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No Value for a Pound of Flesh: Extending Marketinalienability of the Human Body

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NO VALUE FOR A POUND OF FLESH: EXTENDING MARKET-INALIENABILITY OF THE HUMAN BODY

I. INTRODUCTION

Imagine that you are a destitute, lower-class laborer in Brazil.[1] As you are hard at work one day, a foreign man whom you have never seen before asks if you will sell one of your kidneys for an American woman dying of kidney failure. He offers you a sum of $25,000, and he assures you that all your travel and medical expenses will be covered.[2] Moved by the chance to help save a stranger's life and by the good fortune to make some quick (and much-needed) money, you excitedly agree to be flown to a hospital in South Africa to undergo the transplant procedure. But matters quickly sour. You receive only $6,000 of the promised sum, and when you return home, you find criminal charges filed against you for participation in an illegal organ trade. To make matters worse, you have begun developing health complications from the hurried procedure.[3]

Now picture yourself as a female college student at an Ivy League institution in the United States.[4] One day as you are leafing through the school newspaper, an

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[1]Larry Rohter, *The Organ Trade: A Global Black Market; Tracking the Sale of a Kidney on a Path of Poverty and Hope*, N.Y. TIMES, May 23, 2004, at 1. The following relates the true story of Alberty Jose da Silva, a 38-year old Brazilian who has been implicated in a worldwide black market organ trade.

[2]*Id.*

[3]*Id.*

[4]This story derives from a particularly attractive advertisement in a 1999 college newspaper. The ad reads as follows: "Help our dream come true…couple seeking egg donor. Candidates should be intelligent, athletic, blonde, at least 5'10", have a 1400+ SAT score, and possess no major family medical issues. $50,000." SoYouWanna.com, *So You Wanna*

advertisement catches your eye: "$50,000 guaranteed for eggs. Must have blonde hair and blue eyes, have minimum SAT score of 1450, be no shorter than 5'6", be of attractive physique, and be in overall good health." Judging yourself compatible with these requirements, you follow up on the ad and begin the procedure to donate your eggs. However, the experience does not quite live up to the advertisement. Not only do you endure an extremely invasive procedure, including having to take hormone-stimulating drugs that possibly present unknown risks to your health, but you also receive much less than the promised $50,000.[5]

Although these two situations at first glance appear worlds apart, the dilemmas suffered by their protagonists derive from a common source: federal, state and international statutory prohibitions on organ sales. In the United States and many countries throughout the world, selling non-regenerative organs for monetary gain constitutes a serious criminal offense.[6] Notwithstanding this strong ban on the sale of organs, United States citizens are permitted to sell other "parts" of their bodies, including blood, sperm, and eggs ("ova"), for market value because current statutes do not consider reproductive cells and other regenerative tissue "organs" or even within the ambit of "parts."[7] Rather, in most contexts, regenerative cells and tissue are thought of as "products" of the human body. In fact, the United States remains one of only a few industrialized nations that allow the sale of human reproductive cells ("gametes").[8]

Given the similarities between the unfortunate stories above, however, such a "Products vs. Organs" distinction is no longer tenable in this age of rapidly-developing medical research. The incongruous management of alienation of human body parts needs to be reconciled with traditional principles of property law. This note seeks to bring the legal status of gametes into line with that of organs using the framework of property rights. This note will argue that, since the law justifiably prohibits people from selling organs, it should likewise bar them from selling any

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Donate an Egg?, http://www.soyouwanna.com/site/syws/donateegg/donateeggFULL.html (last visited Nov. 27, 2004).

I challenge readers of this note to consult their local city or college newspaper, as they will find advertisements quite similar to this one.

[5]NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, THINKING OF BECOMING AN EGG DONOR? GET THE FACTS BEFORE YOU DECIDE! 7 [hereinafter "GET THE FACTS"] (Oct. 2002), *at* http://www.health.state.ny.us/nyudoh/infertility/pdf/1127.pdf.

[6]National Organ Transplant Act, 42 U.S.C. § 274e (2004).

[7]"Human organ[s]" include the following under § 274e: human (including fetal) kidneys, liver, heart, lung, pancreas, bone marrow, cornea, eye, bone, and skin "or any subpart thereof." 42 U.S.C. § 274e.

[8]The United Kingdom and France make illegal the outright sale of reproductive cells. David B. Resnik, *Eggs for Sale*, 3 J. MED. ETHICS 1 (2000), http://www.ecu.edu/medhum/newsletter/ spring2000_p1.htm (last visited Jan. 12, 2005).

Also, Canada has banned sales of human eggs and sperm. Michelle Blackley, *Eggs For Sale: The Latest Controversy in Reproductive Technology: Couples Are Paying Lofty Fees to Egg Donors With the Perfect Combination of Brains and Beauty*, USA TODAY MAGAZINE (July 2003), *available at* http://www.findarticles.com/p/articles/mi_m1272/is_2698_132/ai_104971305 (last visited Oct. 27, 2004).

parts of their bodies - even the products thereof (specifically sperm and ova) - as disposable personal property. This note will conclude with the proposition that a system of total market-inalienability and uncompensated donation of human body parts will best fulfill the economic goal of supplying organs and gametes to those in need of them while simultaneously protecting donors from any coercion of sale.

Part II of this note will begin by surveying the philosophical and doctrinal underpinnings of property law as they relate to human beings and their bodies and will continue with an exploration of the impact, both theoretical and actual, of commodification on market behavior. Then, through case study at both the federal and state levels, Part II will assess the historical judicial hesitance against recognizing any outright property interests in the human body or its components. Part III will describe the current state of the law prohibiting market sales of human organs and factual data regarding organ donations. It will then move to a discussion of contemporary policies for and against the sale of "non-regenerative" organs.

Part IV will explain why sales of gametes are contrastingly permitted in the United States and will position arguments supporting the sale and purchase of sperm and ova as distinguishable from organs. Finally, Part V will compare and analyze the preceding arguments and will argue that the statutory prohibition on monetary compensation for organs should extend uniformly to gametes. This paper will conclude with the proposition that the law should authorize only profit-less donations of either organs or gametes and only allow reimbursement costs to donors for expenses incident to the donation procedures.

II. HISTORICO-LEGAL TREATMENT OF THE HUMAN BODY

A. Doctrinal and Philosophical Theories on "Propertization" of the Human Body

In order to determine whether any property right in the human body exists, property itself should first attain a satisfactory definition. However, this task proves to be quite difficult, if not practically impossible, since property has always been an abstract concept at best.[9] Contrary to the common tendency to define property with respect to physical objects, property actually refers to "rights or relationships among people with respect to [those objects]."[10] And so, most property theorists envision property as a "bundle of rights" – a commingled group of separate rights gained when one acquires property.[11] Classically, these include the right to use property, the right to exclude others from using one's property, and the right to transfer or "alienate" property.[12] Regardless of whatever definition of property one uses however, property, as a societal vehicle in attributing wealth, must have its basis in some broader justifying theory.[13]

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[9]JESSE DUKEMINIER & JAMES KRIER, PROPERTY, 93 (4th ed. 2002).

[10]*Id.*

[11]*Id.*

[12]Brotherton v. Cleveland, 923 F.3d 477, 481 (6th Cir. 1991); DUKEMINIER & KRIER, *supra* note 9, at 93.

[13]Michelle Bourianoff Bray, *Personalizing Property: Toward a Property Right in Human Bodies*, 69 TEX. L. REV. 209 (1990).

Indeed, several theories were advanced to justify property rights. To begin with, John Locke espoused a theory of property grounded in principles of natural law.[14] In regard to human beings and property, Locke stated that all people by nature have a property interest in their own "person."[15] This right derived from one of Locke's central theses: people could own things external to themselves only because they first have ownership in their own bodies.[16]

Similarly, Georg Frederic Hegel postulated that ownership of one's body necessarily precedes ownership of any external things.[17] However, Hegel diverged from Locke when maintaining that no absolute property rights in one's body could exist;[18] rather, human beings decide when and how they wish to relinquish their rights to "the members of [their] bod[ies]."[19] Thus, Hegel took Locke's natural rights theory and added the element of human choice into the calculus of defining property rights.

However, a second property theory stands diametrically opposed to natural rights theory: utilitarianism. With Jeremy Bentham and John Stuart Mill as its primary advocates, utilitarianism generally holds that property rights exist only because human behavior and laws create and grant them.[20] For Mill, the ideal notion of property contained the rights to things that human beings produce by their own labor.[21] Accordingly, Mill reasoned that no property right in the human body could exist, since the body is not a product of human labor.[22] Furthermore, Mill lamented that the law "ha[s] made property of things which never ought to be property, and absolute property where only a qualified property ought to exist."[23] Thus, while early natural rights theorists assumed and almost took for granted that property right exists in the human body, utilitarians contrarily denied that people have this right.

With this divergent quandary in mind and in order to strike a balance between these two competing theories, in 1987 law professor Margaret Jane Radin, proposed her "personhood model" for property rights in a highly influential law review article.[24] Developing her model under the auspices of Kant and Hegel, Professor Radin promoted that the closer something is to the human identity and self, the less accurately it can be considered property.[25] In other words, those aspects, attributes, and qualities of the human person – those that are so qualitatively vital to the concept

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[14]*See generally* JOHN LOCKE, TWO TREATISES ON GOVERNMENT § 27 (3d ed. 1968).

[15]*Id.*

[16]Bray, *supra* note 13, at 212.

[17]*Id.* at 213. GEORG HEGEL, PHILOSOPHY OF RIGHT § 44 (T. Knox trans. 1967).

[18]Bray, *supra* note 13, at 213.

[19]HEGEL, *supra* note 17, at § 47.

[20]JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY, bk. I, 123-25 (1904).

[21]*Id.* at 133.

[22]Bray, *supra* note 13, at 213.

[23]MILL, *supra* note 20, bk. III, at 208.

[24]Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

[25]*Id.* at 1907.

of human identity, those that are quintessentially "human" – should never receive property status. Although Radin did not directly address the issue of whether the human body is property under this "personhood" paradigm, she appreciated that all body parts could be esteemed as so "integral to the [human] self" that they are essentially distinct from vulgar, fungible market commodities.[26]

Crucial to Radin's thesis is the notion of separability: "[t]o conceive of something personal as fungible assumes that the person and the attribute, right, or thing, are separate."[27] In regard to human bodies and parts, separability translates like this: conceiving of a human organ, which likely would be deemed as truly personal to human self and identity, as "monetizable or completely detachable from the person . . . is to do violence to our deepest understanding of what it is to be human."[28] For Radin, not unlike Mill in this respect, separability of the human person from the body portends the very real danger of viewing all other people as objects, attainable and ownable as personal property.

Radin's personhood analysis further developed the concept of separability within the context of a fundamental right in the "bundle" of property rights: alienability. Following Hegel, she defined alienation plainly as "the separation of something . . . from its holder."[29] Applying that model to the human person, she argued that only those things inherently separate from the human self can be alienated from it.[30]

Just as the Declaration of Independence professes its list of "inalienable rights,"[31] certain rights are indeed inherently inalienable.[32] While American property rights generally enjoy a presumption of full alienability, certain "exceptional" property rights are denied this status completely.[33] As Radin suggests, total inalienability yields many nuances in meaning, in some instances denoting not subject to transfer or not subject to commercial sale, while in others carrying the connotation of rights not relinquishable, waivable or perishable at the hand of their holders.[34] For the purposes of this note, "inalienability" refers to that category of property not subject to commercial sale - that certain things are of such nature that they can never be transferred by contract for sale in exchange for valuable consideration.[35] Radin terms this species of non-salability "market-inalienability."[36]

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[26] *Id.* at 1906. Examples of "everyday" fungible commodities may include automobiles, baseball cards, steak dinners, currency, and deeds to parcels of land.

[27] *Id.*

[28] *Id.*

[29] *Id.* at 1852.

[30] *Id.*

[31] THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

[32] Radin, *supra* note 24, at 1849.

[33] *Id.* at 1850.

[34] *Id.* at 1849-50.

[35] *See id.* at 1850; Radin's extreme example for a "non-salable" is that of a "market in infants"; *see also* Landes & Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 23 (1978).

[36] Radin, *supra* note 24, at 1850.

Nevertheless, Professor Radin was careful to assure that non-salability does not mandate per se prohibitions on donative transfers as well.[37] Gifts of market-inalienable objects are always permissible in such a regime, according to Radin, because "[n]on-giveability" (the prohibition against donative transfers) occupies a separate sphere of inalienability from non-salability;[38] that is, they are, visually speaking, two circles that overlap in certain situations but do not overlap in others. And so, Radin explicated an essential aspect of market-inalienability when stating that, while property classified as market-inalienable cannot be transferred by contract for sale, it may be transferred by gift.[39]

Still, the genius of Radin's market-inalienability model did not fully shine through until she further applied it to the concept of commodification.[40] Generally, a "commodity" is any article of trade or commerce for sale in a particular market.[41] In the simplest sense, commodification describes legally permitting the buying and selling of some thing.[42] For Radin, however, commodification of the human body poses an even greater danger than simply buying and selling on the market. For in another, broader sense, commodification not only means actual salability on the market but also includes general "market rhetoric, the practice of thinking about interactions as if they were sale transactions."[43] In other words, commodification represents the subconscious categorizing of something as a market good. Radin argues that, once this first step of commodification occurs, that is, "once market value enters our discourse" in regards to a certain object in the primary instance of sale, a slippery slope will result, and "market rhetoric will take over and characterize every [future] interaction in terms of market value."[44]

When the concept of commodification is applied to the human body, treating it as an article of commerce in a few preliminary transactions (sales of organs, for example) would eventually lead to the human body itself being thought of as a fungible commodity.[45] More specifically, once the first legally-sanctioned barter of a human kidney commences, it will be only a matter of time before all kidneys will be considered and sought after as market commodities.

And so, applying market-inalienability to the concept of commodification, Radin argued that "[b]y making something nonsalable we proclaim that it should not be conceived of or treated as a commodity."[46] As a result, Radin advocated a prophylactic rule against outright sale of children, sexual services, physical

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[37] *Id.* at 1854-55.

[38] *Id.* at 1853.

[39] *Id.* at 1854-55.

[40] *Id.* at 1855.

[41] "The term embraces only tangible goods, such as products or merchandise . . . ." BLACK'S LAW DICTIONARY 291 (8th ed. 2004) (emphasis added).

[42] Radin, *supra* note 24, at 1859.

[43] *Id.*

[44] *Id.* at 1914.

[45] *Id.* at 1907.

[46] *Id.* at 1855.

characteristics, and body parts because "such commodification [would be] destructive of personhood . . . ."[47] Thus, Radin completed her model of personhood theory of property by declaring that all rights, attributes, and things intrinsically unique to the human person must not be commodified.[48] The appropriate means to accomplish this goal of non-commodification of the human body lies in deeming it and its composite parts market-inalienable.

Although philosophers and theorists have disagreed on whether or not the body is property, Professor Radin's personhood model of property rights strikes a delicate and appropriate balance. Even if it could be said that people have property rights in their own bodies, those rights still must be carefully limited. One necessary and proper limit, as Radin suggests, is to deem the human body and its parts market-inalienable.[49] This vision of non-salability best preserves the utmost dignity and respect for the human vessel by not allowing a price tag to be affixed to it while at the same time permitting free donation for much-needed human organs, tissue, and cells.

B. Case History of the Human Body and its Parts as "Quasi" Property

Historically, American law has been consistently averse to allowing people to treat their body parts like normal parcels of personal property.[50] This fact may arouse curiosity and concern, since the Declaration of Independence affirms the right to the pursuit of happiness and the concomitant right to own property to be "inalienable."[51] However, the Framers' intent was likely not to include a property right in one's body as one of those constitutionally protected rights.[52]

Following English common law, courts in the United States initially refused to recognize any property interest in a human corpse, particularly for purposes of burial.[53] Despite this early reluctance, several 19th century state courts labored to grant plaintiffs recovery for the right to bury their next of kin.[54] For instance, in 1890, the Indiana Supreme Court allowed a father and mother to recover in tort for the negligent disposal of their deceased daughter's body.[55] Although positioning its

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[47]*Id.* at 1910.

[48]*Id.* at 1907.

[49]*Id.* at 1903.

[50]Lori B. Andrews, *My Body, My Property*, HASTINGS CENTER REP. 28, 29 (Oct. 1986).

[51]THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

[52]Bray, *supra* note 13, at 218.

[53]ALEXANDER M. CAPRON & IRWIN M. BIRNBAUM, 5-23 TREATISE ON HEALTH CARE LAW § 21.02, at 2 (24th ed. 2004); *see also* Renihan v. Wright, 25 N.E. 822, 824 (Ind. 1890) (surveying the refusal of English common law courts to hear actions for the "disturbance of the remains of . . . buried ancestors").

[54]O'Donnell v. Slack, 55 P. 906 (Cal. 1899); *Renihan*, 25 N.E. at 824.

[55]*Renihan*, 25 N.E. at 823 (stating in the facts that undertakers refused to provide the location of the daughter's body except with the trite explanation "[y]our child is in Ohio").

holding on evanescent "burial rights," the Indiana court reasoned that a dead body belongs to the surviving relatives as "other property."[56]

This nebulous notion of "other" property received a more perfect definition as "quasi-property" in a California case several years later.[57] In *O'Donnell v. Slack*,[58] the California Supreme Court held that a quasi-property right to a decedent's body vests in the next of kin.[59] Specifically, the decedent O'Donnell had expressed his last wish to his widow that he be buried beside his parents' remains in Ireland, which wish the widow did not follow.[60] While the California court expressly held that the human body itself is not personal property disposable by probate, it recognized some species of legal ownership by the next of kin in a deceased relative's body.[61]

More recently, courts have acknowledged the rights of next of kin to recover for civil deprivation of rights under 42 U.S.C. § 1983.[62] This federal statute allows recovery for deprivation of property under color of state statute without due process of law.[63] Several cases implicated coroners who had removed the decedents' corneas without obtaining consent from the next of kin.[64] The coroners in each situation claimed to have acted pursuant to state statutes that purported to allow the removal of corneas "provided that the coroner has no knowledge of an objection by the decedent, the decedent's spouse, or . . . the next of kin . . . ."[65] The relatives of the deceased subsequently brought suit, alleging that their legal rights in the decedents' bodies had been violated by the coroners' actions. Recall, however, that in the United States, a human corpse is not the personal property either of the next of kin or

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[56]*Id.* at 825.

[57]*O'Donnell*, 55 P. at 907.

[58]*Id.*

[59]*Id.*

[60]*Id.* at 906.

[61]*Id.* at 907.

[62]42 U.S.C. § 1983 (2003). "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."

[63]*Id.*

[64]Newman v. Sathyavaglswaran, 287 F.3d 786, 788 (9th Cir.), *cert. denied*, 537 U.S. 1029 (2002); Whaley v. Tuscola, 58 F.3d 1111, 1113 (6th Cir. 1995); Brotherton v. Cleveland, 923 F.2d 477, 478 (6th Cir. 1991).

[65]*Brotherton*, 923 F.2d at 478 (paraphrasing OHIO REV. CODE § 2108.60); *see also Whaley*, 58 F.3d at 1116 (equating Michigan's Anatomical Gift law with Ohio's); *Newman*, 287 F.3d 788 (citing CAL. GOV. CODE § 27491.47(a): "the coroner may, in the course of the autopsy, remove . . . corneal eye tissue . . . if . . . the coroner has no knowledge of objection to the removal . . .). Note that the Ohio and California statutes involved are codifications of the Uniform Anatomical Gift Act.

of the state.[66] With each plaintiff having successfully recovered damages, the federal circuit courts remarkably surmounted the legal obstacle of the "deprivation of property" element necessary in a § 1983 action.[67]

In *Brotherton v. Cleveland*,[68] the Sixth Circuit reasoned that the concept of property escapes exact legal definition because it is often conceptualized as a "bundle of rights."[69] And so, that court held that the aggregate of these rights combine to form a "substantial interest" in the dead body, regardless of whatever title this combination of rights may be given.[70] In dissent, Justice Joiner reminded the court of the steadfast refusal under Ohio law to recognize any property right in a deceased human body.[71] Justice Joiner was troubled at the court's virtual "creat[ion of] a property right" in a dead body by allowing a plaintiff to recover for deprivation of property under § 1983.[72]

Even before Justice Joiner voiced his dissent in *Brotherton*, the Florida Supreme Court had upheld as constitutional a statute allowing medical examiners to remove corneal tissue from decedents for necessary transplantations.[73] In an opinion predicting Joiner's concerns about granting property status to human bodies, the court in *Florida v. Powell* held that no full property right to a deceased relative's body vests in the next of kin, but rather a right strictly "limited to 'possession of the body . . . for the purpose of burial, sepulture or other lawful disposition.'"[74] Cautioning that any cognizable right to a human body must be limited to that sole purpose of proper burial, the court proclaimed the inherent difficulty in distinguishing the human body from the traditional legal framework of property law[75] and fashioned its decision on the strictly delimited right to bury the decedent.[76]

Four years after *Brotherton*, in *Whaley v. Tuscola*,[77] the Sixth Circuit again declared that the aggregation of the rights to a decedent's body should allow the next

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[66]POLLY J. PRICE, PROPERTY RIGHTS: RIGHTS & LIBERTIES UNDER THE LAW, 158 (ABC-CLIO 2003).

[67]Three elements are necessary to establish a violation of due process under § 1983: (1) deprivation, (2) of property, (3) under color of state law. *Brotherton*, 923 F.2d at 479 (emphasis added).

[68]*Id.*

[69]*Id*. at 481.

[70]*Id.* at 482.

[71]*Id.* at 483.

[72]*Id.*

[73]Florida v. Powell, 497 So.2d 1188, 1194 (Fla. 1986).

[74]*Id.* at 1191 (citing Kirksey v. Jernigan, 45 So.2d 188, 189 (Fla. 1950)).

[75]"It seems reasonably obvious that such 'property' is something evolved out of thin air to meet the occasion, and that it is in reality the personal feelings of the survivors which are being protected, under a fiction likely to deceive no one but a lawyer." *Id.* at 1192 (citing W. PROSSER, THE LAW OF TORTS, 43-4 (2d ed. 1955)).

[76]*Powell,* 497 So.2d at 1192.

[77]*Whaley,* 58 F.3d 1111, 1115.

of kin to recover for any violation of those rights.[78] The Sixth Circuit found that the distinctive rights to dispose of a human body, to make a gift of its parts, to prevent its expropriation by others, and to possess it for burial quantitatively add up to "the heart and soul of the common law understanding of 'property.'"[79] In an even stronger opinion than what it had issued in *Brotherton*, the Sixth Circuit "look[ed] beyond the law's nomenclature and to its substance" and used a generously malleable definition of property to allow the plaintiff to recover.[80] Thus, although still hesitant to state explicitly the existence of an outright property right to a human body, federal courts began to allow recovery on the basis of a combination of "other" rights.[81]

Following the reasoning of the Sixth Circuit, the Ninth Circuit in *Newman v. Sathyavaglswaran*[82] held that the identification of constitutional property interests "turns on the substance of the interest recognized, not the name given that interest."[83] Following the quasi-property rationale of earlier decisions, the *Newman* court held that the coroners had "chopped through the bundle [of property rights of the decedents' next of kin], taking a slice of every strand" by removing the decedents' corneas without prior consent.[84] *Newman* instructs that, since the human body and its parts enjoy at best only a "quasi-property" status, state actions grounded in common law torts such as conversion or replevin will likely be untenable.[85] Thus, ostensibly due to the flexible nature of the rights upon which plaintiffs sue under § 1983, federal actions have been contrastingly more successful than actions based on state common law.

Nevertheless, it would be unfounded to maintain that questions have not arisen on the state level regarding the property status of human body parts. Perhaps the most intriguing case is *Venner v. Maryland*,[86] addressing whether human excrement could be the property of its owner. *Venner* involved the determination that an unreasonable search and seizure of criminal defendant Charles Venner's feces did not occur during a narcotics investigation.[87] The defendant had ingested twenty-one

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[78] *Id.*

[79] *Id.*

[80] "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* at 1114 (citing Board of Regents v. Roth, 408 U.S. 564 (1972)).

[81] "Just because the woman cannot technically 'replevin' her husband's body does not mean she has no legitimate claim of entitlement to it." *Whaley,* 58 F.3d at 1116.

[82] *Newman,* 287 F.3d 786, 797.

[83] *Id.*

[84] *Id.* at 798.

[85] "All authorities generally agree that the next of kin have no property right in the remains of a decedent." *Powell*, 497 So.2d at 1191.

[86] Venner v. Maryland, 354 A.2d 483 (Md. Ct. Spec. App. 1976).

[87] *Id*.

balloons filled with hashish oil in a daring attempt to smuggle the illegal substance across state lines.[88] With Venner suddenly hospitalized due to a resultant drug overdose after one balloon "fortuitous[ly]" exploded in his stomach, police seized his leavings to obtain the balloons as evidence.[89] Before his trial, Venner motioned to suppress the balloons from evidence, claiming that they had been obtained in a warrantless search and seizure in violation of his Fourth Amendment rights.[90]

Most intriguing is the general holding of *Venner* that human waste could possibly be considered property; the *Venner* court held that human waste "or other materials which were once a part of or contained within [the] body" are subject to property rights and that any person may assert rights over excrement.[91] Thus, since Venner did not assert such dominion and control over his feces or the balloons accompanying, he had legally abandoned his property, or more specifically "whatever legal right he theretofore had" in it.[92] The *Venner* court was certainly not as wary as the federal Circuit Courts about referring to the body as property, but it still vacillated concerning the nature of the legal rights Venner had in his waste.

Furthermore, using the doctrinal basis from cases involving the disposition of dead bodies, another state court, speaking explicitly of gametes as the personal property of their owners, extended the quasi-property analysis to the bequest of human sperm.[93] In *Hecht v. Superior Court*,[94] the decedent William H. Kane had attempted to bequeath by his last will and testament his sperm that he had deposited at a Los Angeles sperm bank.[95] Kane's will read, in pertinent part: "I bequeath all right, title, and interest that I may have in any specimens of my sperm stored with any sperm bank or similar facility for storage to Deborah Ellen Hecht."[96] In a tremendous leap, the *Hecht* court, expressly stating that the decedent had a property interest in accordance with the California Probate Code's definition of property,[97] held that the decedent could probate his sperm cells. Stating that Kane had an undeniable interest in the disposition of his frozen sperm cells, the court explained that "even if not governed by the general law of personal property, [they would still] occup[y] 'an interim category'" of ownership and legal protection.[98] Thus, although

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[88] *Id.* at 486.

[89] *Id.* at 489-90.

[90] *Id.* at 486.

[91] *Id.* at 498.

[92] *Id.* at 499.

[93] Hecht v. Superior Court, 20 Cal. Rptr. 2d 275 (Ct. App. 1993).

[94] *Id.*

[95] *Id.* at 276.

[96] *Id.* Kane also had a contract with the sperm bank which provided for similar disposition to Deborah.

[97] Defined as "anything that may be the subject of ownership and includes both real and personal property and any interest therein." CAL. PROBATE CODE § 62 (West 2002).

[98] *Hecht,* 20 Cal. Rptr. 2d at 846 (citing Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992)).

state courts have remained consistently hostile to recognizing any traditional property interest in a human body or a part thereof, *Hecht* teased out of the prior law a narrow comprehension of property rights in human cells.[99]

Despite this longstanding debate regarding legal rights over one's body parts, no case, state or federal, has had more of an impact on the issue of property rights in the human body than the California Supreme Court's decision in *Moore v. Regents of University of California*.[100] *Moore*'s legal vigor and import stems not as much from what the Supreme Court of California said in its landmark decision, but rather in what it failed to say.

In *Moore*, the plaintiff had undergone several treatments for hairy-cell leukemia at UCLA Medical Center as well as numerous and extensive extractions of "blood, bone marrow aspirate, and other bodily substances."[101] Unbeknownst to Moore, his physician, Dr. Golde, was conducting extensive research on Moore's very rare cells with the motive of developing and patenting a new commercial cell line derived from them.[102] Moore subsequently sued the medical center and Dr. Golde for breach of fiduciary duty, lack of informed consent, and, most importantly, conversion.[103]

The California Court of Appeals in *Moore*, by allowing Moore to recover on his conversion theory, recognized a complete property right in the human body.[104] However, in reversing that decision, the California Supreme Court avoided the issue of whether Moore's cells were his property, holding only that Moore's conversion theory must fail because he neither had title to nor possession of his cells after they had been removed from his body and altered by Dr. Golde to the new cell line.[105] The *Moore* court found no judicial precedent supporting Moore's claim of conversion and also declared that the subject of the Regents' patent – the invention of a qualitatively different and novel cell line – could no longer be viewed as Moore's property.[106] As the California Supreme Court did not address the appellate court's competence of a full property right, the only guidance given by *Moore* on whether the human body is property lies in its statement that the law treats human tissues, organs, blood, and dead bodies as objects *sui generis* – physical objects not within the parameters of traditional personal property.[107]

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[99] *Hecht,* 20 Cal. Rptr. 2d at 849.

[100] Moore v. Regents of Univ. of Cal., 51 Cal. 3d 120, 793 P.2d 479 (1990).

[101] *Moore,* 51 Cal. 3d at 125.

[102] *Id.* at 126.

[103] *Id.* at 124.

[104] Moore v. Regents of Univ. of Cal., 215 Cal. App. 3d 709, 728-29 (1988), *aff'd in part, rev'd in part*, 51 Cal. 3d 120, 793 P.2d 479 (1990). Conversion is "a tort that protects against interference with possessory and ownership interests in personal property." *Moore*, 51 Cal. 3d at 134.

[105] "Where plaintiff neither has title to the property alleged to have been converted, nor possession thereof, he cannot maintain an action for conversion." *Moore*, 51 Cal. 3d at 136 (citing Del E. Webb Corp. v. Structural Materials Co., 123 Cal. App. 3d 593, 610-11 (1981)).

[106] *Moore,* 51 Cal. 3d at 137.

[107] *Id.*

In a concurring opinion in *Moore*, Justice Arabian voiced the moral rationale for rejecting Moore's claim for conversion of his cells.[108] Arabian articulated the problem of commodification of human body parts – "the selling of one's own body tissue for profit" – as an inclement degradation of "the human vessel – the single most venerated and protected subject in any civilized society."[109] Focusing on the possible adverse effects on human dignity of any resultant "marketplace in human body parts," Arabian warned that courts should forbear from any pronouncement that the human body or any part thereof is property.[110] "Clearly the Legislature, as the majority opinion suggests, is the proper deliberative forum" for any such pronouncement.[111]

At this juncture, there may appear an irreconcilable legal disparity. While on the one hand some courts have held that the human body and its parts are not property, several courts, on the other hand, have openly declared human waste and cells to be some kind of personal property of their "owner." However, this disparity is likely illusory and merely the result of confusing misuse of terminology throughout these cases. As a Comment to the Restatement (Second) of Torts § 868[112] illustrates, the incongruity in judicial language regarding human bodies is simply a by-product of the legal difficulty of pigeonholing the unique nature of the human body into traditional property concepts.[113] The Restatement authors recognized that courts, whether interchangeably or by inconsistency, use the terms "property" and "quasi-property" in reference to the rights that people or next of kin, respectively, have in human bodies.[114] The Comment argues that this mere technicality should be disregarded, because the tort of interference with dead bodies is an action seeking damages, not for violation of any property right, but rather for mental distress suffered as a result of the tort.[115]

Consider also the following excerpt from *Dougherty v. Mercantile-Safe Deposit & Trust Co.*,[116] a case which "summarized" Maryland's law on this issue[117]:

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[108]*Id.* at 148.

[109]*Id.*

[110]*Id.* at 149-50.

[111]*Id.*

[112]RESTATEMENT (SECOND) OF TORTS § 868 (1979). "One who intentionally, recklessly or negligently removes, withholds, mutilates or operates upon the body of a dead person or prevents its proper interment or cremation is subject to liability to a member of the family of the deceased who is entitled to the disposition of the body."

[113]RESTATEMENT (SECOND) OF TORTS § 868 Cmt. a. "This does not, however, fit very well into the category of property, since the body ordinarily cannot be sold or transferred, has no utility, and can be used only for the one purpose of interment and cremation."

[114]*Id.*

[115]*Id.*

[116]Dougherty v. Mercantile-Safe Deposit & Trust Co., 387 A.2d 244, 246 (Md. Ct. App. 1978).

[117]*Powell,* 497 So.2d at 1192.

> [i]t is universally recognized that there is no property in a dead body in a commercial or material sense. It is not a part of the assets of the estate . . . it is not subject to replevin; it is not property in a sense that will support discovery proceedings; it may not be held as security for funeral costs; it cannot be withheld by an express company, or returned to the sender, where shipped under a contract calling for cash on delivery; it may not be the subject of a gift *causa mortis*; it is not common law larceny to steal a corpse.[118]

Taking *Venner* and *Hecht* along with this statement in *Dougherty* further illustrates the tension even among state courts as to whether human beings have any legal property rights in their bodies. Thus, on account of its mercurial legal status, the human body presents unique issues for lower courts that have attempted to answer whether it is property.

To date, the Supreme Court of the United States has not had the opportunity to directly address the issue of whether people have any property rights, traditional or *sui generis*, in their organs or tissue or in those of their next of kin upon death.[119] Heeding Justice Arabian's concerns in *Moore*, perhaps that is a comforting fact. Nevertheless, the Supreme Court has decreed several times that the claim that "one has an unlimited right to do with one's body as one pleases" is purely mistaken.[120]

For instance, Justice Harlan in *Jacobson v. Massachusetts*,[121] in rejecting a due process challenge to a state vaccination statute, iterated that the concept of liberty "secured by the Constitution . . . to every person . . . does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint.[122] More importantly, Harlan added the following limitation on the rights of property: "[r]eal liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own . . . regardless of the injury that may be done to others."[123]

In addition, Justice Blackmun of the majority in *Roe v. Wade*[124] stated that, although the privacy right fashioned in that case may encompass a woman's abortion decision, "this right is not unqualified" and must yield to important interests of the sovereign.[125] Regardless, the Supreme Court has laid down no uniform judicial rule of whether or not the human body and its parts are property. At best, lower American courts have acknowledged an evasive "quasi-property" status.[126]

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[118] *Dougherty*, 387 A.2d at 246 (quoting P.E. JACKSON, THE LAW OF CADAVERS AND OF BURIAL AND BURIAL PLACES (2d ed. 1950)).

[119] PRICE, *supra* note 66, at 162.

[120] Roe v. Wade, 410 U.S. 113, 154 (1973).

[121] Jacobson v. Massachusetts, 197 U.S. 11, 39 (1905).

[122] *Id.* at 26 (emphasis added).

[123] *Id.*

[124] *Roe*, 410 U.S. at 154.

[125] *Id.*

[126] PRICE, *supra* note 66, at 159.

III. CONTEMPORARY LAWS AND POLICIES REGARDING SALES OF HUMAN ORGANS

The judicially-constructed quasi-property status of the human body may have influenced the legislative enactment of the current prohibition on organ sales. Both federal and state statutes forbid monetary compensation to the donor of any human organ.[127] On the federal level, the National Organ Transplant Act (hereinafter "NOTA"), enacted in 1984, expressly prohibits any direct payment to donors of human organs.[128] Some sections of NOTA set up administrative guidelines for a network of non-profit agencies to facilitate organ procurement and transplantation procedures nationally; others arrange criteria for the national and local lists of individuals in need of healthy organs, along with a coordinated system which matches them with possible donors.[129] NOTA narrowly defines "human organ" as "the human . . . kidney, liver, heart, lung, pancreas, bone marrow, cornea, eye, bone, and skin or any subpart thereof and any other human organ. . . ."[130] State regulations have similar definitions, with minimal nuances in wording.[131] Furthermore, NOTA renders illegal any payment to family members of deceased organ donors.[132] Accordingly, NOTA and state statutes provide hefty penalties, including fines or imprisonment, for violating their prohibitions on organ sales.[133]

In enacting NOTA, Congress intended to prevent for-profit marketing of human organs.[134] Interestingly, this legislation was rushed through Capitol Hill due to the plans of a Virginia physician to arrange a commercial market in human kidneys.[135] In 1983, Dr. H. Barry Jacobs proposed a federally subsidized network that would pay for removal and transplant operations of organs to Medicare patients.[136] The proposition shocked many and was met with immediate congressional dissent,

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[127]National Organ Transplant Act, 42 U.S.C. §§ 273-274e (2003); *see also* OHIO REV. CODE ANN. § 2108.12 (Anderson 2002); CAL. PENAL CODE § 367(f) (West 1999).

[128]42 U.S.C. § 274e.

[129]42 U.S.C. § 273.

[130]42 U.S.C. § 274e(c)(1).

[131]*See, e.g.,* CAL. PENAL CODE § 367(f) (defining "human organ" as "any other human organ or nonrenewable or nonregenerative tissue except plasma and sperm"); OHIO REV. CODE ANN. § 2108.01 (defining "tissue" negatively as "any body part other than an organ or eye") (emphasis added).

[132]42 U.S.C. § 274e; *see also* Melissa Healy, *The Changing Rules of Organ Donation; Billboards, Websites and Financial Incentives Are Pushing the Ethical Boundaries*, L.A. TIMES, Nov. 1, 2004, at F1.

[133]*See* 42 U.S.C. § 274e(b) (imposing a maximum fine of $50,000 and/or a minimum imprisonment term of five years for sale of any human organ "if it affects interstate commerce"); *see also* OHIO REV. CODE ANN. § 2108.99 (proscribing violation of organ sale prohibition to be a felony of the fifth degree).

[134]S. Rep. No. 98-382, at 4 (1984).

[135]Margaret Engel, *Va. Doctor Plans Company to Arrange Sale of Human Kidneys*, WASH. POST, Sep. 19, 1983, at A9.

[136]*Id.*

including then-Tennessee Senator Albert Gore, Jr., vehemently contended that "[p]utting organs on a market basis is abhorrent to our system of values."[137] In its report, the Senate Committee on Labor and Human Resources (hereinafter "the Committee") succinctly advanced the government's position: "[t]he Committee believes that human body parts should not be viewed as commodities."[138] The Committee envisioned these dangers to be on the horizon with medical advancements of the early 1980s, and it saw the immediate need for federal legislation barring the commercial sale of human organs.

Despite this prohibition on organ sale and purchase, a statute related to NOTA actively encourages voluntary, uncompensated donation of human organs: the Uniform Anatomical Gift Act (hereinafter "UAGA").[139] Since its two promulgations in 1968 and 1987, the UAGA has disseminated statutory guidelines for the enactment of state regulations to govern the procurement and transplantation of human organs.[140] In the vast majority of its text, the UAGA encourages the donation of bodily organs for transplantation, so long as such donations are uncompensated.[141] It expressly allows the donation of the human body or a part thereof either by the decedent's wishes or, in some instances, by those of next of kin of the deceased, provided that no relative of the donor or any other third party receives monetary profit.[142] All fifty states have adopted versions of this Uniform Act into their state legislative codes.[143]

Unlike NOTA, which attends to "live" donations,[144] the UAGA focuses entirely on donations of anatomical gifts at one's death.[145] It provides that an individual of at least eighteen years of age may make an anatomical gift or may refuse to do so.[146] The prefatory note to the UAGA, states the recognition of the quandary of property law journeyed in Part II above:

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[137]*Id.*

[138]S. REP. NO. 98-382, at 17 (emphasis added).

[139]Unif. Anatomical Gift Act § 1, 8A U.L.A. 15 (1983 & Supp. 2004).

[140]*Id.*

[141]*Id.*

[142]*Id.* at § 10.

[143]CAPRON & BIRNBAUM, *supra* note 53, at 2. *See, e.g.,* CAL. HEALTH & SAFETY CODE ANN. §§ 7150 to 7156.5 (West 1970 & Supp. 2005); D.C. CODE ANN. §§ 2-1501 to 2-1511 (2001); FLA. STAT. ANN. §§ 732.910 to 732.922 (West 1995); LA. REV. STAT. ANN. §§ 17:2351 to 17:2359 (West 2001 & Supp. 2005); MD. CODE ANN., EST. & TRUSTS §§ 4-501 to 4-512 (2005); MASS. GEN. LAWS ANN. ch. 113, §§ 7 to 14 (2003); MICH. COMP. LAWS ANN. §§ 333.10101 to 333.10109 (West 2001); N.Y. PUB. HEALTH LAW §§ 4300 to 4308 (McKinney 2002); OHIO REV. CODE ANN. §§ 2108.01 to 2108.10 (Anderson 2002); WIS. STAT. ANN. § 157.06 (West 1997 & Supp. 2004).

[144]*See generally* 42 U.S.C. § 274.

[145]Unif. Anatomical Gift Act § 1(1) (defining "anatomical gift" as "a donation of all or part of a human body to take effect upon or after death").

[146]*Id.* at § 2(a).

> if utilization of bodies and parts of bodies is to be effectuated, a number of competing interests in a dead body must be harmonized, and several troublesome legal questions must be answered . . . Both the common law and the present statutory picture is one of confusion, diversity, and inadequacy . . . .The Uniform Anatomical Gift Act . . . carefully weighs the numerous conflicting interests and legal problems. Wherever adopted it will encourage the making of anatomical gifts, thus facilitating therapy involving such procedures . . . .[147]

In perhaps its only aspect similar to NOTA, the UAGA also makes illegal the sale or purchase of organs from deceased human bodies for valuable consideration.[148] Thus, while NOTA bars *inter vivos* transfers of human organs by commercial sale, the UAGA likewise prohibits their posthumous transfer by testamentary gift or intestate succession if monetary compensation has been bargained for in exchange.

Supporters of the prohibition on organ sales offer many public policy rationales that reflect the need to uphold the dignity and traditionally sacrosanct nature of the human body. Before examining these policies, contemplate first a poignant comment of Justice Flaherty of a Pennsylvania Common Pleas Court: "[f]orcible extraction of living body tissues causes revulsion to the judicial mind. Such would raise the spectre of the swastika and the Inquisition, reminiscent of the horrors this portends."[149] Commentators and legal ethicists similarly maintain that any eventual financial market compensating donors for their body parts will harm the donors themselves, the recipients, and ultimately society itself.[150]

In general, an ominous fear of commodification[151] of the human body pervades nearly all support for the prohibition on organ sales. Once again, commodification describes both the actual sale of a thing as an article of commerce and the subliminal envisioning of that thing in "market rhetoric" by the public.[152] As Professor Radin's analysis reveals, compensation to organ donors has been widely attacked as espousing the notion that people may become viewed as market commodities.[153] The fear is that, should human body parts be granted full property rights, then, as one expert put it, "we would become slaves, not in a market for our bodies, but in a market for body parts."[154]

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[147] *Id.* § 1 (emphasis added).

[148] *Id.* § 10(a).

[149] McFall v. Shimp, 10 Pa. D. & C.3d 90 (Common Pleas Ct. 1978) (denying a preliminary injunction that sought to compel a matching donor to undergo a bone marrow transplant).

[150] Andrews, *supra* note 50, at 31.

[151] *Cf.* Radin, *supra* note 24, at 1855.

[152] *Id.*

[153] Andrews, *supra* note 50, at 35.

[154] *Id.* at 29.

Second, many view the present system of organ procurement, embodied in the United Network for Organ Sharing,[155] as the only ethically permissible method in striking the delicate balance between maximizing organ procurement (and in turn saving as many lives as possible) and respecting the dignity of the human body.[156] Under Professor Radin's analysis of commodification, this argument would entail that the free donation system for human organs would dissolve should commercial sales be permitted.[157] In hearings in the House of Representatives before NOTA was passed, then-Senator Albert Gore affirmed that "[i]t is against our system of values to buy and sell parts of human beings."[158] The core tenet of this argument holds that it is simply unethical and inhumane to "put a price on a human life."[159]

Third, supporters of the prohibition assert that lifting the ban would make the poor "second-class citizens," as they would be economically coerced into selling their organs to the rich.[160] One transplant surgeon positioned the argument like this: "[a]ny payment to living donors . . . would 'create a second-class citizenry' of people whose organs would be commodities and who would risk organ donation under the coercion of need."[161] As this argument operates, no matter how honestly an organ solicitor may profess that no undue influence occurred, and no matter how "voluntarily" a destitute donor attests to have participated in the transaction, the element of economic coercion will inevitably have pervaded the donor's decision.[162] By virtue of lacking money or assets, the poor will not be able to resist the temptation to achieve some "quick money" for one of their organs.[163] As a result, not only would social stratification further polarize, but the general health of the lower class would sharply decline, creating a "sub-class" of human beings.[164] Should human body parts be alienable, as this argument dictates, an inescapable aura of "economic coercion" would dictate the choices of the lower-class.[165]

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[155]Healy, *supra* note 132. The United Network for Organ Sharing, an administrative organization set up by the Uniform Anatomical Gift Act, polices organ procurement and distribution to those in priority of need. *Id.*

[156]*See* S. Gregory Boyd, *Considering a Market in Human Organs*, 4 N.C. J.L. & TECH. 417, 461 (2003); *see also* Gregory S. Crespi, *Overcoming the Legal Obstacles to the Creation of a Futures Market in Bodily Organs*, 55 OHIO ST. L.J. 1, 20 (1994).

[157]Radin, *supra* note 24, at 1859.

[158]*National Organ Transplant Act: Hearings on H.R. 4080 Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. 125, 128 (1983) (statement of Rep. Albert Gore, Jr.).

[159]CAPRON & BIRNBAUM, *supra* note 53, at 15.

[160]Healy, *supra* note 132.

[161]*Id.* (quoting Dr. Francis Delmonico, a kidney transplant surgeon in New England).

[162]*See, e.g.,* DUKEMINIER & KRIER, *supra* note 9, at 97.

[163]*Cf.* Alberty da Silva's experience, as depicted in Rohter, *supra* note 1.

[164]*See, e.g.,* CAPRON & BIRNBAUM, *supra* note 53, at 16.

[165]Bray, *supra* note 13, at 242.

This particular fear has factual support from horrific events involving innocent people being murdered for their organs.[166] After a large number of killings in Ciudad Juarez, Mexico, some authorities believed that those murders may have been linked to an illegal organ trafficking ring between Mexico and the United States.[167] Since 1993, nearly one hundred women had been killed in Ciudad Juarez, the city directly across the border from El Paso, Texas.[168] With several organs having been removed from many of the victims' bodies, authorities premised that an organ trafficking ring may be either the impetus or the culprit itself behind the killings and that the slayers then sold the organs in international black markets.[169]

Also, return to the plight of the poor Brazilian man in the Introduction of this note.[170] His story sad but true, Alberty Jose da Silva was solicited one day by an Israeli "middleman" from an international "organ syndicate" to undergo a kidney removal procedure in a hospital located in Durban, South Africa.[171] The recipient of da Silva's kidney was an American woman from Brooklyn, New York, who was dying of kidney failure.[172] Both recipient and donor were flown to a hospital in Durban, South Africa where they underwent the clandestine procedure, illegal under the laws of the United States, Brazil, and South Africa.[173] After the transplant operation, da Silva contracted health problems from the haphazard operation and from the loss of one of his kidneys.[174] Other poor Brazilians who had sold a kidney or liver through the same organ trafficking ring also faced criminal charges by Brazilian authorities for their participation. One particularly unfortunate man was robbed of the money that was paid in exchange for his kidney, thus left with so much less than he had before his transplant operation.[175]

Although this particular "organ trafficking ring" was dissolved by international authorities, the organization had facilitated over three hundred illegal organ transplants in a Durban hospital since 2001.[176] Supporters of the prohibition on organ sales readily point to such appalling events internationally where some people "sell their flesh to survive"[177] and others are killed for their organs, and they posit that lifting the ban would invite similar activity here in the United States.

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[166] *See* Mark Stevenson, *Organ Theft Legend Resurfaces in Mexico Border Slayings*, SKEPTICAL INQUIRER, July 1, 2003, Vol. 27 at 7.

[167] *Id.*

[168] *Id.*

[169] *Id.* A black market is defined as an "illegal market for goods that are controlled or prohibited by the government . . . ." BLACK'S LAW DICTIONARY 988 (8th ed. 2004).

[170] *Cf.* Rohter, *supra* note 1.

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] *Id.*

[176] *Id.*

[177] *Id.*

Conversely, others attack the current legislation prohibiting organ sales as paternalistic. Basically, advocates for donor compensation argue that any price for a life-saving organ is preferable to death and that the current law wrongly takes away that option.[178] Proponents of changing the law to allow for commercial sales of human organs cite the shortage of organs in contrast to their vast demand and argue that the current system for organ procurement fails year after year to meet the need.[179] According to the U.S. Department of Health and Human Services, for every 70 people who receive an organ transplant daily in the United States, another 16 die due to the growing shortage of organs.[180] Other statistics are just as startling. In 2004, more than 87,000 people in the United States were on waiting lists for organs.[181] Since 1993, that number has risen dramatically by 65,000, while the number of donations has remained stagnant at approximately 18,000 organs per year.[182] Indeed, the Organ Procurement and Transplantation Network, which provides the only national organ patient waiting list, has reported that the list will continue to grow.[183]

Furthermore, transplant surgeons have pleaded that mere education about organ donation has no effect on the problem of supply shortage.[184] As one transplant surgeon put it, "[w]e've done all the education [about organ donation procedures] we can do . . . [w]e're not getting anywhere.[185] Additionally, advocates of change argue, correctly, that every other "link in the donative chain" of organs does receive monetary compensation for its services and that this inequity vindicates a system of payment to donors as well.[186] Indeed, the UAGA and NOTA both allow "reasonable payments" to organ procurement agencies, intermediaries who contact and obtain donors, and other participants in the process of organ procurement for "removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ."[187] Organ donors, however, can receive no outright recompense for

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[178]"A heart at $125,000 may be a bargain when the alternative is death." CAPRON & BIRNBAUM, *supra* note 53, at 17.

[179]Healy, *supra* note 132.

[180]U.S. Department of Health and Human Services, *FirstGov: Organ Donation, at* http://www.organdonor.gov/ (last visited Sept. 14, 2005).

[181]Healy, *supra* note 132 (citing the United Network for Organ Sharing).

[182]*Id.*

[183]The Organ Procurement and Transplantation Network, *at* http://www.optn.org/ (last visited Sept. 14, 2005) (stating that 87,155 candidates are on organ waiting lists as of January 7, 2005).

[184]Healy, *supra* note 132.

[185]*Id.* (quoting Dr. Ronald W. Busuttil, a liver transplant surgeon at UCLA).

[186]Boyd, *supra* note 156, at 463.

[187]42 U.S.C. § 274e(c)(2) (stating that "valuable consideration does not include the reasonable payments associated with a transplant procedure itself"); *see also* OHIO REV. CODE ANN. § 2108.12(b) ("'[v]aluable consideration' does not include reasonable payments for the removal, processing, disposal, preservation, quality control, storage, transportation, or implantation of a part of a body"); CAL. PENAL CODE § 367f(c)(2) ("'[v]aluable consideration'

their organ under the current law.[188] In sum, those in favor of compensation point out the inequitable result that the only participants obtaining zero financial gain are the sources of the organs themselves.[189]

Nevertheless, NOTA does exempt from prohibited "valuable consideration" certain reimbursement expenses to the donor, including lost wages and travel and housing costs incurred by the donation process.[190] The Senate Committee that produced the final version of NOTA assured donors that these expenses, though limited in dollar amount by organ procurement agencies, would not go uncompensated.[191] Cognizant of the voiced concern that the prohibition against organ sales "may inadvertently make it illegal to reimburse individuals for reasonable costs incurred in the process of organ donation", the Committee assured that "[i]t is not [its] intent that any such reasonable costs be considered part of valuable consideration."[192] NOTA even provides for federal grants to state governments and organ procurement organizations in order to assure donors the reimbursement of these "qualifying expenses."[193] Furthermore, in April 2004, President George W. Bush signed into law a federal bill that allows reimbursement costs to come directly from the organ recipient rather than simply from the federally-funded organ procurement organizations.[194]

In addition, states have enacted legislation assuring reimbursement expenses to organ donors.[195] Just as within the federal scheme, such statutes compensate organ donors for lost wages, any transportation costs, and lodging expenses incurred as incident to the transplant procedure.[196] However, states are additionally exploring the benefit of special tax breaks to organ donors.[197] For instance, Wisconsin recently decided to allow statutory tax breaks in order to reimburse the "non-consideration" expenses incident to organ donation procedures.[198] The Wisconsin law, spurring into motion similar bills in other states across the nation,[199] allows a one-time tax

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means financial gain or advantage, but does not include the reasonable costs associated with the removal, storage, transportation, and transplantation of a human organ . . . ").

[188]42 U.S.C. § 274e(a).

[189]Boyd, *supra* note 156, at 463.

[190]42 U.S.C. § 274e(c)(2); *see generally* 42 U.S.C. § 274e.

[191]S. Rep. No. 98-382, at 15.

[192]*Id.* at 16 (emphasis added).

[193]*See* 42 U.S.C. § 274f.

[194]Healy, *supra* note 132.

[195]*Id.*

[196]*Id.*

[197]*Id.*

[198]Amanda Paulson, *More States Explore Tax Breaks to Benefit Organ Donors*, CHRISTIAN SCI. MONITOR, Oct. 19, 2004, at 2.

[199]*Id.* Georgia and South Carolina have introduced and passed similar bills.

deduction of up to $10,000 for organ donors.[200] Still, the donors may only claim this deduction for travel and lodging expenses and lost wages incurred as a result of an organ donation procedure.[201] Thus, the state statutes allowing tax breaks to organ donors echo the federal assurance that the donors will receive reimbursement of costs incident to the transplantation.

Thus, while it may be correct to say that organ donors receive no financial profit for their organs, one must also acknowledge the fact that the prohibition on sale does not leave donors "out in the cold" without any reimbursement for expenses sustained through the transplant procedures. Assuring to organ donors equitable reimbursement of expenses incidental to transplant procedures hopefully will encourage more people to donate their organs without lifting the prohibition against commercial sale of human organs.

IV. CONTEMPORARY LAWS AND MARKET PRACTICES REGARDING SALES OF GAMETES

The permission of monetary compensation to "donors"[202] of gametes primarily originates from statutory definitions of what does and does not constitute a human organ for purposes of prohibiting sales. Several state statutes express that regenerative cells are not organs and that the prohibition on purchase and sale does not extend to these cells.[203] NOTA, however, has no such explicit statement, although its consistent interpretation has been to exempt sperm and eggs as not within its definition of "human organ."[204] Note, however, the following open-ended phrase in that section: "and any other human organ (or any subpart thereof, including that derived from a fetus) specified by the Secretary of Health and Human Services by regulation."[205] This ostensibly could include reproductive cells, should the Secretary of Health and Human Services pass a regulation so specifying. In any case, human gametes are currently outside the scope of legal status as "organs" for purposes of the prohibition on outright sale.[206]

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[200]WIS. STAT. § 71.05(10)(i)(1) (West 2004). "[A]n individual may subtract up to [$]10,000 from federal adjusted gross income if he or she . . . while living, donates one or more of his or her human organs to another human being for human organ transplantation . . . ."

[201]WIS. STAT. § 71.05(10)(i)(2) (West 2004). "An individual may claim the subtract modification . . . only once, and [it] may be claimed for only the following unreimbursed expenses that are incurred by the claimant and related to the claimant's organ donation: (a) Travel expenses, (b) Lodging expenses, (c) Lost wages."

[202]I set off the term "donors" in this way because I consider it a suspect misnomer when used in the context of sperm and eggs, as the term traditionally has the legal connotation of free giving without compensation.

[203]*See, e.g.,* CAL. PENAL CODE § 367f(c)(1) (stating that "[h]uman organ includes, but is not limited to, a human kidney, liver, heart, lung, pancreas, or any other human organ or non-renewable or non-regenerative tissue except plasma and sperm") (emphasis added).

[204]42 U.S.C. § 274e(c)(1).

[205]*Id.*

[206]The state of Louisiana appears to be the lone exception, as it includes all bodily fluids and cells in its statutory definition of body "parts." LA. REV. STAT. ANN. § 17:2351(4) (West

Consequently, as distinguishably regenerative parts of the human body, gametes can be sold and purchased on the market as transferable and disposable personal property. Indeed, sperm and ova have become market commodities, reaching bids from prospective purchasers as high as $15,000 and $50,000, respectively.[207] The Advanced Fertility Center of Chicago has published that its current charge for a complete egg donation cycle is $18,200, which includes "the donor's fee of $5,000."[208] Also, cryobanks such as the N.W. Andrology and Cryobank provide a pricing list for semen specimens, ranging from $180 per vial for one vial received to $165 per vial for 12 to 24 vials "purchased at the same time."[209] Thus, both individual solicitors and the fertility clinics performing the extraction and implantation procedures provide monetary compensation to donors for their gametes.

Just like any other fully market-alienable good, the demand is highest for gametes with the greatest quality.[210] In this context of sperm and ova donations, this postulate of economics manifests itself in a common formula: wealthy individuals or couples will pay top dollar to donors with the most "preferred" physical, intellectual, and social traits with the hopes of maximizing athleticism, physical attractiveness, and intelligence in their offspring. Within the market for such "high profile" sperm and ova,[211] the customer is always right, and solicitors have the unbridled discretion to reject any potential donor not satisfying their advertised criteria.

To illustrate this market reality, consider the role that gender plays in the price differential between sperm and ova. Normally, sperm are nearly limitless in supply and more easily attainable than ova; and so, they have a lower demand in the market.[212] Typical prices for sperm donors can range from $45 for a single donation "to $200 a week for weekly donations" for a six month duration ($4,800 for six months).[213] In contrast, ova are normally restricted in supply to only one per month for each woman;[214] even with today's technology, the surgical extraction of female ova still necessitates time-consuming and possibly painful surgical procedures.[215]

2001) (defining "[p]art of a body" to include "organs, tissues . . . other fluids and other portions of bodies . . . ").

[207]Randall Parker, *High Intelligence Sperm and Egg Donor Prices Rising,* February 25, 2003, http://www.futurepundit.com/archives/000992.html (last visited Sept. 14, 2005).

[208]Advanced Fertility Center of Chicago, *Egg Donation Pricing, at* http://www.advancedfertility.com/ivfpried.htm (last visited Sept. 14, 2005).

[209]N.W. Andrology & Cryobank, *Donor Pricing and Shipping Costs*, *at* http://www.nwcryobank.com/donor_pricing.html (last visited Sept. 14, 2005).

[210]*Id.* (stating that the "strong demand for the most preferred kinds of sperm and eggs is driving up prices").

[211]Kari J. Karsjens, *Boutique Egg Donations: A New Form of Racism and Patriarchy*, 5 DEPAUL J. HEALTH CARE L. 57, 65 (2002); GET THE FACTS*, supra* note 5, at 21 (stating "[i]t is not payment for the eggs themselves . . . ").

[212]SoYouWanna.com, *So You Wanna Donate Sperm?*, *at* http://www.soyouwanna.com/site/syws/sperm/sperm7.html (last visited Nov. 27, 2004).

[213]*Id.*

[214]GET THE FACTS*, supra* note 5, at 14.

[215]*Id.*

Usually, only with drug-induced hyper-stimulation of the ovaries can more than one egg be generated during a given menstrual cycle.[216] And so, due to this inherent supply-side limitation, ova demand a greater market value than sperm. Consequently, private solicitation offers for ova have reached as high as a "whopping" $50,000 for a single extraction procedure, while sperm prices have reached nowhere near that amount.[217] Acknowledging this price differential, one cannot deny the consequently economic nature of human gametes as commodified property that is fully salable in the market.

Other contemporary protocols provide further evidence of the market atmosphere of human gametes. For example, the Internal Revenue Service requires donors of ova to pay taxes on any money received from the donation process.[218] It is also common for paying recipients of gametes to account for the donor's medical bills from the procedure.[219] These practices supplement the veracity of the averment that a market in human gametes exists in the United States.

Advocates of reimbursement to donors of reproductive cells defend that such compensation is merely for the donor's time, trouble, and, in the case of ova, the painful surgical procedure.[220] The American Fertility Society has stated its official position to view any commercial sale of human ova as wrong but to acknowledge reimbursement for donors' time and inconvenience as readily permissible.[221] Likewise, sperm banks and egg procurement offices typically assert that donors are merely being reimbursed for their time and trouble.[222] However, attempting to "disguise the economic reality of the sale,"[223] assertions like these set up a comforting but false palliative for gamete donors.

At any rate, only when a fertility clinic or egg procurement program makes the payment to the donor could such assertions have any legitimacy.[224] But where private individuals have contacted donors through direct or indirect solicitation and advertisement, the situation is vastly different. In these instances, any payment is plausibly for the gametes themselves, with procedural costs merely a pretense.[225] Regardless of the professed basis for the payment, remuneration to donors of sperm and ova by their solicitors remains legal.[226]

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[216] *Id.*

[217] SoYouWanna.com, *So You Wanna Donate an Egg?*, *at* http://www.soyouwanna.com/site/syws/donateegg/donateeggFULL.html (last visited Nov. 27, 2004).

[218] GET THE FACTS, *supra* note 5, at 22.

[219] *Id.*

[220] Karsjens, *supra* note 211, at 72.

[221] David B. Resnik, *Eggs for Sale*, DEPARTMENT OF MEDICAL HUMANITIES: BRODY SCHOOL OF MEDICINE AT EAST CAROLINA UNIVERSITY, *at* http://www.ecu.edu/medhum/newsletter/spring2000_p1.htm (last visited Sept. 15, 2005).

[222] Boyd, *supra* note 156, at 461.

[223] *Id.*

[224] *Id.*

[225] GET THE FACTS, *supra* note 5, at 22.

[226] Boyd, *supra* note 156, at 461.

On the other hand, a comparative few have laid arguments against the sale of human gametes. And those contentions that have been advanced mainly concern the health implications for women involving the extraction procedures as well as the moral and social issues possibly implicated with future offspring. As to the first concern, very little data exists as to the hyper-ovulating drugs needed for the egg extraction procedures.[227] Understandably, therefore, some women fear for their health due to the virtually unknown risks with the drugs they must take in order to induce hyper-ovulation. As to the latter concern, only a few have argued that the commodification of human gametes has the potential to threaten the sanctity of human dignity.[228] However, although neither of these arguments directly addresses the problem of commercial sale, each requires same exploration.

V. ANALYSIS OF DISPARATE LEGAL TREATMENT OF HUMAN "PARTS" AND "PRODUCTS"

Legal scholars and property theorists, as well as judges, have found it very difficult to speak of human body parts without resorting to masking them in property terminology. This is so on account of the dual problem of the human body not fitting within the traditional doctrines of property law and judicial hesitance in stating that the human body is property. Given that modern property law has come so far as to recognize only limited autonomy over human body parts, the prohibition on compensation to donors of organs should not be reconcilable with the contradictory retailing of gametes. Otherwise, some portions of the human body <u>are</u> fully alienable personal property, transferable and disposable at the will of their owners, while others are inconsistently not alienable property.

Organs have been effectively deemed market-inalienable; while statutes not only allow but encourage their removal from one body and transplant to another, organs can receive no market value as tangible personal property. Without this market-inalienable status, the result would be that organs could never be transplanted for those in need, frustrating the strong societal interest in preserving human life. On the other hand, sperm and ova, have been granted market-alienable status and can receive substantial market value, just like any parcel of tangible personal property. Supporters of this distinguished treatment of gametes offer a simple argument: it is not dangerous to the donor or to society in general to alienate regenerative tissue and cells like sperm and ova, while it is extremely hazardous to one's health and life to do so with any non-regenerative body part, for example, a kidney or a liver.[229] Additionally, there may be an intuitive difference between body "parts" (organs) and body "products" (gametes and blood). However, these arguments fail for several reasons.

First, the "blurry line drawn in the sand" between regenerative and non-regenerative body parts has arguably begun to disappear with unprecedented advances in medical technology.[230] Recently, surgeons have successfully completed

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[227] *California Nurses Association Opposes Prop. 71: RNs Endorse Safe Stem Cell Research, But Say Initiative Lacks Adequate Public Safeguards*, PR NEWSWIRE U.S., Oct. 6, 2004, at 1.

[228] Resnik, *supra* note 221.

[229] Andrews, *supra* note 50, at 32.

[230] Boyd, *supra* note 156, at 461.

procedures of "splitting" livers, which involves cutting a donated organ into two halves.[231] The doctors then place each half into two different donees, with the result that the half-livers will regenerate into complete, fully functioning livers.[232] Physicians have developed other novel methods for "stretching" the use of donated organs.[233] For instance, the procedure of "bridging," endeavoring to "keep a patient alive long enough to get a real [organ]," connects failing organs to functional ones.[234] In addition, surgeons have also attempted "xenotransplantation," entailing implantation of organs from nonhuman species into humans.[235] Although these methods have often been assailed as risky,[236] they arguably evidence a current medical trend towards accepting the prohibition on organ sales and attempting novel ways to address the organ shortage. Furthermore, obvious ethical issues aside, the advent of stem cell research may allow physicians to literally grow new organs from stem cells.[237] Thus, gametes should no longer be distinguishable from statutorily defined "organs" on the sole basis of status as regenerative or non-regenerative.[238]

Second, unlike the relative simplicity of sperm donation, the egg harvesting procedure is extremely lengthy, invasive, and risky for a woman's health.[239] The process of egg extraction involves hyper-stimulation of the ovaries in order to produce a large amount of eggs per cycle, rather than just one.[240] Ovarian hyper-stimulation can produce serious health risks for women, including ovarian hyper-stimulation syndrome.[241] Although less common than simple aches and pains as side effects of hyper-stimulation and surgical removal of ova, this retention of fluid by the ovaries could present a possibly life-threatening condition for a woman.[242] Far more serious, albeit less frequent, side-effects risked by egg donation procedures include infertility and ovarian cancer.[243] Therefore, health risks permeate both ends of the spectrum of human body parts, and any argument that organ donation definitively presents more serious health risks can be misleading.

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[231]Healy, *supra* note 132.

[232]*Id.*

[233]*Id.* UCLA liver transplant surgeon Ronald W. Busuttil and other physicians have devised some of these methods for addressing the shortage of organs.

[234]*Id.*

[235]*Id.*

[236]*Id.*

[237]Lisa Chippendale, *Stem Cells Penetrating the Mysteries of a Potential Cure-All*, http://www.infoaging.org/feat24.html (last visited Sept. 15, 2005).

[238]For an intriguing and thorough analysis attacking the differential treatment of boutique egg donations through a study of critical race theory and feminist jurisprudence, *see generally* Karsjens, *supra* note 211.

[239]GET THE FACTS, *supra* note 5, at 14.

[240]*Id.*

[241]*Id.*

[242]*Id.* at 15-17.

[243]*Id.*

Third, compensation to donors of sperm and ova exploits the participants for their gametes while presenting dangers to society. College newspaper advertisements and egg brokerage firms "capitaliz[e] on the human desire for a child while simultaneously exploiting young women and undervaluing their social worth as individuals."[244] As the Senate Committee for NOTA stated, "individual pleas through television and newspaper articles . . . may be counterproductive to the needs of many others requiring organ transplantation."[245] Moreover, private solicitors of "high profile" gametes sometimes promise vast sums of money merely to attract as many applicants as possible to the pool.[246] Quite often, according to the New York Advisory Group on Assisted Reproductive Technologies, the advertiser does not intend to pay much at all.[247] And so, open solicitation for any human body part, gamete and organ alike, may unfairly deprive others just as deserving or needy from equal access to organs and gametes.

Just as importantly, donors of ova and sperm may be left legally unprotected by law should they seek to assert any rights over their gametes.[248] Egg procurement agencies routinely inform donors that they "have no control over what happens" to their gametes once they donate their cells.[249] This fact spawns a myriad of other issues, such as whether a biological mother – the donor of the egg – could conceivably condition her donation on visitation rights with her biological child throughout its life. While the conviction of some donors may hold that visitation or even custody rights over the offspring conceived from their gametes cannot be denied them should they legally pursue vindication of such rights,[250] in general, courts have met the enforceability of agreements or contracts like these with little welcome.

In the analogous situation of surrogacy contracts, several courts have held such contracts void as contrary to the strong public policy that a mother should have time after her child's birth to reflect on her wishes concerning the child.[251] In one case in particular, the court held that a surrogacy contract should be given no legal effect where the mother's agreement was obtained prior to a reasonable time after the

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[244]Karsjens, *supra* note 211, at 89.

[245]S. Rep. No. 98-382, at 14.

[246]*See* GET THE FACTS*, supra* note 5, at 7.

[247]*Id.*

[248]*Id.* at 19 ("Once you donate your eggs, their fate is entirely up to the recipient. You have no say about what happens.") (emphasis added). *See I Was Duped Into Becoming a Father: Can a Man Make a Woman Pregnant Against His Will? Yes*, THE EXPRESS, SCOTTISH EDITION, Oct. 26, 2004, at 17 (detailing an episode of a nonfiction Scotland television drama Whose Baby?). In this shocking, but true story, a woman had "stole[n]" her sexual partner's sperm from the condom that he had used in order to conceive a child against his will. "She had stolen my sperm to make herself pregnant," claimed Jonathan Evans, the man stunned to hear that he was now a father and could be legally answerable for child support payments. *Id.*

[249]*See, e.g.,* GET THE FACTS, *supra* note 5, at 21.

[250]*Id.* (advising egg donors that "it is extremely unlikely that you would be able to establish yourself as the legal mother of any child born as a result of your donation").

[251]*See generally* R.R. v. M.H., 689 N.E.2d 790 (Mass. 1998).

child's birth or where "the agreement was induced by the payment of money."[252] Thus, for similar reasons, payment to egg donors for their ova may void any contract for visitation rights or custody that the donor seeks to enter into with the donee prior to the surgical extraction. The same will likely hold true for donors of sperm who wish to assert paternal rights over the offspring from their sperm. Permitting full property status to sperm and ova by allowing outright sale on the market has opened the door for these risks.

Returning to Professor Radin's personhood model for justifying property rights, I propose a system of full and equal market-inalienability for all human body parts – organs and gametes. A "gifts only" regime will best protect the interests of donors involved and at the same time preserve altruistic donation.[253] As Radin suggests, once an object receives market value, altruism is forever undermined, and every subsequent transfer of that object faces risk of being drowned in market terminology.[254]

Radin's slippery slope argument of market commodities has a further implication for gamete donation. She posits that,

> [i]f we permit babies to be sold, we commodify not only the mother's (and father's) baby-making capacities – which might be analogous to commodifying sexuality – but we also conceive of the baby in market rhetoric. When a baby becomes a commodity, all of its personal attributes – sex, eye color, predicted I.Q., predicted height, and the like – become commodified as well."[255]

Not only could babies as human persons face the danger of becoming market commodities, but potentially all human, personal traits will also suffer the classification of market goods.[256] This is the very reason why, in this context, there lies no difference – logical or semantic – between body "parts" and body "products.

Thus, websites and college newspaper ads that solicit donors with "preferred" traits arguably foster an ominous 21st century culture of eugenics, in which people not only "shop" for their babies but also for the perfect characteristics and attributes of their offspring. Flatly, the permitted compensation for human gametes, to borrow again from Mill, "has made property of things which never ought to be property, and absolute property where only a qualified property ought to exist."[257] The market reality of sales in human gametes must end, as the monetization of human reproductive capacity in this way promotes a looming attitude that all human attributes are equally commodifiable.

As possible solutions for achieving market-inalienability of gametes, consider the following situation where both organs and reproductive cells have been equally denied monetary compensation. EBay, Inc. is an Internet company operating under

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[252] *Id.* at 796.

[253] Radin, *supra* note 24, at 1913.

[254] *Id.*

[255] *Id.* at 1925 (emphasis added).

[256] *Id.*

[257] MILL, *supra* note 20, bk. III, ch. I, at 208.

the website eBay.com by which users may purchase and sell items of virtually limitless variety in a unique auction format.[258] In general, the online auction site states in its guidelines that "the human body or any human body parts may not be listed on eBay."[259] Specifically, eBay prohibits auctions featuring sperm and ova for sale in addition to those featuring organs for sale.[260] This provides an example of a private industry pronouncing that both organs and gametes are not suitable for sale in its market.

However, private declarations like eBay's prohibition still do not have the full force of law. A possible legal solution would be to utilize an avenue available and present in the National Organ Transplant Act since its inception. In defining "human organ," NOTA includes the phrase "and any other human organ (or any subpart thereof, including that derived from a fetus) specified by the Secretary of Health and Human Services by regulation."[261] The Secretary could simply regulate that human gametes be included in the ban against monetary purchase as subparts of human organs. Gametes would no longer be market commodities, but the system would still allow donors to be reimbursed for incidental expenses and costs, just as it permits with organ donations.

In addition, the United States could follow the lead of other countries that have prohibited the sale of gametes. In early 2004, the Italian Parliament passed a bill banning, among other forms of assisted reproduction, egg donation and artificial insemination using donated sperm.[262] This bill, passed into law by Italy's President on February 19, 2004, reportedly grew out of loud dissent from the vicinage of the Roman Catholic Church against "monstrous and sacrilegious" experiments with frozen embryos that were conceived from donated gametes.[263] Canada has also banned monetary compensation to donors of reproductive cells, "due to the arguments concerning exploiting women for their reproductive capabilities and . . . doctors playing God."[264] The United States should take this lead from other industrialized countries and ban the outright sale of human gametes.

Pursuing the other route that some have suggested, to "start acknowledging that people's body parts are their personal property," would set dangerous precedent.[265] This attitude often manifests itself in the phrase, disturbingly ubiquitous in 21st century culture, "it's my body; I can do with it what I want." While some may cite to ambiguous and, quite frankly, tenuous notions of fundamental liberty in supporting such an assertion, the ultimate question remains as to whether property

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[258]eBay.com, http://www.ebay.com (last visited Jan. 18, 2005).

[259]eBay.com: *Prohibited and Restricted Items – Human Parts and Remains*, *at* http://pages.ebay.com/help/policies/remains.html (last visited Nov. 20, 2004).

[260]*Id.* (stating that "[e]xamples of prohibited items include . . . organs, bone, blood, waste, sperm, and eggs").

[261]42 U.S.C. § 274e(c)(1) (emphasis added).

[262]Robin Marantz Henig, *On High-Tech Reproduction, Italy Will Practice Abstinence*, N.Y. TIMES, Mar. 2, 2004, at F5.

[263]*Id.*

[264]*See* Blackley, *supra* note 8.

[265]Andrews, *supra* note 50, at 37.

law has ever recognized or is prepared to recognize a market-alienable right to financial compensation for bartering with one's body. Moreover, as stated in Part II above, the Supreme Court of the United States has consistently refused to acknowledge the existence of such an unlimited right.[266]

One need only look toward the terrible exploitation of poor individuals abroad to harness truly the dangerous potential of declaring human body parts property.[267] As Professor Radin feared, once some aspects of the human body become commodified, all human attributes may face the peril of suffering a similar fate.[268] Furthermore, several states have commenced granting donors of organs more than adequate reimbursement for their expenses incurred, including some which have offered generous tax breaks in order to encourage more donations.[269] Donors of gametes already receive similar reimbursement expenses. In sum, since the law appropriately prohibits compensation to donors of organs for strong reasons of public policy, it should also deny compensation to donors of gametes.

VI. CONCLUSION

A fascinating and seemingly endless legal dispute has gone on for centuries regarding whether the human body and its components are the personal property of each person. This much is certain: if the human body is not property, then it may not be subject to sale. But even if the human body could be classified as some *sui generis* form of property, the debate subsists upon the issue of whether body parts should receive monetary value in the market. This note has proposed that the human body must achieve full and equal market-inalienability throughout for the preservation and respect of human personhood.

Notwithstanding a disputable modern trend towards recognizing property interests in human body parts, legislatures and courts have still limited these rights, however they may be categorized, by balancing them with strong public policies. In order to align these policies more properly with fundamental tenets of property law, the prohibition against sale and purchase of human organs must harmonize with a similar prohibition on compensation for human gametes.

As the current system in the United States prohibits the sale of organs but permits commercial sale of human gametes, the latter must adjust in order to achieve complete market-inalienability of the human body. Only then will "put[ting] a price on human life" be truly impossible.[270]

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[266]*See* Roe v. Wade, 410 U.S. 113 (1973).

[267]*See* Rohter, *supra* note 1.

[268]Radin, *supra* note 24, at 1907.

[269]*See* Healy, *supra* note 132; Paulson, *supra* note 198.

[270]CAPRON & BIRNBAUM, *supra* note 53, at 15 (citing the 1985 Hastings Center Report on Organ Procurement).