160</sup>

Instead of relying on such private groups, which exist only for certain diseases and exclude those who might not participate with the group, Harrison argues we should locate our approach to body parts somewhere between property rules and inalienability.<sup>161</sup> She advocates a simple and straightforward liability rule.<sup>162</sup> Unlike a property rule which encourages private transfers by sale or license and unlike an inalienability rule which forbids compensation or transfer outright, a liability rule permits compensation where the compensation is set by some sort of tribunal or agency. Harrison, therefore, suggests what she terms an "appropriately timed non-market mechanism for assessing value and transferring compensation to contributors of human tissue."<sup>163</sup> After a particular tissue has proved to be commercially successful, she advocates using the political process to develop standards that can be administered by an agency or tribunal to award compensation. An analogy would be workers' compensation, for example.

Harrison's proposal is not the only legislative remedy suggested; differing legislative solutions have been put forward. Donna Gitter, for example, argues for a

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<sup>155</sup>*Id.*

<sup>156</sup>*Id.*

<sup>157</sup>*Id.*

<sup>158</sup>*Id.* Whether opponents could ultimately have the contracts voided as against public policy under *Moore* remains unseen.

<sup>159</sup>*Id.*

<sup>160</sup>*Id.*

<sup>161</sup>Harrison, *supra* note 134.

<sup>162</sup>*Id.*

<sup>163</sup>Gitter, *supra* note 23.

hybrid using both property and liability rules.<sup>164</sup> She finds Harrison's proposal inadequate because it denies research participants any authority to bargain independently and could strip power from advocacy groups operating currently, such as PXE International.<sup>165</sup> She also believes that something more than our current fiduciary duty and informed consent are necessary to protect individuals because these rights do not allow individuals to control research on their tissue.<sup>166</sup> She likes the PXE International solution but believes it needs to be taken further.<sup>167</sup> While transaction costs associated with a property right can be significant, failure to award compensation has its own costs because some refuse to give their tissue and thereby decrease the supply of tissue.<sup>168</sup> She argues that the transaction costs argument is a nonstarter because these costs are already imbedded in the system.<sup>169</sup> If informed consent, as it is theoretically envisioned, were obtained, it would take the same amount of bargaining and negotiating time. Furthermore, meticulous care and record keeping are already required for tracking samples and their sources.

Gitter and others argue that equity and fairness require some form of compensation, as researchers are permitted to own the tissue and be compensated for it while drug and biotechnology companies are reaping tremendous profits from donated raw materials.<sup>170</sup> The lack of transparency in the current system and its underlying inequity is disturbing. It calls out for reform and imposition of some sense of greater equity.

Adding an element of compensation can encourage tissue donation and encourage groups like PXE International's members to propose research that might not be done otherwise.<sup>171</sup> Because property is a "flexible concept, not an all-or-nothing one,"<sup>172</sup> Gitter advocates compensation and sale of tissue for research in a heavily regulated market, like our securities markets.<sup>173</sup> In response to those who make slippery slope arguments and raise the spectre of government takings of body parts, she and others, such as Radin, contend that this is not a credible argument.<sup>174</sup> No one seriously contends that the government or society would allow takings of organs, tissue, or the like. The body could officially obtain a status akin to the home under the homestead laws in bankruptcy, ensuring that it could not be reached by debtors or sold under duress.

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<sup>164</sup>*Id.* See also Korobkin, *supra* note 28, at 66-67 (critiquing arguments for no compensation for research tissue).

<sup>165</sup>Gitter, *supra* note 23.

<sup>166</sup>*Id.*

<sup>167</sup>*Id.*

<sup>168</sup>*Id.* at 281.

<sup>169</sup>*Id.*

<sup>170</sup>*Id.*

<sup>171</sup>*Id.*

<sup>172</sup>Mahoney, *supra* note 28, at 202.

<sup>173</sup>Gitter, *supra* note 23.

<sup>174</sup>*Id.*

While Harrison, Gitter, and others put forth interesting ideas, they fail to address or account for the political realities and difficulties that would accompany their implementation. They fail to consider the weight of opinions of the American Society of Transplant Surgeons, which unanimously opposes the payment of any money for organs, even in the form of a tax incentive,<sup>175</sup> and the medical establishment, as represented by the IOM, which counsels against any compensation of any sort for organs.<sup>176</sup> The biotechnology and medical lobbying communities' opposition to any such proposals is not an insignificant barrier because these interests are powerful and organized. In contrast, the call by citizens for compensation has little in the way of organization and lobbying clout to back it up.

Aside from the absence of any realistic chance of implementation, there are additional significant logistical problems not addressed by these proposals. For example, there are often unintended consequences that must be avoided, such as industry capture of the regulating body. The transaction costs of a new government bureaucracy are enormous and are not even discussed. These problems, while not insurmountable, are so large that they make passage of anything akin to them unlikely. Instead, legislatures today are often more inclined toward smaller incremental changes that do not create large new bureaucracies, such as limited tax deductions.

### C. Trust Paradigm

Before the enactment of the UAGA, our legal system at times referred to our relationship with our bodies as akin to a sacred trust.<sup>177</sup> A trust is a legal concept. It is a legal entity created under the laws of a state by a grantor for the advantage of the beneficiaries.<sup>178</sup> "Confidence is reposed in one person, who is termed trustee, for the benefit of another, who is called the [beneficiary], respecting property which is held by the trustee for the benefit of the [beneficiary]."<sup>179</sup> The subject of a trust, however, is typically property, such as land, securities, and other items of value. The subject is a thing separate from the trustee and beneficiary that is to be managed. Ownership is separated into different elements and dispersed among different parties. The trust (a legal entity, not a person) holds the title to the property, and the trustee manages the property for the benefit of the beneficiaries, but the beneficiary, who ultimately receives the benefits, neither owns nor controls the property. The trustee must operate under the terms set forth in the initial granting document and has specific duties with regard to the property being managed, as well as fiduciary duties to the beneficiaries.<sup>180</sup>

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<sup>175</sup>ORGAN DONATION, *supra* note 1, at 249. This group did state that it would be allowable to provide reimbursement for funeral expenses but was criticized in the press for doing so.

<sup>176</sup>*Id.* at 251-52; *see also* Korobkin, *supra* note 28, at 46 (explaining overwhelming agreement against compensation or inducements for embryo donation to researchers).

<sup>177</sup>*See* Rao, *supra* note 3, at 368.

<sup>178</sup>BLACK'S LAW DICTIONARY (West 6th ed. 1990).

<sup>179</sup>*Id.*

<sup>180</sup>*Id.*

How would this work with respect to our bodies and their parts? Technically, the body is the subject held in trust. But who are the grantor, the trustee, and the beneficiary? These questions can be answered in a variety of different ways. Often, the answer is based on religious belief. For example, according to some Christians, "Our body was given to us by God and . . . he is the owner."<sup>181</sup> Under this belief, we hold the body in trust and must be good stewards over the body while in possession of it. But this is not the only possible answer, and multiple possibilities can be imagined.

Ultimately, our society is composed of so many different religions and beliefs that reliance on a trust concept, embedded in religious precepts, is unlikely to succeed. Our bodies are so intertwined with who we are and how we view ourselves, with so many competing versions, that how we treat our bodies under the law must ultimately be sufficiently generic and acceptable from multiple perspectives. The trust concept's connection to certain religious beliefs is somewhat problematic, but the concept holds some potentially important ideas in the fiduciary relationship imbedded within it. Therefore, this concept will be revisited in Section VI.

#### *D. Altruism and Consent—The Current U.S. Model*

Generally speaking, the United States operates under an express consent rule for solid organs and most tissue.<sup>182</sup> This is an "opt-in" rule. There is no presumption that an individual would give consent to donate his or her organs or tissue after death. Instead he or she must have clearly demonstrated such a preference while still alive, or after death a next of kin must clearly grant permission.<sup>183</sup> As discussed, federal legislation prohibits commercial transactions in organs,<sup>184</sup> although recent legislation permits limited reimbursement of expenses incurred by living donors.<sup>185</sup> Thus, this opt-in consent model is based on altruism and thereby relies upon individuals' notions of community and willingness to help others.

Federal law requires hospitals to request from relatives organs of deceased candidates.<sup>186</sup> All states have enacted in some form the UAGA, which gives adults the right to donate their organs for use upon death.<sup>187</sup> Many jurisdictions have enacted an amended UAGA, which provides that relatives cannot override expressed intentions of donors. Federal law and most jurisdictions continue to prohibit the sale of organs for transplant.

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<sup>181</sup>See, e.g., Jacqueline L. Salmon, *Calling the Flock to God, Away from the Fridge* (quoting Steve Reynolds, pastor), WASH POST, Jan. 22, 2007, at A1.

<sup>182</sup>NOTA, § 274e; ORGAN DONATIONS, *supra* note 1, at 9-10, 205. In some states, corneas and certain other tissues are, however, routinely extracted during autopsies to determine the cause of death by the coroner. See *infra* Section IV. Such routine extraction has generated litigation and differing results in the courts. See *infra* nn. 193-98 and accompanying text.

<sup>183</sup>See also ORGAN DONATION, *supra* note 1, at 206.

<sup>184</sup>NOTA § 274f.

<sup>185</sup>NOTA § 274f.

<sup>186</sup>ORGAN DONATION, *supra* note 1, at 101.

<sup>187</sup>*Id.* at 19.

Unfortunately, a number of individuals and/or their families still refuse to donate. The timing of the requests, if an individual has not made a prior preference known, makes the donation process difficult because grieving families are attempting to cope with what is usually an unexpected and sudden death. Training those who make the requests and different methods for making requests has improved consent rates, but many potential organ donation candidates still do not donate under the current model.

*E. Opt-Out Policies: Presumed Consent and Routine Removal*

Actual consent, however, is not the only possible model under an altruistic paradigm that excludes payment for organs and tissue.<sup>188</sup> Different approaches exist, such as presumed consent or routine removal. As the name implies, presumed consent means a deceased individual is presumed to have consented to donate tissue and organs. In order to overcome this presumption, an individual, or next of kin, must “opt-out” by expressly stating that the organs shall not be recovered. In the absence of such an objection, an individual is deemed to have consented to donation.<sup>189</sup>

For presumed consent to be valid, a number of conditions must be met. First, the individuals or their families must understand the situation and know that refusal to consent is an acceptable option.<sup>190</sup> Second, they must have a reasonable time to object and understand those time limits. Third, they must understand how to object and have a relatively easy way to make their objection known. Fourth, there can be no coercion, which means no negative effects on an individual if he or she dissents.<sup>191</sup> Finally, the individual must be competent for consent to occur, either presumed or actual.<sup>192</sup>

Other theories can support implied consent as well. For example, society can simply presume consent based on what the deceased person would have decided if he or she had been asked—a substituted judgment of a sort.<sup>193</sup> Or society could assume “on the basis of a general theory of human values or on the basis of what reasonable, altruistic people should and would do” that a donation should be made.<sup>194</sup> Plainly, the latter version of implied consent is somewhat paternalistic because the decision is made for an individual rather than the individual understanding and making the decision. These latter theories of consent which underlie routine removal regimes are similar in their effect to presumed consent, but they are distinct conceptually because their underpinning justifications differ significantly.<sup>195</sup> Under this latter

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<sup>188</sup>In Europe, the European Union Council of Europe and UNESCO human rights documents also prohibit direct payment for human body parts. Harrison, *supra* note 134, at 127.

<sup>189</sup>ORGAN DONATION, *supra* note 1, at 208.

<sup>190</sup>*Id.* at 209.

<sup>191</sup>*Id.*

<sup>192</sup>*Id.*

<sup>193</sup>*Id.* at 210.

<sup>194</sup>*Id.*

<sup>195</sup>*Id.* at 205-12.

understanding, just as in presumed consent, routine removal occurs unless prior or family objection is registered. But, instead of presuming consent by the individual as the basis for donation, here the state or society presumes that society has a right to the organs of a deceased individual.<sup>196</sup> This assumption is “broadly” a communitarian conception of society.<sup>197</sup>

Ultimately, each of these many theories of consent speaks to how we view our own capabilities, and those of others and our decision-making power, that is whether we make decisions regarding organs and our bodies as individuals or as a community. The United States generally does not practice presumed consent or routine removal, but there are exceptions. Presumed consent is, in effect, practiced in a number of states with respect to certain body parts, such as corneas and pituitary glands. Some states permit their removal during an autopsy to consider the cause of death.<sup>198</sup> It is not entirely clear whether these states are, in effect, treating the organs as a communal form of property escheating to the state or actually assuming consent. The statutes have nonetheless been quite effective in creating a sufficient supply of these organs.<sup>199</sup> While there is little understanding or public education about cornea removal, there is generally little objection given their small size and relative unimportance to the perceived “wholeness” of a cadaver. It is unlikely such routine removal would meet with little objection if it were practiced as to all organs and tissue.

Moreover, meeting the conditions of presumed consent is important. They are so important that, in other countries that theoretically practice presumed consent, doctors and hospitals still routinely tend to ask consent from families. That is presumably because silence is so difficult to interpret and because it is so difficult to determine whether the conditions for presumed consent have been met.<sup>200</sup> Thus, actual practice, despite officially differing opt-in and opt-out policies, may not differ as much as is thought. Ultimately, there appears to be a deep-seated feeling by many medical professionals in Western democracies that decisions about the body must be made by the individual or his or her next of kin and not society.<sup>201</sup> Whether one system, “opt-in” or “opt-out,” has higher recovery rates is difficult to say because there is no consistent and reliable way in effect today to measure organ donation across cultures due to the absence of consistent methods and definitions.<sup>202</sup>

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<sup>196</sup>*Id.* at 206.

<sup>197</sup>*Id.* at 205-08.

<sup>198</sup>Rao, *supra* note 3, at 380-81. Many states have passed laws allowing the retrieval of corneas without consent. A Florida court upheld Florida’s statute allowing cornea removal, reasoning that the statute is permissible given the “legislative objective of providing sight to many of Florida’s blind citizens” through increasing supply. *See, e.g., Florida v. Powell*, 497 So. 2d 1188, 1191 (Fla. 1996). *But see Brotherton v. Cleveland*, 923 F.2d 477, 482 (6th Cir. 1991) (ruling that the next of kin had a constitutionally protected property right in the deceased member’s body).

<sup>199</sup>ORGAN DONATION, *supra* note 1, at 207.

<sup>200</sup>Jensen, *supra* note 93, at 563-64.

<sup>201</sup>ORGAN DONATION, *supra* note 1, at 208, 217.

<sup>202</sup>While opt-out countries appear to have higher donation rates, *Id.* at 212-13, because the United States rates are already quite high, a change to an opt-out system would not likely have

In the United States, given our non-communitarian health system and the fact that approximately 47 million Americans have no form of health insurance<sup>203</sup> and many with insurance are still underinsured, there are significant fairness and equity concerns with an opt-out policy. If a person cannot afford a transplant, she will not get one even if she needs one. However, if she dies under the right circumstances, her organs could be taken and used to benefit those who can afford a transplant. Such inequities impose almost insurmountable justice and fairness concerns with an opt-out policy under our current health care system.<sup>204</sup>

#### F. Other Proposals

Not surprisingly, there are numerous proposals for addressing body parts, particularly organs. As to organs, aside from the proposals already reviewed, some recommend futures markets or encouraging more donations through *quid pro quo* donation schemes, such as awarding preference or priority on waiting lists for an organ if one has previously indicated a willingness to donate.<sup>205</sup> Other proposals include granting estate tax deductions and the like. As to tissue and DNA, there are recommendations for creating biobanks that not only control the samples but also return the benefits to the whole of society in some fashion. Ultimately, each of these many proposals rests on an underlying assumption that the body is a type of individual property or that it is something that is not property but more communally based. The absence of a consensus on how we should treat the body makes these proposals harder to implement.

#### IV. CASE LAW

Legally, we approach different subject matters through laws passed by either our federal government or state legislatures, regulations implemented and administered under agencies' legislative authority, or judge-made case law (the common law). Both the national and state legislatures have been reluctant to tackle the complex problem of how the body should be treated, with the exception of outlawing the sale of organs while permitting donations of organs and tissue. Thus, they have left the problems to be resolved by the courts. But, currently, there is no consensus in the courts over how to treat bodies. As a result, the law in this country has still not

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a significant impact and could have negative impacts. *Id.* at 27, 212-13. For example, in Brazil, when the country implemented an opt-out policy, eighty-three percent of one city's population registered refusals and objections because of inequalities in society and distrust of the government. Ultimately, the country had to change the law to bring it in line with its citizens' expectations and require familial authorization. Jensen, *supra* note 93, at 562. In the United States general mistrust of the system, inequities within society, and fear that death might be hastened or one might not receive the best care could, for example, cause many opt-outs from families that might otherwise donate. ORGAN DONATION, *supra* note 1, at 215.

<sup>203</sup>N.C. Aizenman and Christopher Lee, *U.S. Poverty Rate Drops; Ranks of Uninsured Grow*, WASH POST, Aug. 29, 2007, at A3.

<sup>204</sup>ORGAN DONATION, *supra* note 1, at 220.

<sup>205</sup>*See, e.g.*, Robert M. Veatch, *Bonus Allocation Points for Those Willing to Donate Organs* 4(4) AM. J. OF BIOETHICS 1, 1 (2004).



answered the “deceptively simple question: Do we own our bodies?”<sup>206</sup> Instead, “[t]he law of the body [remains] in a state of confusion and chaos.”<sup>207</sup> “Sometimes the body is characterized as property, sometimes it is classified as quasi-property, and sometimes it is not conceived as property at all, but rather as the subject of privacy rights.”<sup>208</sup>

There exists no clear set of legal rules regarding bodies and their parts.<sup>209</sup> As to dead bodies, the issue of how to treat them has long been debated by legal commentators, and the case law is without definitive resolution. The seventeenth century British Scholar Lord Edward Coke opined that cadavers should be the property of no one based on his belief that the word cadaver was derived from the word *caro data erribus*, meaning flesh given to works.<sup>210</sup> His pronouncement on the meaning of cadaver influenced several hundred years of Anglo-American common law and prevented the body from being treated by the law as a type of property until the mid-Nineteenth Century.

In 1856, Samuel Ruggles in a New York legal case set forth another etymological root of cadaver, *cadare*, meaning to fall.<sup>211</sup> This new Latin scholarship, combined with evolving black markets for bodies during the nineteenth century as medical schools began to study anatomy and created a market for cadavers, led some American courts to recognize a right to possession of a body for burial, which they recognized as a property right of sorts.<sup>212</sup> Eventually, recognizing that property might not be the best description of the right to a corpse for burial, some courts in the United States articulated a hybrid term they called quasi-property which gave families and friends a right to claim a corpse to effect a burial, but not for any other reason; whereas, other courts continued to adhere to a “no property” common law rule.<sup>213</sup> As property law is state law and differs among the states, American jurisdictions are today divided between the “no property” jurisdictions and the “quasi-property” jurisdictions, with each side claiming a majority.<sup>214</sup>

Quasi-property states allow next of kin a “right” for burial purposes. They liken it to a “sacred trust” based on the reasons of “natural sentiment, affection, and

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<sup>206</sup>R. Alta Charo, *Body of Research—Ownership and Use of Human Tissue*, 355(15) NEW ENG. J. MED. 1517, 1157 (2006).

<sup>207</sup>Rao, *supra* note 3, at 363; *see also* Hyde, *supra* note 65, at 4 (explaining that under American law the body has developed meanings in an inconsistent and incoherent fashion to accommodate and solve political problems inherent in legal discourse).

<sup>208</sup>Rao, *supra* note 3, at 365-66.

<sup>209</sup>Shapiro, *supra* note 18.

<sup>210</sup>Lord Edmond Coke stated that the burial of a cadaver amounted to the burial of “nullius in bonis,” meaning “the goods of no one.” Commentators attribute the general rule that bodies cannot be property to this statement by Lord Coke. 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 203 (1644), available at [http://www.constitution.org/18th/coke3rd1797/coke3rd1797\\_201-250.pdf](http://www.constitution.org/18th/coke3rd1797/coke3rd1797_201-250.pdf); Charo, *supra* note 120, at 104; Scott, *supra* note 16, at 186.

<sup>211</sup>SCOTT, *supra* note 19, at 186-87.

<sup>212</sup>Charo, *supra* note 120, at 104; Boyd, *supra* note 45, at 436-37; *see also supra* note 16.

<sup>213</sup>Charo, *supra* note 120, at 105; Shapiro, *supra* note 18.

<sup>214</sup>Charo, *supra* note 120, at 105; Shapiro, *supra* note 18.

reverence.”<sup>215</sup> Courts find a duty by family members to tend to the bodies of their next of kin, arising from these sentiments and our common humanity. This duty gives rise to a right in the corpse that is not a property right but more akin to a sacred trust. It is not a traditional property right because the family members do not own the body but merely hold the right as a sacred trust for the benefit of all family and friends who have an interest.<sup>216</sup> A Pennsylvania Supreme Court decision suggests that the distinctions drawn between U.S. jurisdictions is more a matter of rhetoric than substantive rights because, to the extent it is a property right, it is one that resides in a trust and arises out of a duty.<sup>217</sup> Other courts state instead that it is a legal fiction created to enable relatives to recover for the tort of mental distress.<sup>218</sup>

Recent cases addressing the removal of corneas and tissue from dead bodies illustrate the division and confusion within the courts over how to treat body parts from corpses. The Florida Supreme Court, for example, expressly ruled that there is no constitutionally protected interest by family members in dead bodies, thereby validating a Florida Statute permitting the recovery of corneas without family permission from bodies under the Coroner’s purview.<sup>219</sup> The Court rejected the family’s due process (privacy right) and takings (property right) claims.<sup>220</sup>

While other courts reached the same conclusion as the Florida court,<sup>221</sup> many, however, articulate contrary positions. With respect to the same subject matter, some courts find a property right. The United States Court of Appeals for the Sixth Circuit, interpreting Ohio state law, ruled that next of kin have a constitutionally protected right in a deceased family member’s body.<sup>222</sup> Applying Michigan law, the Sixth Circuit also found a right in a next of kin’s dead body that it reasoned is closely

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<sup>215</sup>Rao, *supra* note 3.

<sup>216</sup>Rao, *supra* note 3, at 384-85 (citing *Pierce v. Swan Point Cemetery*, 10 R.I. 227 (R.I.1872)).

<sup>217</sup>*Id.* (citing *Pettigrew v. Pettigrew*, 56 A. 878 (Pa. 1904)).

<sup>218</sup>*Id.* at 384-86 (citing *Carney v. Knollwood Cemetery Ass’n*, 514 N.E. 2d 430 (Ohio Ct. App. 1986) (holding real basis for damages is mental anguish); *Culpepper v. Pearl St. Building*, 877 P.2d 877 (Colo. 1994) (quasi-property does not protect a true ownership interest because it redresses emotional harm rather than pecuniary injury)).

<sup>219</sup>*Florida v. Powell*, 497 So. 2d 1191-93 (Fla. 1996) (holding that the Florida statute allowing the medical examiner to extract corneas from decedents during autopsies does not constitute a taking of relatives’ private property because the next of kin possesses no property right in the body).

<sup>220</sup>*Id.*

<sup>221</sup>*See, e.g., Arnaud v. Odom*, 870 F.2d 304, 309-11 (5th Cir. 1989) (holding that there is no constitutional property or liberty interest in bodies of dead children, although recognizing a state quasi-property interest protected under tort law); *Georgia Lions Eye Bank, Inc. v. Lavant*, 335 S.E.2d 127, 128-29 (Ga. 1985) (upholding the cornea removal statute as constitutional because dead bodies are not constitutionally protected property); *Tillman v. Detroit Rec. Hosp.*, 360 N.W. 275, 277-78 (Mich. App. 1984) (upholding the Michigan cornea removal statute and finding no constitutionally protected interest in deceased relatives’ corneas).

<sup>222</sup>*Brotherton v. Cleveland*, 923 F.2d 477, 482 (6th. Cir. 1991).

analogous to property's bundle of rights.<sup>223</sup> A Missouri federal district court judge reasoned, in a case where parents disputed the use of their dead son's organs for transplant, that both parents held a constitutional property interest (not a liberty or privacy interest) in the dead son's body.<sup>224</sup> But despite finding a property interest, the court proceeded to apply an analysis which found that, when the property interest was balanced against the state's weighty interest in providing organs to the living, the property interest in the body did not prevail, and the organs could be recovered.<sup>225</sup>

To date, looking at the often conflicting court opinions, the courts are treating each case individually without creating enduring principles to be applied in cases addressing bodies but, rather, relying on whatever principles they can conjure up to arrive at a fair outcome for the parties immediately before them. This results in, as demonstrated by the cornea cases, disparate outcomes despite similar circumstances—something our justice system seeks to avoid in the name of fairness and justice.<sup>226</sup>

As to body parts removed from living individuals for research purposes, there is also no definitive statement. The seminal case in this area is *Moore v. Regents of the University of California*.<sup>227</sup> The *Moore* decision is one of the first and only cases to directly address ownership over tissues used for human research, and it illustrates the wide differences of opinion.<sup>228</sup> John Moore discovered after years of treatment at the University of California, Los Angeles Medical Center for leukemia that his cells had been used by his doctors to develop an extremely profitable cell line for research purposes.<sup>229</sup> His unique condition made his cells and the resulting cell line extremely valuable. Moore, however, had never been told that his cells were being collected and used to develop a potential product that would be sold and from which biotechnology companies would reap large sums.<sup>230</sup>

After learning that his cells had been turned into a valuable cell line, he filed a lawsuit arguing that he owned his body parts and that his property rights had been stolen and his rights violated.<sup>231</sup> The lower court emphatically ruled that Moore had

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<sup>223</sup>*Whaley v. County of Tuscola*, 58 F.3d 1111, 1116 (6th Cir.), *cert. denied*, 516 U.S. 975 (1995). See also *Newman v. Sathyavaglswaran*, 287 F.3d 786 (9th Cir. Apr. 16, 2002) (holding that, if the state enacts a statute that appears to endorse a notion that the next of kin has property rights in the body of a deceased relative, then body parts cannot be removed without adequate notice to the next of kin of her right to refuse donation).

<sup>224</sup>See *Mansaw v. Midwest Organ Bank*, No. 97-0271 CV-W-6, 1998 U.S. Dist. LEXIS 10307 (W.D. Mo. July 8, 1998).

<sup>225</sup>*Id.*

<sup>226</sup>Although, of course, property law can vary by state.

<sup>227</sup>*Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479 (Cal. 1990).

<sup>228</sup>*Id.*

<sup>229</sup>*Id.*

<sup>230</sup>*Id.*

<sup>231</sup>It is worth noting here that, while the law prohibits payment for organs, it does not prohibit payment for medical tissue for research. Non-payment is the norm but not required by law. Rao argues that NOTA's prohibition of the sale of organs paradoxically portrays the

a property right in his tissue, reasoning that not awarding him that right and the concomitant control over his tissue it entailed would result in an “invasion of human privacy and dignity in the name of medical progress.”<sup>232</sup> Moreover, the lower court focused on the unequal bargaining power of an individual in need of medical treatment with his doctor and reasoned that imbalance of power only heightened the invasion of the individual’s privacy.<sup>233</sup>

In stark contrast, the California Supreme Court reversed the lower court over a vigorous dissent. The *Moore* majority concluded that societal interests in new medical products trumped individuals’ interests of financial benefit from their own tissue.<sup>234</sup>

The *Moore* court ruling is somewhat complicated by the nuances of John Moore’s particular legal claims. His primary claim argued strict tort liability under a theory of “conversion.” If the court granted his strict liability claim, this would mean that every party in the possession chain, including those researchers down the line who had no knowledge nor responsibility for the deception, would be liable in tort. Thus, liability would attach to every person or entity that had come into possession of the cells regardless of their knowledge of the cell’s origins. The California court expressed grave concerns that requiring scientific researchers to do extensive research and investigation regarding the consensual pedigree of their raw materials would likely stifle the, at that time, emerging bio-technology industry, which held, and still holds, great promise for treatments to aid all of society.<sup>235</sup>

In addition to valuing the advancement of public health and the biotechnology industry over individuals’ private rights in tissue, the majority reasoned that research participants do not merit property rights in the inventions because they perform no innovative or creative work. Finally, they reasoned that commodification of the human body is immoral, unethical, and contrary to our society’s values. Moreover, the court reasoned that Moore’s appropriate remedy was for a breach of fiduciary duty and informed consent and did not, therefore, lie in property law. They reasoned that the fiduciary duties owed by a doctor to a patient, properly applied, adequately protect the plaintiff’s interests. Finally, the court expressly looked to the legislature to solve the problem stating, “if the scientific users of human cells are to be held liable for failing to investigate the consensual pedigree of their raw materials, we believe the Legislature should make that decision.”<sup>236</sup> But neither the California legislature nor any other state legislature has passed legislation invalidating the theory in *Moore* that there is no property interest in the body.

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human body as an article of commerce that lies within the purview of Congressional power and would otherwise be subject to sale on the market. Rao, *supra* note 3.

<sup>232</sup>Moore v. Regents of the Univ. of Cal., 249 Cal. Rptr. at 508 (Cal. App. 2 Dist. 1988).

<sup>233</sup>*Id.*

<sup>234</sup>Moore, 793 P.2d at 479; see discussion in Rao, *supra* note 3; Mahoney, *supra* note 23; Gitter, *supra* note 23; ANDREWS & NELKIN, *supra* note 23.

<sup>235</sup>As Gitter, *supra* note 23, at 278, points out, the *Moore* majority endorsed a Kaldor-Hicks model of efficiency. Under this economic efficiency model, “a proposal for increasing aggregate economic welfare ought to be adopted if, in consequence, gainers could, in concept have sufficient gain to compensate losers and be left with a net gain.”

<sup>236</sup>Moore, 793 P.2d 496.

The California court's reliance on a doctor's fiduciary duty to her patient as adequately protecting John Moore's interests proved to be incorrect. Fiduciary law, as currently applied in health care, only applies to the relationship between the patient and his or her doctor. It does not cover any of the relationships down the chain with researchers, hospitals, or corporations who may eventually profit from an individual's raw materials. Moreover, *Arato v. Avedon*,<sup>237</sup> decided three years after *Moore*, took such a narrow view of a doctor's duty of informed consent for research that research participants are in fact left without much in the way of remedies if something other than their medical interests, such as their dignity or autonomy, is impacted by unethical research methodologies.<sup>238</sup>

Only a few cases following *Moore* directly address these issues. Most recently, in *Washington University v. Catalona*,<sup>239</sup> a dispute arose when a research doctor left his position at Washington University and took a position at a new institution. Dr. Catalona sought to take with him the biological materials he had collected from his patients for the purpose of continuing his prostate cancer research.<sup>240</sup> He argued that the materials belonged to his patients and that because many of them had signed a second consent form drafted by him directing that he be allowed to take the materials with him to his new institution, Washington University no longer had a legal interest in the materials.<sup>241</sup> Washington University argued, in contrast, that because it had "developed, paid for, and maintained a substantial repository of tissue and serum samples for prostate cancer research . . ."<sup>242</sup> and that because the initial consent forms were made out in the name of Washington University, not Dr. Catalona personally, the University owned the tissue samples.

The court sided with the University, finding that once the patients signed an informed consent form donating their tissue, blood, DNA, or other biological materials for research purposes to the University, they surrendered all rights of ownership to direct the use and transfer of the materials.<sup>243</sup> They could not come back later and direct a new use or ownership.

The court's opinion is ambiguous as to whether the patients ever had a property interest in their bodies. Under one reading, they potentially had such an interest, but lost it when they donated the tissue for research. Under another reading, they never had such an interest.<sup>244</sup> What is clear is that the court in *Catalona* equated

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<sup>237</sup>*Arato v. Avedon*, 858 P.2d 598 (Cal. 1993).

<sup>238</sup>*Id.*

<sup>239</sup>*Wash. Univ. v. Catalona*, 437 F. Supp. 2d 985 (E.D. Mo. 2006), *aff'd*, 490 F.3d 667 (8th Cir. 2007).

<sup>240</sup>*Id.*

<sup>241</sup>*Id.*

<sup>242</sup>Question and Answer release by Washington University regarding the *Catalona* case.

<sup>243</sup>*Id.*

<sup>244</sup>Charo, *supra* note 206. Also at issue in *Catalona* are waivers in Informed Consent Forms signed by patients donating tissue for research studies. Generally speaking, human research guidelines (Office for Human Research Protection (OHRP) guidelines) prohibit any exculpatory language in Informed Consent Forms in which the subject waives legal rights or releases the investigator, sponsor, or institution from liability for negligence. It is unclear

Washington University's possession and control over the research samples with ownership under state law and concluded that the University owned and controlled the removed samples.<sup>245</sup> Under the *Catalona* decision, once a patient donates materials for research, regardless of what relationship or legal interest the individual had with those materials prior to donation; they become an object, similar to equipment, brick and mortar, or intellectual property, in which title (ownership) vests with the institution conducting the research.<sup>246</sup>

In reaching its conclusion, the *Catalona* court relied on both the *Moore* case and one subsequent case, *Greenberg v. Miami Children's Research Institute*.<sup>247</sup> In *Greenberg*, discussed *supra* in Section III.B., families with a rare genetic disorder believed they had an agreement with a group of researchers that, in return for their donation of tissue and other samples with genetic materials, the researchers would develop a genetic test that would be made widely available on the families' terms.<sup>248</sup> The hospital and research institutions, however, gained a patent over the genetic test and disagreements arose between the patent holders and the families as to the manner in which the tests would be made broadly available and affordable.<sup>249</sup> The families sued, claiming, *inter alia*, that their property had been unjustly used to enrich the researchers' hospital and alleging conversion of property. The lower court, citing *Moore*, reasoned that the families had no property rights in their tissue and DNA.

As a result of the *Greenberg* case, as discussed in Section III.B., savvy patient groups are now bargaining in advance with researchers over the rights to the products and tools created with their tissues or genetic material.<sup>250</sup> Whether a court would strike down these private contractual negotiations as against public policy under *Moore* is simply unknown.

Organs and tissue are not the only body parts that have been addressed by courts. U.S. courts have taken somewhat varying positions with respect to body parts that are easily reproduced and separated, such as blood, sperm, and hair. In one case, a court likened blood to a tangible product akin to "eggs, milk and honey," clearly treating it as property and an object once separated from the body.<sup>251</sup> Similarly, in

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whether this prohibition includes property interests. A 1996 guidance document from the OPRR stated that waiver of property rights in tissue or fluid would violate this ban. Mark Barnes et al., *Wash. Univ. v. Catalona: Ownership and Use of Biological Materials Collected for Research*, 5 MEDICAL RESEARCH LAW & POL'Y REP. 336-39 (May 3, 2006) (available at <http://www.bna.com/>) (last visited Nov. 15, 2007). But a subsequent 1989 letter from the director of the compliance division reached the opposite conclusion. *Id.* The *Catalona* court found these agency pronouncements to be mere opinions and not legally binding. *Id.* (citing *Catalona* at 20).

<sup>245</sup>*Catalona*, 437 F. Supp. at 994-1002. See discussion of case in Barnes, *et al.*, *supra* note 211.

<sup>246</sup>Barnes, *et al.*, *supra* note 211.

<sup>247</sup>*Greenberg v. Miami Children's Research Inst.*, 264 F. Supp. 2d 1064 (S. D. Fla. 2003).

<sup>248</sup>*Id.*

<sup>249</sup>*Id.*

<sup>250</sup>Harrison, *supra* note 134.

<sup>251</sup>*Green v. Commissioner*, 74 T.C. 1229 (1980) discussed in Rao, *supra* note 76, at 372.

*Hecht v. Superior Court*,<sup>252</sup> the court allowed sperm to be bequeathed by will, essentially treating the sperm as property.<sup>253</sup>

Frozen embryos, on the other hand, have caused the courts some angst. In *Davis v. Davis*,<sup>254</sup> the Tennessee Supreme Court refused to treat an embryo as property. The court reasoned that the embryo was neither a person nor property but rather some sort of in-between category which required it to balance the various privacy interests at stake. In *Kass v. Kass*,<sup>255</sup> New York's highest court, in contrast to the Tennessee court, refused to apply privacy rights to a similar frozen embryo dispute. The court there reasoned that the embryo was not a person for constitutional purposes. Instead, the court treated the dispute over who controlled the embryo as one of dispositional authority to be determined by enforcement of prior contracts and agreements. The New York court's treatment of the embryo as the subject of a contract is compatible with a property treatment, but the court did not specifically endorse a property approach.<sup>256</sup>

Recently, in California's field of regenerative medicine, new funding regulations "require researchers to honor the limits set by donors of embryos or gametes on the kinds of work that can be done even with donated tissue that has been 'anonymized'—a rule consistent with a theory of property rights in tissue."<sup>257</sup> But as explained in Section VII, it does not necessarily entail a property rights regime. This regulation would also be consistent with the framework set forth in Section VII of this paper.

#### V. REFRAMING THE DEBATE

Ultimately, how we view and understand ourselves is at stake. Many of our core values underlie the questions and answers we ask about how we treat our body parts. Most fundamentally, our autonomy, dignity, human liberty, and self-determination are at issue, but balanced against these are our sense of ourselves as part of a larger community and our concomitant duties to help others. Superimposed on these issues are existing and quickly evolving markets and technologies and the great promises they hold for us. The questions are complex and hard to answer. Yet, given our nature as conscious beings with ethical sensibilities, we are compelled to ask questions and to attempt to develop some answers. Moreover, we need a consistent framework within which to ask and answer these questions. This is necessary not just to satisfy our sense of fairness and justice but also to give evolving industries and markets more certainty with which to plan and work.

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<sup>252</sup>*Hecht v. Super. Ct.*, 20 Cal. Rptr. 2d 275 (Cal. Dist. Ct. App. 1993).

<sup>253</sup>*Id.*

<sup>254</sup>*Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).

<sup>255</sup>696 N.E.2d 174 (N.Y. 1990).

<sup>256</sup>A pregnant woman's control over her body is another example of the courts addressing the complex web of relations regarding bodies and persons. Where the pregnant woman is incompetent, many courts have overridden her prior wishes or those of her proxy and taken over her body, refusing the right to remove life support, Rao, *supra* note 3, at 409-10. In these cases, they have treated the right at stake as one requiring a balancing of privacy interests, not one of property rights. *Id.*

<sup>257</sup>Charo, *supra* note 206, at 1517-19.

In asking these questions, we must also ask what is it we need the courts and/or legislatures to do regarding the treatment of our bodies. Should we seek uniform principles to be applied to these cases and the quickly evolving markets in tissue and body parts, so their treatment is clear? Or should we continue to address them on an *ad hoc* basis state-by-state, court-by-court, attempting to apply old bodies of law, such as property or privacy, as best we can?

Most parties involved would welcome some guidance, yet the consequences of selecting differing sets of principles are significant. For example, if ownership/property is selected, a multitude of questions will arise including the question whether individuals can sell their organs and body parts? Property does not necessarily require such treatment; we can allow ownership, but forbid sales. But ownership does entail “objectness” and “thingness” and most of us associate with it a right to sell things or, if not sell, at least dispose of things we own as we wish. Yet we do not allow individuals to give away essential organs, even if they so desire, because it would sanction suicide. On the other hand, a trusteeship model might imply that our bodies are held in common and that there is a communal right to our organs after we die,<sup>258</sup> violating some people’s sense of autonomy and control over their bodies. A privacy based model would create rights of action that do not currently exist. Such consequences explain, in part, why our legal system still has not answered the question “do we own our bodies?”<sup>259</sup> Moreover, there is simply confusion as so many different concepts appear to apply in part but not in full.

Moreover, we have strong and visceral reactions that we do not entirely understand or explore regarding the treatment of bodies and their parts. Our relationship with our bodies is complicated and laden with many different religious and societal beliefs. Science is learning more and more about how our minds are intimately connected with our bodies, and how our physical bodies create consciousness and even our sense of ethics and of being individuals. Yet, despite these connections or this connectedness, we know through our experience that we can distance ourselves from our bodies—to be what yogis call “an observer” of our thoughts, our minds, our bodies, and our feelings; we are both them and can observe them simultaneously. Being the observer does not entail objectifying our bodies necessarily, but we are certainly capable of that as well. We can view our bodies as things to be adorned, sculpted, manipulated, and transformed, and we can objectify ourselves and others. Yet our experience of the body “is simultaneously a perception of subjectivity and objectivity,” but we can also transcend our bodies and relate to ourselves as mere things. Our minds are quite powerful in making distinctions and thrive on creating meaning from difference. But there is a very real fear that doing this with body parts threatens the ambiguity we experience between our subjective and objective selves and turns the experience of the body into a “mere object in a world among other things.”<sup>260</sup>

A successful legal conception of our bodies must both recognize its “object” qualities and its “subject” qualities. Property, despite all of its malleability, cannot

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<sup>258</sup>*Id.*

<sup>259</sup>*Id.*

<sup>260</sup>*Id.*



accomplish this task, or at a minimum, it is not well suited to accomplishing this task, as property is inherently an object devoid of subjectivity.<sup>261</sup>

Any treatment of the body must recognize that we relate to the world through our bodies. And our bodies are an inevitable measuring stick through which we understand and experience everything. As neurologist Damasio explains:

[T]he body as represented in the brain, may constitute the indispensable frame of reference for the neural processes that we experience as the mind; that our very organism rather than some absolute external reality is used as the ground reference for the constructions we make of the world around us and for the construction of the ever-present sense of subjectivity that is part and parcel of our experiences; that our most refined thoughts and best actions, our greatest joys and deepest sorrows, use the body as a yardstick.<sup>262</sup>

In a very important sense, objections to treating the body as property stem from these concepts. Our bodies are the source of all we feel and think. Everything we experience is related or processed through our bodies. They are the root of our existence. Treating them as pure objects is repugnant because it lessens the essence of this miracle we experience as life. Any treatment of bodies must incorporate the dignity and sanctity of the body as the source of all we experience.

In addition to accomplishing this most difficult task, any set of legal principles for the body must encompass a sense of autonomy, liberty, and integrity, as well as a sense of altruism, reciprocity, relatedness, and moral obligations and duties. Yet, as discussed, differing frameworks emphasize different values, and it is difficult to come up with one that can accommodate these all too often competing values and concepts.

Property both aids and detracts from these values. Property aids the sense of autonomy in that it typically entails control—the right to possess, use, and exclude others, as well as to direct the disposition of. These are core elements of the bundle of sticks included in the property concept. Property also disaggregates and creates a conceptual system for allocating rights and responsibilities towards a resource.<sup>263</sup> Yet property also encompasses a dualism, which is not consistent necessarily with our understanding of ourselves. Property implies something separate doing the owning that is distinct from the object owned.<sup>264</sup> This separateness and objectification, stemming from a dualistic view of the person as separate from the body, is not threatening when the essence of human life is not at stake.<sup>265</sup> While it allows us to create value in our markets and is a crucial tool in our arsenal for

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<sup>261</sup>Of course, slavery is a counterexample. Slaves were property but also clearly had subjectivity. Slavery, however, is uniformly now considered immoral and not an ethical practice, precisely because it treats people as property and objects.

<sup>262</sup>Damasio, *supra* note 102, at xvi.

<sup>263</sup>*Id.*

<sup>264</sup>Rao, *supra* note 3, at 366-72.

<sup>265</sup>Munzer, *supra* note 71.

valuing and trading resources,<sup>266</sup> at the same time, this attribute is property's failing.<sup>267</sup>

Some scholars (*e.g.*, Rao) frame the debate as necessitating a choice between a property or privacy paradigm. Privacy is strongly related to property, as both create boundaries and protect individual autonomy. Both are full of metaphors and language describing boundaries that protect the individual. The appeal in these concepts, thus, stems from, among other things, the sense of a boundary, as our bodies constitute one of the most significant boundaries we experience between us and the world.

Yet, for important reasons, the concepts of privacy and property are also quite distinct. Whereas property creates the dualism and objectification described above, privacy envisions something that is indivisible and inextricably intertwined.<sup>268</sup> Property is a positive entitlement,<sup>269</sup> endowing the individual with rights and power against others. Privacy, on the other hand, is a negative entitlement; it does not empower but, rather, circumscribes interference with personal and spiritual activities. Property protects market relationships; whereas, privacy protects personal spheres and relationships. Privacy interests cannot be sold, separated, confiscated, or contracted away, but they can be balanced against competing interests. Privacy interests cannot be disaggregated or objectified. Privacy interests also end at death.<sup>270</sup>

Privacy thus aligns itself well with non-commodification and integrity of the individual and body. It also connotes control, although not absolute, as it can be balanced against other interests. It is, in effect, a legal characterization of the body, not so much as body but rather as a refuge from the state and others' competing rights or demands.<sup>271</sup>

Both concepts include and support autonomy values and are important in creating our sense of liberty, as well as in defining our relationships to the state. Consequently, we tend to lean on them when we are uncertain. They are comforting when we are in unfamiliar territory regarding the conflicts that arise regarding the body and its parts. Yet these new dilemmas call for a new conceptualization that can both continue to protect autonomy and liberty but also address our relatedness.

Instead of looking to one particular area of the law, we should ask how we can construct a body of the law to address body parts. Given the broad array of differing issues to be addressed and the law of unintended consequences, a broad array of responses will likely be necessary, and any scheme must present broad principles not narrow rules. Yet the principles must be sufficient to guide analysis and outcomes to

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<sup>266</sup>Mahoney, *supra* note 28; Gordan & Postbrief, *supra* note 117.

<sup>267</sup>Munzer, *supra* note 71, at 43.

<sup>268</sup>Rao, *supra* note 3.

<sup>269</sup>Munzer, *supra* note 71, at 43-45.

<sup>270</sup>Rao argues that privacy should apply to the body until death at which point the body becomes property and that paradigm should take over. He believes that these are dynamic rights that can evolve; whereas, stewardship is static and not up to the task. Rao, *supra* note 3, at 445.

<sup>271</sup>Hyde, *supra* note 57, at 85-6.

the best and most just result. What is needed is a new law of the body. Just as we have, for example, labor law to govern our working relationships, we need a law to govern our bodies and their constituent parts. Such a system works best if it is an amalgamation of legislation and judge-made law.

Ultimately, given the principles upon which our society is founded, we must establish certain values that most of us can agree upon regarding our bodies.<sup>272</sup> Those values are autonomy (control) over our destinies (liberty) and, hence, some degree of control over what sorts of uses are made over our body parts once they are separated from us. Dignity in the treatment of body parts is also important. As to relationships and duties, a communal right and duty regarding our bodies is simply not part of our current culture or legal vocabulary. It is hard to impose a duty where there is no coupled right. Yet there is still a need to recognize our interconnectedness as a community. Moreover, something must govern the relationship between the donor and the entity that receives any parts, whether it is an organ or tissue after death or tissue donated during a medical procedure for research. Autonomy itself can be seen as imposing some sort of duties upon those who work with, receive, or benefit from body parts.

Stewardship often is cited as an alternative paradigm. Stewardship is not a legal paradigm in and of itself,<sup>273</sup> as there are few laws directly addressing stewardship. Although, in a broad sense, the law of trusts, agency, and other bodies of law that encompass fiduciary duties include elements of the concept of stewardship, stewardship, as commonly understood, entails taking care of something. While one can own that which one is the steward over, ownership is not central to the concept. Rather, responsible management is the controlling element. It connotes a relationship in which there is a duty to manage in a responsible manner. As to natural resources, for example, stewardship entails managing them so as not to deplete them but rather to use them so that value is maximized for current and future generations.

Stewardship, unlike property and privacy, can encompass subjects at both ends of a relationship or an object or thing at one end. It does not necessarily imply objecthood without subjectivity, which property implicitly creates, nor does it require a subject at both ends, as privacy does. Dignity can be read into stewardship because the duty to manage or use responsibly can promote the thing managed as being entitled to respect and dignity, whether it is a mere object or something else.

Stewardship can also satisfy many justice concerns. Objections to the courts' solution in *Greenberg* and *Moore* arise because individuals received no benefit from

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<sup>272</sup>Gordon & Postbrief, *On Commodifying Intangibles*, *supra* note 107 (explaining the theory that a successful theory of treatment of the body needs an account of human flourishing).

<sup>273</sup>Nor, surprisingly, is "stewardship" defined as a word in most dictionaries. Webster's New Universal Unabridged Dictionary (1989) fails to define stewardship as a word, although it does define a steward as one who manages another's property or financial affairs, one who administers anything as the agent of another or others, as well as the position of one managing household affairs or waiting on passengers in a variety of vessels. WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY (1989); Apple Computer's online dictionary also does not include stewardship as a word. Apple Computer Dictionary, <http://www.computer-online.org/> (2007). The Oxford English Dictionary's online service only mentions that it is a derivative of steward. Oxford English Dictionary Online, <http://www.oed.com> (2007).

products created from their donations; whereas, doctors and biotechnology companies reaped profits. Courts are concerned, however, with logistically giving patients control over their samples once donated, and rightly so. Giving them total control over their samples would create a logistical nightmare and make research extremely difficult, thus stifling new discoveries. Stewardship could impose duties on the doctors and companies to use the products in a responsible manner and to use them only in a manner consistent with certain principles. It might also impose a responsibility to give back to the broader community, thus meeting justice concerns. But it would not necessarily give the original donor the power to disrupt the research and directly control the disposition of a research sample.

What stewardship does not provide, however, is concrete rules. It is merely an ethical precept, not a body of law. Moreover, the liberty values of control and autonomy, which must be central to any body of law regarding the body and its parts, are not part of the concept of stewardship.

Is there a body of law that meets all of these concerns? Agency law offers a possibility.

#### VI. DEFINING STEWARDSHIP TO INCLUDE FIDUCIARY DUTIES TO SOCIETY AND DONORS THROUGH AGENCY PRINCIPLES

Fiduciary duties owed today contain some elements of stewardship but are insufficient to protect individuals' dignity and autonomy.<sup>274</sup> Is there a way to expand the concept of fiduciary duty with broader principles so as to protect dignity and autonomy? What would a new duty or expanded fiduciary duty look like? The concept of duty and obligation, generally, is missing in great part from much of contemporary American society, which is more focused on rights. Duties tend to be associated in our minds with antiquated concepts that have roots in the past and past cultures (*e.g.*, duties in feudalism to a liege lord). If rooted to old modes of being, duty may not be particularly useful to us in formulating a solution. But there are places where duty can come into play in contemporary life. Duty is really part and parcel of the concept of stewardship. It is this sense of duty that separates stewardship from the concept of ownership, which predominantly entails positive rights without concomitant duties.

Agency law is, in part, a law of duties.<sup>275</sup> Historically, it derives from the law of master and servant.<sup>276</sup> In essence, it sets forth principles to govern a relationship.<sup>277</sup> As such, it is a good fit for defining stewardship because it defines the rights and duties within the relationship and also sets forth the mechanisms for redress if duties are violated.<sup>278</sup> Additionally, agency law incorporates within the relationship aspects

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<sup>274</sup>*See, e.g.*, Rodwin, *supra*, note 75, at 249-50 ("Generally malpractice law ignores traditional fiduciary concerns" and doctors' duties are limited to clinical competence, obtaining informed consent, preserving patient confidentiality, and not abandoning patients.).

<sup>275</sup>RESTATEMENT (THIRD) OF AGENCY §1.01 (2006).

<sup>276</sup>*Id.* Moreover, according to some scholars, both trust law and agency law trace their lineage to the concept of stewardship, as set forth in the Biblical parable of the unjust steward in the Gospel according to Saint Luke. Rodwin, *supra* note 75, at 243.

<sup>277</sup>RESTATEMENT (THIRD) OF AGENCY §1.01, *et seq.* (2006).

of control and consent; the relationship must be a “consensual” one, thus respecting the parties’ autonomy and dignity.<sup>279</sup>

Typically there are three categories of parties involved in an agency relationship: (1) a principal, (2) an agent, and (3) affected third parties.<sup>280</sup> Essentially, agency law sets forth a variety of fiduciary duties that an agent owes to a principal and that a principal also owes to an agent. It typically is envisioned as “encompass[ing] the legal consequences of consensual relationships in which one person (“the principal”) manifests assent that another person (the “agent”) shall, subject to the principal’s right to control, have power to affect the principal’s legal relationship through the agent’s acts and on the principal’s behalf.”<sup>281</sup>

Within the broad confines of agency law there are “true” agency relationships that must meet the strict requirements of agency, but there are also what the *Restatement (Third) of Agency* refers to as “untrue” agency relationships that do not meet all of these prerequisites but are still governed by many of the same principles. Essential to a “true” agency relationship are certain requisite elements of control, including (1) an ability by the principal to terminate the relationship at any point and (2) an ability by the principal to change instructions through interim directions to an agent.<sup>282</sup> Traditionally, “many people understand the law of agency . . . to appl[y] to situations in which one person has, or appears to have, the right to enter into contracts with third parties that bind a principal or in which a person has the right to make dispositions of another person’s property.”<sup>283</sup> If one were to hypothesize that a donor or patient were the principal and anyone receiving a body part were an agent, agency law would not be a good fit. The control aspect would create far too many problems to be accommodated in any realistic fashion.

But, importantly, for our purposes, the reach of agency relationships is broader than the traditional understanding of this strict form of true agency.<sup>284</sup> Agency

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<sup>278</sup>Also appealing are the other meanings of agency outside of the legal doctrine. While relying on them conflates separate and distinct meanings, those meanings also come into play within this context. Section 1.01 (b) of the *Restatement* comments: “the terminology of agency is widely used in commercial settings and academic literature to characterize relationships that are not necessarily encompassed by the legal definition of agency. In philosophical and literary studies, “agency” often means an actor’s capacity to assert control over the actor’s own intentions, desires, and decisions. In economics, . . . relationships in which one person’s effort will benefit another or in which collaborative effort is required.” Both of these non-legal meanings of agency have obvious appeal in this context as agency conveys a sense of autonomy and an active agent in the world, and there is a collaborative effort potentially benefiting another. RESTATEMENT (THIRD) OF AGENCY §1.01 cmt. b (2006).

<sup>279</sup>*Id.* at §1.01 cmt. d.

<sup>280</sup>*Id.*

<sup>281</sup>*Id.* at 3. Section 1.01 of the *Restatement (Third) of Agency* defines agency as “the fiduciary relationship that arises when one person (a “principal”) manifests assent to another person (an “agent”) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.” *Id.* at §1.01 (2006).

<sup>282</sup>*Id.* at introductory cmt, exclusions & inclusions, *et seq.*

<sup>283</sup>*Id.*

<sup>284</sup>*Id.*

embraces a “broader set of relationships than might be expected” and, thus, intersects with many different bodies of law, for example, torts, restitution, and employment law.<sup>285</sup> While all employees of a business are not necessarily true agents because they cannot make binding contractual rights or liabilities on behalf of their employers, the law of agency is still relevant because it “defines duties the employer and employee owe to each other, and it defines circumstances under which the employer is vicariously liable for wrongs committed by an employee.”<sup>286</sup>

Another example of an “untrue” agency relationship would be a durable power of attorney. This is an agency relationship created initially by a principal consenting to someone to act as his or her agent in the future. Yet the actual agency relationship, in this instance, is only triggered by the principal’s loss of mental competence, at which point the principal is unable to terminate the relationship or to provide interim instructions.<sup>287</sup> The control requisite to a “true” agency relationship is not present. Yet the agent has a duty to adhere to the initial set of instructions and other fiduciary duties.

The duties of an agent, true or untrue, generally are those of a fiduciary: general duties of care, competence, and diligence; a duty of good conduct; a duty to provide information regarding that being taken care of; and a duty of record keeping and accounting.<sup>288</sup> In addition to these duties, which one could imagine easily mapping onto the treatment of body parts, there are also other duties: that any benefits flow to the principal and not to the agent; that there be no commingling of properties of the agent with the principal’s assets; and that the principal is always in control and can terminate the relationship. Plainly, this latter set of principles is inappropriate for any body parts regime. Continuing control is impractical in almost all contexts. The donor is either dead and the parts are now part of someone else and control is now in their purview, or it would stifle research and development of new products to allow such control. The duty regarding no commingling of assets is also impractical in almost every context. Furthermore, benefits do not only flow to the original donor (in this analogy the principal); rather, benefits may flow to all involved: recipients, corporations, and society as a whole.

Thus, while a strict and true agency relationship cannot be directly mapped onto the body, how we treat our body parts, once separated from the body, can be addressed by aspects of agency law. We can isolate those aspects of this old body of law and expand upon them to meet the needs addressed in Section V. Agency law can apply in a way akin to its application to durable powers of attorney. At the time the power of attorney is created, there is a principal and an agent. In the context of body parts, initially, as the donation or separation of the body part is occurring, there could exist something more akin to an agency relationship.

After separation from the body occurs, the relationship is more “trust like” because there is no true agency relationship, yet the agent has a duty to follow the

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<sup>285</sup>*Id.* “Relationships of agency are among the larger family of relationships in which one person acts to further the interests of another person and is subject to fiduciary obligations. Agency is not antithetical to other fiduciary relationships . . . .” *Id.* at §1.01 cmt. g, illus. 17.

<sup>286</sup>*Id.* at introductory cmt., exclusions & inclusions.

<sup>287</sup>*Id.*

<sup>288</sup>*Id.* at § 8.01.

initial guidelines set forth by the principal. What exactly might this entail? First, consent is essential to the relationship, and under our current regime, typically some form of consent is required. But an agency relationship implies more than just consent; an element of control is also a prerequisite. While it would be impractical in all instances (*e.g.*, organ donation) to allow each principal or family to set forth detailed guidelines and instructions, it is, however, not impractical to imagine a set of principles generally applicable to all donations of tissue and organs that would be disclosed to the principal, as well as a range of options to choose from as to future uses. The range would be something like the range of options offered to a financial donor to a university or school. The donor can restrict his or her donation to certain purposes (*e.g.*, athletics or musical programs only). As long as the funds are used responsibly within these circumscribed categories, they meet the terms of the initial donation. Likewise, people could circumscribe the future uses of their body parts.

Of course, there are limits on the ability to designate uses. One cannot designate, generally, when donating to a scholarship fund, for example, that no lesbian or African-American be given a scholarship. Likewise, someone cannot prohibit the tissue from going to specific groups of people. Instead, only certain types of uses and limitations could be allowed. But, in this way, some limited form of control and autonomy is given to the individual or his or her family. Moreover, by disclosing certain uses (and this would be a very limited, but broad, universe of categories), there is much fuller disclosure and openness about what may occur in the future to the body part, making the entire process more sincere and open.

Finally, an ultimate accounting is required by agency law, which should also be required by stewardship. While the accounting may not necessarily be required to each individual, an annual report by each organization using body parts is not out of the question: something available for public inspection and widely disseminated explaining the ultimate uses, profits and losses, and return to society in a way for all to see. Such an accounting entails something different than what is typically present in an annual report, such as balance sheets explaining revenues and expenses. Instead, it requires an accounting of the uses of the body parts and the ultimate benefits received from those uses.

In order for the stewardship concept to be meaningful, any recipient organization of body parts would owe specific duties to society or to donors and their families. Adding both (1) an element of control over future uses of body parts and (2) requiring an accounting introduces elements of an agency relationship. Stewardship as an ethical concept could be structured to incorporate these principles of agency law and more broadly fiduciary law as not only the right thing to do but also a socially expected requirement or a legal duty.

Finally, neither stewardship nor these agency principles rule out payment or in-kind compensation for body parts. Monetary compensation or in-kind compensation (*e.g.*, funeral expenses), if provided in this context, do not necessarily raise the fears expressed by those opposing an ownership/property designation. As Radin argues, the real concern is that compensation is the beginning of a slippery slope, ultimately permitting social oppression such as turning the subject (*i.e.*, the person) into an object.<sup>289</sup> Compensation, however, can exist within frameworks other than

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<sup>289</sup>Radin, *supra* note 83, at 154-63.

property.<sup>290</sup> An understanding more akin to how we compensate for services, for example, does not necessarily lead to the feared social oppression. If compensation is given, but it is given within a context of shared relationships and duties that are clearly enunciated instead of simply a market exchange, we can avoid the slippery slope to social oppression.

## VII. CONCLUSION

“When systems fail, alternatives must be sought.”<sup>291</sup> Ultimately neither courts nor the legislatures are likely to resolve the confusion surrounding the treatment of human body parts. The place for answers and a resolution is most likely to stem from our practices, our customs, and the discourse we use in addressing our treatment of human body parts. A new understanding in this context will then naturally filter through to the courts and legislatures as necessary.

Stewardship, if re-defined to incorporate familiar duties, rights, and relationships offers one possible framework. Turning to stewardship, however, requires much work to flesh out the concept and give its framework significant substance. One possible avenue for developing concrete guidelines and new institutions to support the ethical concept of stewardship are those defined above: requiring certain specific duties, including some element of initial designation about future uses within narrow limits, and an ultimate accounting to society of the treatment and uses made. By no means is this the only path, but it is useful because it can accommodate a wide range of values, including a limited, but still viable, autonomy and, simultaneously, a sense of relatedness through mutual obligations.

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<sup>290</sup>*Id.* at 97-102 (explaining that non-market and market conceptualizations or understandings can exist simultaneously).

<sup>291</sup>Goodwin, *supra* note 6, at 314.