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SCHOOL OF LAW**

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**WHAT ARE WE—LABORERS, FACTORIES OR SPARE PARTS? THE TAX
TREATMENT OF TRANSFERS OF HUMAN BODY MATERIALS**

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What Are We—Laborers, Factories, or Spare Parts? The Tax Treatment of Transfers of Human Body Materials

Lisa Milot*

Abstract

Transfers of human body materials are ubiquitous. From surrogacy arrangements, to sales of eggs, sperm and plasma to clinics, to black markets for kidneys, to pleas for donations of body materials, these transfers are covered and debated daily in popular and academic discourse. The associated philosophical and legal issues have been explored by a wide range of commentators. The appropriate tax treatment of these transactions, however, is mostly unexamined.

Current law is unclear about what the tax consequences of these transfers are. There are no statutory provisions directly on point, Internal Revenue Service guidance is outdated and conflicting, and the small number of judicial decisions in this area are narrowly written to resolve only the tax liability of the particular taxpayer before the court. Moreover, there are only a few academic publications on this topic, of which the most comprehensive is a 1973 student Note.

This lack of legal clarity reflects in part the complexity of the issues involved. Transfers of human body materials raise questions as to the appropriate tax treatment across multiple federal tax regimes, each of which is governed by a distinct set of rules and informed by different considerations of tax policy and history. Moreover, these tax issues are arising in the context of evolving jurisprudence involving human bodies more generally, and they implicate complex philosophical problems. Of particular significance in this debate is whether human bodies can only

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provide services, or if their materials can constitute property of the person from whose body they come: Whether the human body is exclusively a laborer, or if it can also be a factory or a collection of spare parts. What is more, the technology that has enabled these transfers continues to evolve rapidly, increasing the demand for human body materials and creating new markets for which no well-defined regulatory frameworks exist.

In this Article, I offer a comprehensive methodology for handling the taxation of transfers of human body materials. To this end, I offer three principles for characterizing human body materials for tax purposes. This approach produces a workable set of doctrines that is consonant with our broader cultural and legal understandings, which I then apply to recurring forms of transfers of human body materials to illustrate the resulting tax treatment of these transfers.

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I. Introduction

Transfers of human body materials are ubiquitous. Details about them appear daily in the popular press, and scholars regularly debate the ethical questions they present. These transfers can (and do) take many forms. For example, consider:

- Military wives serving as paid surrogate mothers while their husbands are deployed abroad;¹
- Ivy League women selling their eggs for upwards of \$50,000;²
- Sales of kidneys for \$20,000;³

1. Lorraine Ali, *The Curious Lives of Surrogates*, NEWSWEEK, Mar. 29, 2008, <http://www.newsweek.com/id/129594> (last visited Sept. 24, 2010) (on file with the Washington and Lee Law Review).

2. Martha Frase-Blunt, *Ova-Compensating?: Women Who Donate Eggs to Infertile Couples Earn a Reward—But Pay a Price*, WASH. POST, Dec. 4, 2001, at F01.

3. Drew Griffin & David Fitzpatrick, *Donor Says He Got Thousands for His Kidney*, CNN.COM, Sept. 2, 2009, <http://www.cnn.com/2009/WORLD/meast/09/01/blackmarket.organs/index.html?iref=storysearch> (last visited Sept. 24, 2010) (on file with the Washington and Lee Law Review).

- Semi-weekly sales of plasma yielding an annual income of \$75,000;⁴
- Donation of a pint of blood or a kidney to a charitable organization;
- A woman providing an egg for her sister's use in *in vitro* fertilization;
- A taxi driver donating his kidney to a passenger who is on the verge of kidney failure;⁵ and
- The harvesting of corneas and other body materials from cadavers for commercial resale.⁶

These transfers raise many questions: How should we allocate these scarce resources? Should we allow payment for them? Does allowing these transactions devalue human life? Who is the "mother" and who is the "father" of a child conceived as a result of surrogacy or egg or sperm donation? Should we enforce contracts in which the subject matter is human body materials? If so, is it appropriate to order specific performance of these contracts? These issues, which have both philosophical and legal dimensions, have inspired examination by a wide range of commentators. Examination of the appropriate tax treatment of these transactions, however, is all but nonexistent.

All transfers of human body materials have potential federal tax consequences. Is there taxable income when a person sells an egg, a kidney, or blood plasma? If so, are the proceeds ordinary income or capital gains?⁷ If capital gains, does the income represent long-term capital gains eligible for preferential tax rates, or short-term capital gains taxed at the same rate as ordinary income?⁸ When, if ever, is the income subject to

and Lee Law Review).

4. See *United States v. Garber*, 607 F.2d 92, 94 n.1 (5th Cir. 1979) (deciding the tax treatment of income from plasma sales of approximately \$70,000 to \$90,000 per year).

5. ASSOCIATED PRESS, *Arizona Woman Finds Taxi Driver Is a Kidney Match*, MSNBC, Aug. 25, 2009, http://www.msnbc.msn.com/id/32541245/ns/us_news-wonderful_world/?gtl=43001 (last visited Sept. 24, 2010) (on file with the Washington and Lee Law Review).

6. *Man Jailed over LA Body Parts Scheme*, ABC NEWS, June 12, 2009, <http://www.abc.net.au/news/stories/2009/06/12/2596444.htm> (last visited Sept. 24, 2010) (on file with the Washington and Lee Law Review).

7. See *infra* notes 52–59 and accompanying text (discussing the characterization of income as ordinary or capital gain).

8. See *infra* notes 59–64 and accompanying text (discussing the tax treatment of capital gains).

payroll taxes?⁹ Should a taxpayer who donates blood or a kidney to a charitable organization receive a tax deduction?¹⁰ Is the gratuitous transfer of a kidney for transplantation subject to gift tax like a gift of a car or a home?¹¹ Should the market value of all human body materials in a single cadaver—estimated at \$220,000¹²—be included when calculating the value of a decedent's gross estate?¹³

Under current law, the answers to these questions are unclear. There are no statutory provisions on point, and the available guidance from the Internal Revenue Service (the I.R.S. or Service) is conflicting¹⁴ and outdated.¹⁵ There are only a small number of judicial decisions in this area, and each is narrowly written to resolve only the tax liability of the particular taxpayer before the court.¹⁶ Academic commentary on these matters is also thin: Only a handful of publications on the tax treatment of

9. Payroll taxes consist of social security and Medicare taxes. They are due on employee and nonemployee compensation received by a taxpayer. See *infra* notes 69–71 and accompanying text (discussing payroll tax provisions).

10. See *infra* notes 65–67 and accompanying text (discussing tax deductions for charitable contributions).

11. See *infra* notes 71–79 and accompanying text (discussing gift tax provisions).

12. See MICHELLE GOODWIN, BLACK MARKETS: THE SUPPLY AND DEMAND OF BODY PARTS 178 (2006) (estimating the value of all usable human body materials if they were harvested and sold at secondary market prices at \$220,000).

13. See *infra* notes 80–84 and accompanying text (discussing estate tax provisions).

14. Compare Rev. Rul. 162 (Revenue Ruling 162), 1953-2 C.B. 127 ("Furnishing blood for a transfusion, or to a blood bank, is analogous to the rendering of a personal service by the donor rather than a contribution of 'property.'"), with I.R.S. Gen. Couns. Mem. 31817 A-634712 (Oct. 26, 1960) (G.C.M. 31817) (recognizing that blood is undoubtedly property). Because a revenue ruling is a formal declaration of the Service's position on a legal issue that may be cited and relied upon by taxpayers while a general counsel memorandum is an internal I.R.S. document that provides the legal basis and rationale for a ruling by the Service which may not be relied upon or cited in defense of a tax position, Revenue Ruling 162 remains the Service's official statement of its position despite its later declaration to the contrary. As discussed in this Article, see *infra* notes 52–87 and accompanying text, the characterization of a body material as a service or as property critically changes its tax treatment.

15. The Service's only binding statement of its position is contained in Revenue Ruling 162, which was published in 1953. See Rev. Rul. 162, *supra* note 14, at C.B. 127. Its most recent statement on point is from 1987. See I.R.S. Priv. Ltr. Rul. 8814010 (Dec. 30, 1987). A private letter ruling is a statement of the Service's position with respect to a legal issue presented by a taxpayer and may only be relied upon and cited by the taxpayer that requested the ruling.

16. See *infra* notes 101–33 and accompanying text (discussing the judicial decisions on the tax treatment of transfers of human body materials).

transfers of human body materials exist,¹⁷ and the most comprehensive is a 1973 student Note.¹⁸

This lack of legal clarity in this area reflects in part the complexity of the issues involved. Transfers of human body materials raise questions as to the appropriate tax treatment across multiple federal tax regimes— income, payroll, gift, and estate.¹⁹ Each of these tax systems is governed by a distinct set of rules and informed by different considerations of tax policy and history. Moreover, these tax issues are arising in the context of evolving jurisprudence involving human bodies more generally, and they implicate complex philosophical problems.²⁰ Of particular significance in this debate is whether human bodies can only provide services, or if their materials can constitute property of the person from whose body they come: whether the human body is exclusively a laborer, or if it can also be a factory or a collection of spare parts. What is more, the technology that has enabled these transfers continues to evolve rapidly, increasing the demand for human body materials and creating new markets for which no well-defined regulatory frameworks exist.²¹

In this Article, I offer a comprehensive methodology for handling the taxation of transfers of human body materials. In my view, both the history and intensity of the current debate, as well as the dual nature of humans as legal subjects and the object of markets, foreclose any simple approach to these problems—particularly an approach founded on a categorical view that human body materials are or are not uniformly property. Instead, the context in which the transfer of a material occurs must be considered. By embracing this underlying complexity, a nuanced framework for the appropriate tax treatment of human body materials can be developed.

To this end, I offer principles for characterizing human body materials for tax purposes. First, transfers involving living intact bodies, as with surrogacy, are separated from those involving excised body materials or

17. See *infra* notes 138–43 and accompanying text (discussing the limited scholarship on tax treatment of transfers of human body materials).

18. See generally Note, *Tax Consequences of Transfers of Bodily Parts*, 73 COLUM. L. REV. 842 (1973), discussed *infra* notes 138, 206, 240.

19. See *infra* notes 52–85 and accompanying text (providing an overview of each of these tax systems). While there are potential state and local tax consequences as well complicating the analysis, this Article discusses only the federal tax treatment of these transactions.

20. See *infra* notes 144–74 and accompanying text (discussing the uneven treatment of human bodies as comprising legal actors and as legal property).

21. See *infra* notes 175–81 and accompanying text (discussing the new and evolving markets for human body materials).

cadavers. Second, commercial transactions in body materials excised from a living being, as when eggs are sold to a clinic, are distinguished from gratuitous transfers of the same materials, like the transfer of eggs to an infertile sister. Finally, cadavers disposed of in traditional ways, such as by burial or cremation, and the posthumous gratuitous transfer of their constituent materials are differentiated from those transferred in commercial transactions. This approach produces a workable set of doctrines that is consonant with our broader cultural and legal understandings, which I then apply to recurring forms of transfers of human body materials to illustrate the resulting tax treatment of these transfers.

Part II of this Article discusses the nature and scope of the problem, highlighting the growing importance of the tax questions posed by the transfer of human body materials. Part III analyzes and critiques current tax jurisprudence concerning these transfers. Part IV locates these issues within the larger legal and philosophical contexts in which they arise, focusing, in particular, on the debate over whether human body materials are properly characterized as property and how that characterization bears on tax law issues. Finally, Part V sets forth my proposed tax framework.

II. The Burgeoning Problem of the Taxation of Human Body Materials

Historically, potential taxable transactions in human body materials were limited in number and value. The first civilian blood drive was organized to provide blood and plasma for transfusions during World War II,²² and one of the three court cases concerning the proper tax treatment of transfers of a human body material, decided in 1985, concerned just one pint of blood.²³ While sales of organs for transplantation have been banned in the United States since the National Organ Transplant Act (NOTA) was passed in 1984,²⁴ in the last twenty years vibrant markets have developed

22. See *Red Gold: The Epic Story of Blood*, PBS.ORG, <http://www.pbs.org/wnet/redgold/history/timeline4.html> (last visited Sept. 21, 2010) (on file with the Washington and Lee Law Review).

23. See *infra* notes 111, 127–29, 195 (discussing *Lary v. United States*, 608 F. Supp. 258, 263 (N.D. Ala. 1985)).

24. See National Organ Transplantation Act of 1984, 42 U.S.C. § 273 (2006) (limiting the availability of organs for transplantation to qualified nonprofit organ procurement organizations). Iran is the only country in which the sale of organs is legal. See Jeneen Interlandi, *Not Just Urban Legend*, NEWSWEEK, Jan. 10, 2009, <http://www.newsweek.com/id/178873> (last visited Sept. 21, 2010) (discussing the worldwide problem of organ trafficking and its increased occurrence in the United States) (on file with the Washington and Lee Law Review).

for blood products,²⁵ sperm and eggs, and, to a lesser extent, human hair. Individuals selling plasma generally receive \$15–\$25 per bleed and can effectuate transfers as often as twice each week.²⁶ Typical sperm sales, which also can occur on a twice weekly basis, yield \$25–\$100 per vial.²⁷ While eggs had an average market payment of only \$1,500 fifteen years ago,²⁸ women are now routinely paid \$4,000–\$8,000 per cycle,²⁹ although medical guidelines limit such sales to three to six lifetime cycles.³⁰ Hair commands between \$125 and \$2,600 but can be sold only infrequently.³¹ All of these materials are now available for sale in most states.³²

25. See GOODWIN, *supra* note 12, at 152 ("Commercial plasma companies extract and sell over 13 million units of plasma in the United States.").

26. See U.S. GEN. ACCOUNTING OFFICE, HEHS-98-205, BLOOD PLASMA SAFETY: PLASMA PRODUCT RISKS ARE LOW IF GOOD MANUFACTURING PRACTICES ARE FOLLOWED 7 (1998), available at <http://www.gao.gov/archive/1998/he98205.pdf> (explaining plasma donation practices in the United States); see also *Frequently Asked Questions*, BIOLIFE PLASMA SERVICES, <http://www.biolifeplasma.com/html/faq/faq.html> (last visited Sept. 21, 2010) ("The body replaces the plasma removed during the donation process quickly; therefore, healthy individuals can donate as often as twice in a seven-day period, with at least one day between donations.") (on file with the Washington and Lee Law Review).

27. See Brenda Reddix-Small, *Assessing the Market for Human Reproductive Tissue Alienability: Why Can We Sell Our Eggs But Not Our Livers?*, 10 VAND. J. ENT. & TECH. L. 643, 653 (2008) (discussing the practices and prices for sperm sales); see also *Sperm Donor FAQs*, 123DONATE.COM, <http://www.123donate.com/spermdonorfaqs.html#week> (last visited Sept. 21, 2010) ("A minimum of 72 hours of sexual abstinence is generally needed for specimens to pass our standards for processing. The number of donations per week is based on donor specimen quality and overall lifestyle choices.") (on file with the Washington and Lee Law Review).

28. See Gina Kolata, *Price of Donor Eggs Soars, Setting Off a Debate on Ethics*, N.Y. TIMES, Feb. 25, 1998, at A1, available at <http://www.nytimes.com/1998/02/25/us/price-of-donor-eggs-soars-setting-off-a-debate-on-ethics.html> (noting that in 1993, the compensation paid for human eggs was only \$1,500).

29. See Mary Jo Layton, *Fertile Market (Time to Sell Your Sperm and Eggs for Cash)*, RECORD (Bergen County, N.J.), Feb. 8, 2009, at A01 (noting that North Hudson IVF of New Jersey pays women \$4,000 for their eggs, while other New Jersey clinics pay women up to \$8,000).

30. See, e.g., Naomi Cahn, *Accidental Incest: Drawing the Line—or the Curtain?—for Reproductive Technology*, 32 HARV. J.L. & GENDER 59, 102 (2009) ("Indeed, many fertility clinics do limit donation cycles per donor to six and some to as few as three.").

31. See, e.g., THEHAIRTRADER, <http://thehairtrader.com> (last visited June 18, 2010) (serving as an example of an internet marketplace that facilitates hair sales and trades between the more than 12,000 users of the site) (on file with the Washington and Lee Law Review).

32. See Reddix-Small, *supra* note 27, at 652 (discussing the sale of eggs and sperm in most states); see also *Infertility IVF Clinics*, IHR.COM, <http://www.ihr.com/infertility/provider> (last visited Sept. 21, 2010) (listing hyperlinks to clinics in over forty states that provide products and services for IVF procedures) (on file with the Washington and Lee Law Review).

Markets for human body materials are continuing to expand dramatically due to modern technological advances in the removal, storage, transformation, and re-use of human body materials.³³ The secondary market for transplantable human organs and soft tissue has become a multi-billion dollar a year business,³⁴ facilitated by shifting legal standards that increasingly provide decedents (or their next of kin) the right to transfer body materials for transplantation or research upon death.³⁵

Amounts offered to purchase body materials from individuals with unique characteristics have skyrocketed in recent years. For plasma containing rare antibodies, compensation can reach \$1,000 per bleed.³⁶ Sperm sells for \$500 per vial in instances where the provider allows the intended parent(s) to know his identity.³⁷ Depending on a woman's exact attributes, she can earn as much as \$25,000–\$50,000 for the sale of eggs from a single cycle.³⁸ Markets for these reproductive materials have

33. See generally Lori Andrews & Dorothy Nelkin, *Whose Body Is It Anyway? Disputes over Body Tissue in a Biotechnology Age*, 351 LANCET 53 (1998) (discussing the debates surrounding the use of human body tissue in light of scientific advances).

34. GOODWIN, *supra* note 12, at 178; see also ASSOCIATED PRESS, *Demand for Body Parts Fuels Booming Trade*, http://www.msnbc.msn.com/id/13165909/print/1/display_mode/1098 (last visited Sept. 21, 2010) ("Over the past two decades, the tissue industry has exploded into a billion-dollar business, creating a huge demand for ligaments, tendons, bones and other valuable body parts.") (on file with the Washington and Lee Law Review). The "secondary market" refers to the resale of body materials by an organization for use in medical procedures, as opposed to "primary market" sales from an individual of his or her own body materials to the reselling organization.

35. See REVISED UNIF. ANATOMICAL GIFT ACT §§ 4, 9, 8A U.L.A. 63 (Supp. 2010) [hereinafter RUAGA] (discussing which persons are authorized to make anatomical gifts of a decedent's body or part for purpose of transplantation, therapy, research, or education). While subsequent variations in law have occurred, initially every jurisdiction adopted the UAGA. See *Uniform Anatomical Gift Act*, ANATOMICALGIFTACT.ORG, <http://www.anatomicalgiftact.org/DesktopDefault.aspx?tabindex=1&tabid=67> (last visited Sept. 21, 2010) ("The original Uniform Anatomical Gift Act was promulgated in 1968, shortly after Dr. Christian Barnard's successful transplant of a heart in November, 1967. It was promptly and uniformly enacted in every jurisdiction.") (on file with the Washington and Lee Law Review).

36. See, e.g., *Donor Compensation*, BLOOD & PLASMA RESEARCH, INC., <http://www.bloodandplasma.com/compensate.htm> (last visited Sept. 21, 2010) ("Donor compensation ranges from \$20 to \$1,000 per donation.") (on file with the Washington and Lee Law Review).

37. See *"Become Exclusive Donor" in NJ or NY*, BIOGENETICS CORP., <http://www.sperm1.com/biogenetics/donor.html> (last visited Sept. 21, 2010) (listing the compensation for anonymous and open identification sperm sales) (on file with the Washington and Lee Law Review).

38. Adrienne Knox, *Have Brokers Gone Overboard for Human Ova?*, STAR-LEDGER (Newark, N.J.), Mar. 8, 1998, at 1 ("For three months an anonymous couple, through a

experienced especially rapid growth, driven in part by technological advances that now allow live births from frozen eggs.³⁹

In addition, the likelihood that NOTA will be revised to allow payments for transplantable organs is on the rise. Since 2001, several bills have been proposed in Congress that would allow for modest payments for organs, although none has yet become law.⁴⁰ Even more importantly, in 2008 the American Medical Association adopted a directive specifically advocating the modification of NOTA to rescind its prohibition of payments for organs for transplantation so that researchers could conduct pilot studies concerning the effectiveness of financial incentives for medically valuable transfers.⁴¹

Moreover, to say that currently no *legal* U.S. market for transplantable organs exists is not to say that there is no current U.S. market for such organs. While black markets in other countries are well-documented,⁴²

broker, has been advertising in the Princeton University student newspaper for a young woman willing to sell her ova, offering \$35,000 plus expenses for the egg of an 'attractive, intelligent woman with proven fertility.'").

39. See, e.g., Cahn, *supra* note 30, at 78–79 ("Until recently, most donor eggs had to be 'fresh.' As of 2007, there were only an estimated two hundred children worldwide born from frozen eggs Frozen eggs, however, provide opportunities for expanding the market in eggs, perhaps resulting in an increased number of banks.").

40. For example, the Living Donor Tax Credit Act of 2007, H.R. 1035, 110th Cong. (2007), would amend the Code to provide a nonrefundable personal credit of up to \$5,000 in any one tax year to individuals who donate all or any part of a kidney, liver, lung, pancreas, intestine, or bone marrow. The credit would cover any unreimbursed costs and lost wages incurred by an organ donor in connection with an organ transplant. Most recently the bill was referred to the House Committee on Ways and Means on January 6, 2009. Living Organ Donor Tax Credit Act of 2009, H.R. 218, 111th Cong. (2009); see also H.R. 2090, 107th Cong. (2001) (providing a tax credit of up to \$2,500); H.R. 1872, 107th Cong. (2001) (proposing up to \$10,000 in tax credits for deceased-donor organ donations).

On a more modest level, Georgia provides a seven dollar discount on driver's license fees to residents agreeing to be organ donors. O.C.G.A. § 40-5-25(d)(2) (2003) (amended 2005). Pennsylvania approved a law providing \$300 toward the funeral expenses of organ donors, but the law was never enacted due to its conflict with NOTA. 20 PA. CONS. STAT. ANN. § 8622 (West 2000). Other states provide nonrefundable state income tax credits for unreimbursed live organ donation expenses, including lost wages. See, e.g., IDAHO CODE ANN. § 63-3029K (2008) (providing such a credit up to \$5,000); UTAH CODE ANN. § 59-10-1015 (2009) (providing a credit up to \$10,000).

41. See AM. MED. ASS'N, DIRECTIVES OF THE AMA HOUSE OF DELEGATES 153 (2008), available at <http://www.ama-assn.org/ad-com/polfind/Directives.pdf> ("Our AMA will place high on its legislative agenda modification of the National Organ Transplantation Act to rescind prohibition of 'valuable consideration' for cadaveric organ donation, so that pilot studies of financial incentives for donation can be carried out.").

42. See Interlandi, *supra* note 24, at 41 (noting the World Health Organization estimated that approximately one-fifth of the 70,000 kidneys transplanted globally annually

reports about the illegal trade in organs in the United States are harder to verify. However, several authors allege its existence,⁴³ and recently evidence of sales of organs (specifically of kidneys) has surfaced in news reports. In the late 1990s, for example, anthropologist Nancy Scheper-Hughes found evidence of illegal organ sales not only in Brazil, South Africa, and China, but also in the United States.⁴⁴ While the State Department has classified reports of organ trafficking within the U.S. as "urban legend,"⁴⁵ Nick Rosen filmed his sale of a kidney for transplantation for \$20,000 at Mount Sinai Medical Center in New York.⁴⁶ Rosen further reported that only one U.S. hospital he approached about performing the transplantation blocked his efforts to move forward due to its screening process.⁴⁷ Levy-Izhak Rosenbaum was recently charged with brokering

come from black markets, and describing the trade of half-livers, eyes, skin and blood sold illegally throughout the world); see also Steve P. Calandrillo, *Cash for Kidneys? Utilizing Incentives to End America's Organ Shortage*, 13 GEO. MASON L. REV. 69, 86–91 (2004) (discussing what the author terms "the thriving global black market"); Robert Steinbuch, *Kidneys, Cash, and Kashrut: A Legal, Economic, and Religious Analysis of Selling Kidneys*, 45 HOUS. L. REV. 1529, 1529–1607 (2009) (highlighting the international trade of body parts).

43. See Nancy Scheper-Hughes, *The Global Traffic in Human Organs*, 41 CURRENT ANTHROP. 191, 193 (2000) ("For many years Japanese nationals have resorted to various intermediaries, sometimes with criminal connections, to locate donor hearts in other countries, including China and the United States."); see also Michael Finkel, *Complications*, N.Y. TIMES, May 27, 2001, at F26, available at <http://www.nytimes.com/2001/05/27/magazine/complications.html> ("Some [U.S.] facilities, especially those struggling financially, appear to employ a type of 'don't ask, don't tell' policy when it comes to transplant surgeries on foreigners."); see also Charles C. Dunham, IV, "Body Property": *Challenging the Ethical Barriers in Organ Transplantation to Protect Individual Liberty*, 17 ANNALS HEALTH L. 39, 58 (2008) (positing the existence of black markets, but without providing evidence).

44. Interlandi, *supra* note 24, at 41; see also Marina Jimenez, *Europe's Poorest Sell Their Kidneys*, NAT'L POST, Mar. 29, 2002, at A1 (reporting that, in 2001, dozens of Moldavians sought to enter the United States illegally to sell their kidneys).

45. Interlandi, *supra* note 24, at 41; see also David Porter & Carla K. Johnson, *First Case of Organ Trafficking in U.S.?*, MSNBC, July 24, 2009, http://www.msnbc.msn.com/id/32132371/ns/us_news-crime_and_courts/ (last visited Sept. 21, 2010) (quoting University of Pennsylvania ethicist Arthur Caplan as stating, with respect to organ trafficking, that "[t]here's certainly cross-national activity, but it hasn't touched the United States or we haven't known about it until now") (on file with the Washington and Lee Law Review).

46. See Griffin & Fitzpatrick, *supra* note 3 (describing Rosen's kidney transfer and compensation). Earlier reports put the compensation at \$15,000. Interlandi, *supra* note 24, at 41.

47. See Interlandi, *supra* note 24, at 41 (noting that Rosen stated that one hospital in Maryland screened him out of completing the kidney transfer).

sales of kidneys between Israeli sellers and American recipients for \$10,000, with the transplants performed in U.S. hospitals.⁴⁸

As long as transfers of body materials were infrequent and payments were insignificant, their appropriate tax treatment was of little consequence. However, with the recent expansion of markets for human body materials and the anticipated growth of such markets in the near future, a clear, consistent, and coherent understanding of the tax consequences of these transfers is needed. Without such a framework, taxpayers cannot know their reporting obligations, and thus cannot comply with them or make rational decisions about whether to participate in these markets. Moreover, the Service and the courts cannot properly review and enforce existing tax laws without an understanding of how they apply to human body materials. For these reasons, it has become imperative to determine the proper tax treatment of transfers of human body materials.

III. Existing Law Is Inadequate

Existing tax law concerning transfers of human body materials fails to provide meaningful guidance to taxpayers, the I.R.S., or the courts. Comprised of an amalgamation of often-contradictory I.R.S. rulings and court cases, all from at least two decades ago, tax jurisprudence in this area provides little aid. While the authorities consistently suggest that proceeds from the sale of human body materials are taxable income, there is no clear guidance about whether such proceeds are taxable as ordinary income or capital gains, and the potential payroll, gift, and estate tax consequences of

48. See David M. Halbfinger, *44 Charged by U.S. in New Jersey Corruption Sweep*, N.Y. TIMES, July 24, 2009, A1, available at <http://www.nytimes.com/2009/07/24/nyregion/24jersey.html?pagewanted=2&r=2&hp> ("Another man in Brooklyn, Levy-Izhak Rosenbaum, was accused of enticing vulnerable people to give up a kidney for \$10,000 and then selling the organ for \$160,000 Mr. Rosenbaum said that he had been in the business of buying organs for years, according to the complaint."); see also Porter & Johnson, *supra* note 45 (describing the organ donation selling scheme which led to Rosenbaum's arrest). Janeen Interlandi reports that the market price of a kidney in the United States is \$30,000 and part of a liver sells for \$10,000. See Janeen Interlandi, *Body Parts a la Carte: What Living Organ Donors Can Spare*, HUMAN CONDITION (July 24, 2009, 2:20 PM), <http://blog.newsweek.com/blogs/thehumancondition/archive/2009/07/24/parts-a-la-cart-what-living-organ-donors-can-spare.aspx> (last visited Sept. 21, 2010) (listing international and domestic prices for organs) (on file with the Washington and Lee Law Review). Such deals may occur because NOTA permits gratuitous transfers; the individuals who buy and sell organs may claim a family relationship where none exists to appear legitimate. See, e.g., Interlandi, *supra* note 24, at 41 (reporting Rosen sold his kidney under guise of being the recipient's cousin).

transfers have not been addressed in any serious way. As a result, the tax treatment of similar items and activities proves contradictory—a result which the Service has, surprisingly, encouraged and Congress has ignored. The resolution of these questions depends on the characterization of the transaction as a transfer of property or as the performance of a service.

The taxation of human body materials is not covered in explicit terms by the Internal Revenue Code (the "Code"). Instead, taxpayers must interpret the Code's general provisions that define terms such as "income," "ordinary income," and "capital gains." Even agents at the I.R.S.'s helpline struggle with the proper reporting of proceeds from a sale of human eggs. In response to several calls in association with the preparation of this Article, agents provided clearly incorrect⁴⁹ or unhelpful advice.⁵⁰ Because these transactions are often of limited value or are one-time events for any given taxpayer, it is seldom efficient for a taxpayer to seek professional tax advice on the matter. And, even if he or she did, there would not be any reason to have a high degree of confidence in the advice provided given the underlying lack of formal guidance.⁵¹ Further complicating matters is the

49. One agent first transferred my call on this point to the department that handles proceeds from livestock. Once I clarified that it was proceeds from the sale of *human* eggs, she suggested that a charitable donation deduction for the amounts received might be most appropriate. After I reiterated that it was the reporting of payments received by a taxpayer for human eggs in which I was interested, she informed me that the classification by the clinic of the payment as gains from the sale of property, independent contractor income, or miscellaneous income determined the taxes that needed to be paid by a taxpayer. Telephone Interview with I.R.S. Representative, I.R.S. Helpline (Mar. 11, 2009). However, this is not a correct statement of tax law; it is the actual transaction that determines the tax treatment, not the tax classification assigned by an employer or a taxpayer. See, e.g., *Gregory v. Helvering*, 293 U.S. 465, 469–70 (1935) (stating that the proper characterization of a transfer for federal income tax purposes depends upon the substance of the transaction); *Joseph Radtke, S.C. v. United States*, 895 F.2d 1196, 1197–98 (7th Cir. 1990) (noting that an employer may not evade FICA and FUTA by characterizing all of the employee's remuneration as something other than wages); cf. *Duberstein v. Comm'r*, 363 U.S. 278, 285 (1960) (determining whether a transfer from an employer to an employee is a gift or income, the transferor's intention is the most critical consideration; however, the transferor's own characterization of the payment is not determinative).

50. My research assistant was advised by one agent that such advice is "beyond the scope" of permissible assistance and that we should consult a tax professional. Telephone Interview with I.R.S. Representative, I.R.S. Helpline (May 20, 2009). Another agent offered to research the matter and respond within fifteen days, but never, in fact, responded despite repeated inquiry. After four such conversations spread over two months, we are still awaiting an answer. Telephone Interview with I.R.S. Representative, I.R.S. Helpline (May 20, 2009); Telephone Interview with I.R.S. Representative, I.R.S. Helpline (June 15, 2009); Telephone Interview with I.R.S. Representative, I.R.S. Helpline (June 24, 2009); Telephone Interview with I.R.S. Representative, I.R.S. Helpline (July 8, 2009).

51. As of December 9, 2008, a search of RIA Checkpoint, an online tax database that

limited likelihood of judicial clarification. In most cases, the tax benefits that might be obtained by a taxpayer in a judicial forum are not sufficient to justify litigation costs. Thus, this doctrinal uncertainty is unlikely to be corrected absent formal action by Congress or the Service.

A. The Existing Statutory Framework Does Not Directly Address the Issue

There are four separate federal tax regimes implicated by the transfer of human body materials. Where the transfer involves payment—as when sperm or eggs are sold to a clinic or plasma to a blood bank—both income taxes and payroll taxes are potentially due. Where the transfer is both *inter vivos* and gratuitous—as with eggs given to an infertile sister or a kidney to a dying friend—gift tax liability may arise. And harvesting body materials on death, or even burying a decedent's body intact, has potential estate tax implications.

1. Income Tax Provisions

The threshold question for any income tax assessment is whether there is "income" to be taxed in the first instance. The Code provides that, "[e]xcept as otherwise provided . . . gross income means all income from whatever source derived."⁵² Among other items, amounts received as compensation for personal services, business profits, and gains from dealings in property⁵³ are specifically included as income.⁵⁴ However, the

provides comprehensive coverage of U.S. tax matters and includes all I.R.S. rulings and releases, proposed and enacted federal tax legislation (including Committee reports) and court cases on tax matters, provides no relevant hits with respect to the taxation of proceeds from human egg donations or sales.

52. I.R.C. § 61(a) (2006).

53. "Property" is undefined in the Code. *See id.* § 7701 (providing a list of defined terms, in which the term "property" does not appear). Instead, tax law looks to the rights provided under state law to see whether they are sufficient to constitute property for federal tax purposes. *See, e.g.,* *United States v. Irvine*, 511 U.S. 224, 238 (1994) (restating "the general and longstanding rule in federal tax cases that although state law creates legal interests and rights in property, federal law determines whether and to what extent those interests will be taxed"); *see also* *Morgan v. Comm'r*, 309 U.S. 78, 80 (1940) ("State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed.").

54. *See* I.R.C. § 61(a) (defining gross income). Items specifically excluded include gifts and most damages received for personal physical injury or sickness. *See id.* § 102(a) ("Gross income does not include the value of property acquired by gift, bequest, devise, or

term "income" is to be interpreted broadly⁵⁵ and includes all "undeniable ascensions to wealth, clearly realized, and over which the taxpayers have complete dominion."⁵⁶ This includes income received from illegal activities⁵⁷ and amounts received by nonresident aliens for performing services or from the sale of inventory while in the United States.⁵⁸

The source of a taxpayer's income determines the rate at which it is taxed, the deductions available, and whether payroll taxes are due. Income from the performance of services or from the operation of a business is taxed at rates between 10% and 35% ("ordinary income tax rates").⁵⁹ To determine the appropriate tax treatment for gains from the disposition of property, the property must be classified either as a capital asset or as ordinary income property, and the taxpayer's holding period—generally the amount of time the taxpayer owns the property prior to sale—must be determined.

All property is a capital asset unless fitting one of eight specific exceptions.⁶⁰ Where a capital asset is held by the taxpayer for more than

inheritance."); *see also id.* § 104(a)(2) (providing that gross income does not include "the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness").

55. *See* *Comm'r v. Jacobson*, 336 U.S. 28, 48–49 (1949) (determining that in the Federal Income Tax Acts, "[t]he income taxed is described in sweeping terms and should be broadly construed in accordance with an obvious purpose to tax income comprehensively"); *see also* *Comm'r v. Smith*, 324 U.S. 177, 181 (1945) ("Section 22(a) of the Revenue Act is broad enough to include in taxable income any economic or financial benefit conferred on the employee as compensation, whatever the form or mode by which it is effected.").

56. *Comm'r v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955).

57. *See* *Treas. Reg. § 1.61-14(a)* (as amended in 1993) ("Illegal gains constitute gross income.").

58. *See* I.R.C. §§ 861–62, 865 (2006) (providing for the taxation of sales and services performed by nonresidents in the United States). Other gains from personal property are not subject to U.S. tax. *Id.*

59. *See* *Rev. Proc. 2008-66*, 2008-45 I.R.B. 1107 (listing the tax rate tables for years beginning in 2009). An employee-taxpayer who itemizes deductions and is not subject to the alternative minimum tax may deduct business expenses, which, together with his or her other "miscellaneous expenses," are greater than 2% of his or her adjusted gross income. I.R.C. §§ 56(b)(1)(A)(i), 67(a). A self-employed taxpayer may deduct the ordinary and necessary business expenses of the business without meeting the 2% floor. *Id.* § 162.

60. *See* I.R.C. § 1221 (listing the exceptions to classification of property as a capital asset). These exceptions are: (1) stock in trade or inventory, or property held primarily for sale to customers in the ordinary course of the taxpayer's trade or business; (2) property used in a taxpayer's trade or business which may be depreciated, or real property used in a trade or business; (3) certain copyrights, compositions, letters, memoranda, or similar property; (4) certain accounts or notes receivable; (5) certain U.S. government publications; (6) certain commodities derivative financial instruments; (7) certain hedging transactions; or

one year prior to sale, the gain is taxed at preferential capital gains tax rates; otherwise, it is taxed at ordinary income tax rates.⁶¹ Proceeds from the sale of property are reduced by the taxpayer's capital investment (or "basis") in the property before the tax due is calculated.⁶² Most assets have a basis equal to their purchase price.⁶³ A taxpayer must prove his or her basis in an asset; absent substantiation, the full proceeds from sale of the asset are taxable.⁶⁴

A taxpayer who itemizes deductions may deduct the value of charitable contributions he or she makes prior to calculating his or her tax due.⁶⁵ However, the charitable contribution deduction is limited to contributions of property, so that no deduction is allowed for the

(8) supplies regularly used or consumed by the taxpayer in the ordinary course of his or her trade or business. *Id.*

61. Gains from capital assets held for more than one year ("long-term" capital assets) are taxed at rates between 0% and 15% ("capital gain tax rates"). Those held for a year or less ("short-term" capital assets) are taxed at ordinary income tax rates. *See id.* § 1222 (defining "long-term" and "short-term" capital assets); *see also* Jobs & Growth Tax Relief & Reconciliation Act of 2003, Pub. L. No. 108-27, § 301, 117 Stat. 752, 758 (reducing the capital gains tax rates for individuals).

62. *See* I.R.S. PUB. 551: BASIS OF ASSETS 1 (2002), available at <http://www.irs.gov/pub/irs-pdf/p551.pdf> (explaining "basis" as the amount of an individual's investment in property for tax purposes).

63. *See* I.R.C. § 1012 ("The basis of property shall be the cost of such property, except as otherwise provided in this subchapter and subchapters C (relating to corporate distributions and adjustments), K (relating to partners and partnerships), and P (relating to capital gains and losses)."). Amounts spent on improving capital assets increase this basis rather than being immediately deductible and certain deductions taken prior to sale decrease it. *See id.* § 1011(a) (explaining adjusted basis for determining gain or loss); *id.* § 1016(a) (stating that adjustments to basis will be made "for expenditures, receipts, losses, or other items, properly chargeable to capital account"). In general, expenditures that add to the value or useful life of an asset are either deducted over time, in the form of depreciation, amortization, or depletion allowances, or increase the asset's basis. *See id.* § 263 (listing the capital expenditures for which deductions are not permitted); Treas. Reg. § 1.263(a)-2(f) ("Amounts assessed and paid under an agreement between bondholders or shareholders of a corporation to be used in a reorganization of the corporation or voluntary contributions by shareholders to the capital of the corporation for any corporate purpose. Such amounts are capital investments and are not deductible."). Where the useful life of the asset is indefinite, a basis adjustment is made and reduces the gain when the asset is finally disposed of. *See, e.g.,* *INDOPCO, Inc. v. Comm'r*, 503 U.S. 79, 83-84 (1992) ("[A] capital expenditure usually is amortized and depreciated over the life of the relevant asset, or, where no specific asset or useful life can be ascertained, is deducted upon dissolution of the enterprise.").

64. *See* *Cates v. Comm'r*, 716 F.2d 1387, 1389 (11th Cir. 1983) (stating that taxpayers have the burden of proof with respect to basis); *see also* *Better Beverages, Inc. v. United States*, 619 F.2d 424, 428 & n.4 (5th Cir. 1980) (same).

65. *See* I.R.C. § 170 (2006) (permitting tax deductions for charitable contributions and gifts by individuals and corporations).

contribution of services.⁶⁶ If the property is a long-term capital asset, the taxpayer may deduct its fair market value; otherwise, the deduction is limited to the lesser of fair market value and the item's basis.⁶⁷

2. Payroll Tax Provisions

In addition to being subject to income tax, gross income from the performance of services or from operating a business is subject to payroll taxes of 15.3%.⁶⁸ Where the taxpayer is an employee, one-half of this tax will be withheld from each paycheck and his or her employer will pay the other half.⁶⁹ Where the taxpayer is self-employed, he or she is instead responsible for paying the full amount ("self-employment tax").⁷⁰ Thus, the actual federal tax rate range for services income is significantly higher than that for other forms of income once these taxes are taken into account.

66. See Treas. Reg. § 1.170A-1(g) (as amended in 2008) ("No deduction is allowable under section 170 for a contribution of services.").

67. I.R.C. § 170(e)(1) (allowing deductions from income for donations of ordinary income and capital gain property to qualified charitable organizations); see also I.R.S., PUB. 526: CHARITABLE CONTRIBUTIONS 11 (2008), available at <http://www.irs.gov/pub/irs-pdf/p526.pdf> (explaining the amount of deduction allowed for contributions of ordinary income property and capital gain property). This difference can be substantial. For example, consider three donations to a charitable organization. In the first, an attorney donates five hours of her own legal work to the charity. She is not eligible to take a charitable deduction since the contribution is of a service. If instead she donates securities she bought several years ago for \$10 which are now worth \$100, she can deduct the full \$100 from her taxable income. However, if she chooses instead to donate vegetables she grew in her garden with an initial investment of \$10 that she would otherwise have sold at the local farmer's market for \$100, she may only deduct her initial \$10 investment. Thus, classification of a donation as one of long-term capital gain property results in highly favorable tax treatment for a taxpayer.

68. These are comprised of 12.4% in social security taxes and 2.9% in Medicare taxes. I.R.C. § 3101. For 2009, the social security portion of the tax is only due on the first \$106,800 of income. SOCIAL SECURITY ADMIN., *Social Security and Supplemental Security Income Program Rates and Limits, 2009*, SOCIALSECURITY.GOV (Oct. 2008), http://www.ssa.gov/policy/docs/quickfacts/prog_highlights/RatesLimits2009.html (last visited Sept. 22, 2010) (on file with the Washington and Lee Law Review). Medicare taxes are due on all compensation. *Id.* In each case, 50% of the self-employment taxes are allowed as a deduction for income tax purposes. SOCIAL SECURITY ADMIN., *Electronic Fact Sheet*, SOCIALSECURITY.GOV (Jan. 2010), <http://www.ssa.gov/pubs/10022.html> (last visited Sept. 22, 2010) (on file with the Washington and Lee Law Review).

69. See I.R.C. § 3102 (requiring that payroll taxes be collected by employers).

70. See *id.* § 1401 (setting the rate of tax on self-employment income). These amounts must be paid on self-employment income in excess of \$600 in a single calendar year. *Id.*

3. Gift Tax Provisions

Gift tax is imposed on gratuitous transfers of property made by a taxpayer during his or her lifetime, unless the transfer is explicitly excluded from taxation.⁷¹ The most common exclusions are "annual exclusion" gifts⁷² and the payment of certain educational and medical expenses.⁷³ In addition, there are deductions available for, *inter alia*, gifts to qualified charitable organizations⁷⁴ and transfers between spouses.⁷⁵ Currently, the first \$1 million in lifetime gifts is exempt from tax.⁷⁶ Gifts in excess of that amount are taxed on a progressive rate schedule that starts at 41% and quickly reaches a maximum rate of 45% (on lifetime gifts in excess of \$2 million).⁷⁷ The gift tax only applies to gratuitous and below-market transfers of property; services may be provided without incurring this tax.⁷⁸ Most taxpayers escape gift taxation due to annual and lifetime exclusions, but in cases where a taxpayer has made substantial gifts, as with the

71. See *id.* § 2501(a)(1) ("A tax . . . is hereby imposed for each calendar year on the transfer of property by gift during such calendar year by any individual, resident or nonresident.").

72. In 2010, gifts by a taxpayer equal to or less than \$13,000 per recipient are excluded from taxation. See *id.* § 2503(b) (excluding certain gifts from the gift tax); Rev. Proc. 2009-21, 2009-16 I.R.B. 860 (providing an inflation adjustment to the value of gifts that may be excluded from taxation under I.R.C. § 2503(b) in 2010).

73. See I.R.C. § 2503(e) (2006) (excluding certain transfers for educational or medical expenses from gift taxation).

74. See *id.* § 2522 (allowing deductions for gifts to governmental entities, certain domestic corporations and unincorporated entities, certain domestic fraternal orders and lodges, and domestic veterans organizations). There is no percentage limitation on the amount of the charitable deduction for gift tax purposes. *Id.*

75. See *id.* § 2523(a) ("Where a donor transfers during the calendar year by gift an interest in property to a donee who at the time of the gift is the donor's spouse, there shall be allowed as a deduction in computing taxable gifts for the calendar year an amount with respect to such interest equal to its value.").

76. See *id.* § 2505(a) (allowing a credit against the gift tax for total lifetime gifts not in excess of \$1 million).

77. See *id.* § 2502 (establishing the tax rate schedule for taxable gifts).

78. See *id.* § 2501(a)(1) (specifying that the gift tax applies only to the transfer of property by gift); see also Jack F. Thorne, *Changes in Tax Rates Call for Review of Effectiveness of Estate Planning Techniques*, ESTATE PLANNING, July–Aug. 1988, at 220 ("The gift tax is imposed only on transfers of property; gratuitous transfers of services are not subject to tax.").

purchase of a house for a child, the tax impact on future gifts can be sizeable.⁷⁹

4. Estate Tax Provisions

The estate tax is a tax on property transferred by the decedent at the time of his or her death.⁸⁰ As with the gift tax, only transfers of *property* are subject to the tax,⁸¹ and there are deductions available for, *inter alia*, property transferred to a qualified charitable organization⁸² or to a surviving spouse.⁸³ Under 2009 law, estates with a net value of \$3.5 million or less were exempt from estate tax, with the value of property in excess of that amount taxed at a 45% rate.⁸⁴ Because the estate tax due is based on the value of the property the decedent transfers at the time of his or her death, even property that is disposed of thereafter is included in the calculation. Thus, the clothes or jewelry in which a decedent is buried is included in the value of his or her estate, even though no beneficiary will receive them, unless their value is eligible to be deducted as a funeral expense.⁸⁵

79. See I.R.C. § 2505(a) (2006) (exempting a lifetime total of \$1 million in gifts, then imposing a tax of 41%–45% on gifts above that).

80. See *id.* § 2001(a) ("A tax is hereby imposed on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States."); *id.* § 2031(a) ("The value of the gross estate of the decedent shall be determined by including to the extent provided for in this part, the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated."). In addition, certain lifetime transfers are included, but they are not relevant here.

81. See *id.* §§ 2001, 2031 (imposing an estate tax "on the transfer of the taxable estate," which includes "the value at the time of [] death of all *property*, real or personal, tangible or intangible, wherever situated" (emphasis added)).

82. See *id.* § 2055 (allowing deductions for certain charitable contributions from the value of the taxable estate).

83. See *id.* § 2056 (allowing a deduction from the taxable estate for certain interests in property which pass from the decedent to or for the benefit of his or her surviving spouse).

84. See *id.* § 2010 (providing the applicable credit amount for estate tax purposes). This amount must be reduced by the value of taxable gifts made by the decedent to which gift tax credit amounts were applied. *Id.* § 2012. So, for example, if a decedent made \$750,000 in taxable gifts during his or her lifetime, \$2.75 million of his estate would not be taxed upon his or her death in 2009. In 2010 there is no estate tax. In 2011 and thereafter, current law allows only a \$1,000,000 estate tax exclusion, with rates rising quickly from 41% to 50%. *Id.* § 2010. However, many commentators expect this law to be amended to provide an exclusion and rates at or near the 2009 levels.

85. See *id.* § 2053(a)(1) (allowing a deduction from a decedent's gross estate for

5. Conclusions

For at least five important reasons, the distinction between property and nonproperty is critical to determining the appropriate tax treatment under these regimes. First, most income is subject to taxation at ordinary income tax rates, with only gains from property potentially eligible for the highly favorable capital gains tax rates. Second, only compensation for services and proceeds from operating a business are subject to payroll taxes; proceeds from sales of property designated as capital assets are not. Third, charitable contributions of property potentially provide an income tax deduction, whereas contributions of services are nondeductible. Fourth, only transfers of property are subject to the gift estate tax. Finally, only the value of property is included in a decedent's estate for estate tax purposes.

This distinction is thus critical for determining the appropriate tax treatment of transfers of human body materials. If human eggs are properly classified as property, the proceeds from their sale are potentially eligible for capital gains tax rates, their transfer to an infertile family member free of charge is potentially subject to gift tax and their value is potentially includible in a decedent's estate. If not, any such proceeds are subject to tax at ordinary income tax rates and to payroll taxes. Despite the relevance of this distinction to existing tax regimes, the Code does not address the issue of the appropriate characterization of human body materials, and the Service and the courts have done little to fill the legal gap.

B. Existing Guidance Is Contradictory, Narrowly Drawn, and Outdated

Existing guidance about the appropriate tax treatment of transfers of human body materials raises more issues than it resolves. I.R.S. rulings are contradictory: The only binding statement of the Service's position is a 1953 revenue ruling that it later repudiated in nonbinding publications. Moreover, judicial decisions are narrowly drawn to answer only the immediate question at hand, thus providing little guidance. In short, U.S. taxpayers have no meaningful official guidance to aid them in complying with their filing requirements with respect to these transfers.

Service guidance is contradictory and outdated. The only binding ruling issued by the Service with respect to the proper tax treatment of transfers of human body materials is a pronouncement in Revenue Ruling

162,⁸⁶ which was issued in 1953. There, in response to a taxpayer request for advice on whether a deduction would be allowed for federal income tax purposes for the fair market value of a blood donation to a charitable organization, the Service asserted that providing blood for a transfusion was a personal service, not a donation of property.⁸⁷ Therefore, no deduction was available.⁸⁸

In 1975, when a similar question arose with respect to the donation of mother's milk to a charitable organization, the Service reversed its position.⁸⁹ It declared that a "donation of mother's milk is clearly a donation of property."⁹⁰ In fact, even blood was "a commodity with a commercial market and value apart from its donor"⁹¹ so that deciding the instant matter on the basis of Revenue Ruling 162 would be "contrary to an ordinary understanding of the facts presented."⁹²

The Service declared the milk to be a capital asset as none of the exceptions to capital asset treatment applied to it.⁹³ Next, the Service addressed the taxpayer's holding period for the milk. After raising the question of whether the period appropriately began at the time of the milk's creation or upon extraction, the Service concluded that the distinction did not matter. In either case, the total time period was less than needed to make the milk a long-term capital asset.⁹⁴ Similarly, it opined that the distinction would not matter with respect to blood since:

[T]he greater part of whole blood (by volume) has a life of less than six months in the body. Therefore, if sold upon withdrawal, the sale arguably would not give rise to long-term capital gain whether the

86. See Rev. Rul. 162, *supra* note 14, at 127 (finding that furnishing blood for a transfusion, or to a blood bank, is the provision of a personal service by the donor rather than a contribution of property).

87. *Id.*

88. *Id.* at 128 (deciding that "the fair market value of blood donated by an individual to a charitable institution is not deductible as a charitable contribution").

89. See I.R.S. Gen. Couns. Mem. 36418, 1975 GCM LEXIS 112, at *1 (Sept. 15, 1975) (declaring that the fair market value of mother's milk donated to a charitable organization is deductible as a charitable contribution under Int. Rev. Code of 1954, § 170).

90. *Id.* at *3.

91. *Id.* at *6.

92. *Id.*

93. See *id.* at *7 n.2 ("Since the milk in question does not seem to fall within any exception under Code § 1221, it is a capital asset.").

94. See *id.* ("It is arguable that the holding period should start at the time of withdrawal because at that time the milk is property separate and apart from the person producing it.").

holding period includes the lifetime of the blood in the body or begins at the time of withdrawal when it is property separate and apart from the person.⁹⁵

The Service's reversal of position with respect to the proper characterization of human body materials, however, failed to resolve the issue because it was contained in a general counsel memorandum. These memoranda are not binding on the Service and may not be relied upon by taxpayers in their tax filings. Moreover, the Service's Chief Counsel recommended *against* the issuance of a binding ruling for two reasons.⁹⁶ First, because the milk could not be long-term capital gain property and the taxpayer had not established that she had any basis in the milk, the tax result would be the same whether the milk provided was classified as a service or as property so there was no need to issue a ruling to answer the immediate question.⁹⁷ Second, the Service acknowledged that it was not prepared to resolve the resulting issues with respect to the appropriate gift and estate tax treatment if human body materials were characterized as property. Specifically, the Service worried that:

If any part of the body is property then a gift tax should be levied on the gift of a kidney for transplant if it is not given through a charitable organization. Likewise, a taxpayer's estate includes the value of all property in which he had an interest at death. The value of a decedent's body should therefore be includible in his estate. In today's world where transplants take place daily, these issues are not illusory.⁹⁸

To avoid the difficulties suggested by this analysis, the Service declined to publish a revenue ruling recognizing that human body materials could be property.⁹⁹ As a result, no official statement of the Service's change in position with respect to the proper characterization of charitable donations of human body materials exists.

In litigation with taxpayers, the Service has oscillated between the two approaches with no clear resolution. Further muddying the waters, the Service asserted in a 1987 private letter ruling that proceeds from the sale

95. *Id.* at nn.2-3.

96. *Id.* at *7.

97. *Id.* ("The taxpayer had a zero basis in her milk unless she showed that she incurred expenses directly attributable to its production. The gain would not have been long-term capital gain because the milk was not a capital asset held for more than six months . . ."); *see also supra* notes 59-64 and accompanying text (discussing the taxation of capital gains).

98. I.R.S. Gen. Couns. Mem. 36418, *supra* note 89, at *8.

99. *Id.* at *8-9. At this time, transfers of human body materials are not reported for gift tax purposes or included in the value of a decedent's estate for estate tax purposes.

of blood are taxable income, without addressing whether the blood was property or how to report the income.¹⁰⁰

Judicial decisions are narrow and incomplete. Courts have not cleared up the confusion created by the Service's incomplete and contradictory guidance on the tax treatment of transfers of human body materials. This is for two reasons. First, there are only a few judicial decisions concerning the subject. Second, each of these decisions produced only a narrowly crafted opinion, resolving only the specific issue before the court. The courts agree with the Service that proceeds from the sale of human body materials are taxable income, but they establish no clear rules for how that income should be reported and taxed. And none of the cases addresses gift and estate tax issues at all.

The question of whether proceeds from the sale of blood are taxable income was first raised, and ultimately avoided, in a published court opinion in 1979.¹⁰¹ There, the taxpayer, Dorothy Garber, sold her blood to three companies on a regular basis, receiving in return a weekly salary, use of a car, an end-of-year bonus, and a sliding scale amount based on the strength of the plasma obtained from her blood.¹⁰² Taxes were withheld from the salary payments, but all other amounts were paid by check without withholding.¹⁰³ Garber failed to pay income taxes on these amounts and was convicted of tax evasion.¹⁰⁴

On appeal, the taxpayer argued that no income tax could be due because she had no income. Instead, she asserted that she had simply exchanged her plasma for money of equal value, so there was no gain on the transaction to be taxed.¹⁰⁵ Garber also asserted that the proceeds should not be taxable because they represented "the exchange of something so personal that its value is not susceptible to measurement."¹⁰⁶

100. See Priv. Ltr. Rul. 8814010 (Dec. 30, 1987) (asserting that "amounts received for the sale of blood are includible in the gross income of the blood 'donor'").

101. See *United States v. Garber*, 607 F.2d 92, 97 (5th Cir. 1979) (addressing whether the sale of blood would result in taxable income).

102. See *id.* at 94 (indicating that in exchange for her "blood plasma," Garber was paid "on a sliding scale dependent on the titre or strength of the plasma obtained").

103. *Id.*

104. *Id.*

105. See *id.* at 95 ("The defense proffered [testimony] to the court . . . that the money received by Garber was not within the legal definition of income in [I.R.C. §] 61(a) and that she had therefore participated in tax-free exchanges.").

106. *Id.* The taxpayer cited *Doyle v. Mitchell Brothers*, 247 U.S. 179 (1918), in support of her argument. *Id.*

Instead of addressing either point, the *Garber* court focused on the novelty of the question presented. One government witness had admitted that the case was the first to address the question of the taxation of proceeds received in exchange for body products¹⁰⁷ and another "conceded that the taxability of money received for giving up a part of one's body is a unique and undecided question in tax law."¹⁰⁸ Under the circumstances, the court stated that it did not need to decide what the substantive tax rules should be in this "uncharted area in tax law."¹⁰⁹ Instead, this uncertainty meant that Garber could not be guilty of willfully and intentionally evading her tax liability as required by the controlling criminal statute.¹¹⁰ Thus, whether the taxpayer had realized income was undecided by the court.

In more recent years, the human capital theory embodied in the argument that exchanges of human body materials cannot produce income has since been rejected by the courts.¹¹¹ Instead, any proceeds received are included as income, and thus subject to tax, because they represent ascensions to wealth received by the taxpayer that are not excluded under the Code.¹¹² These later decisions, though, leave open key questions about the proper characterization of this income and applicable holding periods.

Of particular importance, in *Green v. Commissioner*¹¹³ the Tax Court addressed how to characterize income received from sales of plasma.¹¹⁴ Green, like Garber, sold her plasma on a regular basis. She reported the proceeds of these sales as income from a business and claimed offsetting deductions. The Service denied substantially all of the claimed deductions,

107. *Id.* at 95.

108. *Id.* at 95–96.

109. *Id.* at 99.

110. *Id.* at 100.

111. *See Lary v. United States*, 787 F.2d 1538, 1540–41 (11th Cir. 1986) (determining that taxpayers bear the burden of proving "basis in the blood" and that "the holding period for blood is more than six months[;] furthermore, the failure to do so renders taxpayers to be not entitled to a charitable deduction under [I.R.C. §] 170(e)(1)(A)"); *see also* *Murphy v. I.R.S.*, 493 F.3d 170, 176 (D.C. Cir. 2007), *cert. denied*, 553 U.S. 1004 (2008) (holding that taxpayer's compensatory damages award was not exempt under I.R.C. § 104(a)(2), and thus "income" under I.R.C. § 61(a)).

112. *See supra* notes 54–57 and accompanying text (discussing the meaning of "income").

113. *Green v. Comm'r*, 74 T.C. 1229, 1238 (1980) (holding that the loss of minerals from the blood and the eventual loss of the ability of the blood to regenerate from "donations" are not among those depletions of "natural deposits" for which deductions are provided within the scope of I.R.C. § 611).

114. *Id.*

asserting that the provision of plasma was a service,¹¹⁵ and thus the deductibility of the expenses was limited.¹¹⁶

In holding that the taxpayer was entitled to deduct her ordinary and necessary business expenses, the *Green* court found that the taxpayer's sales of plasma were sales of a noncapital asset.¹¹⁷ While recognizing the troubling equation of a human body to an animal's body, the court likened Green's blood to "hen's eggs, bee's honey, cow's milk, or sheep's wool" purchased and sold for processing and distribution.¹¹⁸

Under the court's analysis, the human body was envisioned as "manufacturing machinery"—a factory—producing a product for sale on the market.¹¹⁹ However, the court declined to extend this analysis to the tax treatment of the intact human body as opposed to its plasma.¹²⁰ In particular, the court rejected the taxpayer's claimed deduction for a depletion allowance for her body's "natural deposits" and regenerative ability.¹²¹ Thus, the court distinguished between the intact human body as exclusively a legal actor and its constituent materials that, once extracted, may become marketable commodities. Notably, the *Green* court did not discuss the payroll tax consequences of its decision. Instead, it merely observed in a footnote that any adjustment to Green's taxable income would require a corresponding adjustment to her self-employment taxes.¹²²

115. While unclear from the text of the *Green* opinion, the Service later clarified that its stance in the *Green* case had been that a sale of plasma is a performance of a service based on Revenue Ruling 162. See I.R.S. Gen. Couns. Mem. 38730, 1981 GCM LEXIS 192, at *1 (May 22, 1981) (suggesting "acquiescence in the Tax Court opinion and that the rationale of [Revenue Ruling] 162 be modified accordingly.").

116. *Green*, 74 T.C. at 1232. A few of the claimed amounts were denied for lack of proper substantiation. *Id.*

117. *Id.* at 1233–34. In reaching this conclusion, the court stated without analysis that the transactions that produced the income were not the sale of a capital asset. Thus, since Green performed no substantial service in providing her plasma, her sales were of ordinary income property. *Id.*

118. *Id.* at 1234.

119. *Id.* at 1236.

120. See *id.* at 1238 (determining that, while commuting expenses are usually nondeductible personal expenses, in this case taxpayer "was the container in which her [blood] was transported to market[.]" thus taxpayer's "trips to and from the lab were solely for business purposes, not for her personal comfort or convenience[.]" and were therefore deductible).

121. *Id.*

122. See *id.* at 1229 n.1 ("The contested adjustment to petitioner's taxable income necessarily resulted in adjustments to petitioners self-employment tax and claimed sales tax deduction for 1976, as well as the treatment of medical insurance premiums as a medical-expense deduction, rather than a business-expense deduction, by the respondent in the notice

In a nonbinding statement, the Service recommended acquiescence to the *Green* result.¹²³ It explained that it agreed "that the court properly characterized the petitioner's blood plasma as a product."¹²⁴ In keeping with this statement, the Service explicitly repudiated Revenue Ruling 162.¹²⁵ Moreover, the Service recommended that a ruling project be undertaken to modify Revenue Ruling 162 accordingly.¹²⁶ However, no replacement ruling has ever been issued, once again leaving taxpayers with no binding precedent as to the Service's announced change of mind.

A few years later, courts again considered whether blood is property. In *Lary v. United States*,¹²⁷ the taxpayer claimed a deduction for his contribution of blood to a qualified charitable organization.¹²⁸ The Service denied the deduction, claiming the donation of blood was the provision of a service. The trial court upheld the denial based on Revenue Ruling 162¹²⁹ despite the Service's earlier public, yet nonbinding, renunciations.¹³⁰

On appeal, the Eleventh Circuit declined to decide whether the taxpayer had transferred property or performed a service in donating his blood. In its view, because blood cells have a lifespan of approximately four months in the human body, they cannot be long-term capital gain assets since they could not be held by the taxpayer for more than one year

of deficiency.").

123. *Green v. Comm'r*, 74 T.C. 1229 (1980), *action on dec.*, 1981-128, 1981 AOD LEXIS 44, at *2 (Apr. 23, 1981). An action on decision is issued by the I.R.S. National Office with respect to a litigated point and sets forth whether the Service will follow an adverse decision or continue to contest the point. It is not intended as taxpayer guidance and may not be cited as precedent for a taxpayer's position.

124. *Id.*

125. *Id.*

126. See I.R.S. Gen. Couns. Mem. 38730, *supra* note 115, at *2 ("[W]e recommend that a ruling project be initiated to modify [Revenue Ruling] 162 to be consistent with the acquiescence in *Green*.").

127. See *Lary v. United States*, 787 F.2d 1538, 1540 (11th Cir. 1986) (determining that no tax deduction was allowable for blood donations).

128. *Id.* Interestingly, the donation in question was one pint of blood. The cases do not report the value claimed or the presumably larger principle at stake that made it worth appealing to the Eleventh Circuit.

129. See *Lary v. United States*, 608 F. Supp. 258, 263 (N.D. Ala. 1985) ("Furnishing blood for a transfusion or to a blood bank has been deemed analogous to the rendering of a personal service by the donor rather than a contribution of property, and . . . has long been held not to be deductible as a charitable contribution." (citations omitted)).

130. See I.R.S. Gen. Couns. Mem. 38730, *supra* note 115, at *2 (suggesting a modification be made to Revenue Ruling 162); *Green v. Comm'r*, 74 T.C. 1229 (1980), *action on dec.*, 1981-128, 1981 AOD LEXIS 44, at *2 (Apr. 23, 1981) (recommending acquiescence to *Green*).

prior to sale.¹³¹ Thus, even if they were property, any deduction would be limited to the lesser of the fair market value of the blood and the taxpayer's basis in it.¹³² Since the taxpayer had presented no evidence that he had any basis in the blood, and no deduction would be allowed if the donation was of a service, no amount was deductible regardless of the characterization of the human body materials.¹³³ There have been no further published court decisions on the point.

These materials reveal two simple facts. First, the guidance on the tax treatment of transfers of human body materials that has been provided by the Service and the courts is contradictory and incomplete. Second, this guidance does not take into account modern technology, the proliferation of transfers of human body materials, and the variations within current markets. As a result, taxpayers have little formal tax guidance to assist them in deciding whether to engage in transactions involving human body materials.

C. Advice Given by Clinics Is Erroneous

The difficulties faced by taxpayers are illustrated by the practical problems confronting patients of assisted reproduction clinics. In this setting, egg transferors are often told that they are being compensated for their time and effort, not for the product they are providing. This advice is given even though (1) a substantial portion (or all) of the payment is not made until the egg is successfully transferred; (2) the amount of the payment does not depend on the time spent on injections and appointments; and/or (3) the donor receives a higher pay-out if the material is secured than if it is not.¹³⁴ These assertions, which are often made to counter concerns

131. See *Lary*, 787 F.2d at 1540 (indicating that blood needed to be held for longer than six months to qualify for "long-term capital gain treatment"). The period is now more than one year. I.R.C. § 1222(3).

132. See *supra* note 67 and accompanying text (discussing tax deductions for long-term capital assets).

133. See *supra* note 66 and accompanying text (discussing the deductibility of donated services).

134. See, e.g., Oregon Health and Science University, *Become and [sic] Egg Donor*, OHSU.EDU, <http://www.ohsu.edu/xd/health/services/women/services/fertility/fertility-services/third-party-programs/become-and-egg-donor.cfm> (last visited Sept. 21, 2010) ("Egg donors are compensated \$5,000 on the day of the egg collection. This is the financial way we can acknowledge your time, effort, and generosity.") (on file with the Washington and Lee Law Review); see also *Egg Donation Compensation*, EGG DONATION AND SURROGACY CENTER, <http://www.findadonor.com/dDonorCompensation.htm> (last visited Sept. 21, 2010) ("Donors

about baby selling,¹³⁵ suggest that egg sales generate ordinary, rather than capital gain, income. Self-interested statements by the clinics buying the eggs, however, do not change the underlying nature of the transaction for tax purposes.

Anecdotally, the Service has raised the possibility of self-employment taxes being due on sales of eggs and sperm,¹³⁶ and some clinics advise donors that they are independent contractors to insulate themselves from liability for the employer half of these taxes.¹³⁷ However, this information is not necessarily accurate; to the extent the sale represents simply the sale of a capital asset, no payroll taxes are due. Thus, a taxpayer attempting to comply with her tax obligations who relies on the advice provided by clinics might well end up significantly overpaying.

D. Treatment by Commentators Is Narrow and/or Outdated

Commentators have not filled the gap left by Congress, the Service and the courts. Little has been written about the appropriate tax treatment of transfers of human body materials; in fact, the most often cited authority is a 1973 student Note which predates all of the available

receive \$1,000 when they begin medication [and] [t]he remaining compensation is given to donors within 3 days of the completion of the egg donation retrieval.") (on file with the Washington and Lee Law Review); *see also* BIOGENETICS CORP., *supra* note 37 ("Although these monies are taxable, donors will not receive a 1099 from Biogenetics Corporation because we are reimbursing you for your time expended at the cryobank, traveling expenses, and your efforts in complying with the program requirements.").

135. *See* Jay A. Soled, *The Sale of Donors' Eggs: A Case Study of Why Congress Must Modify the Capital Asset Definition*, 32 U.C. DAVIS L. REV. 919, 921 n.5 (1999) ("Physicians at infertility clinics are fearful that the public might associate the sale of eggs with the sale of babies.").

136. *See, e.g.*, Posting of Sgklein, TAXALMANAC, http://www.taxalmanac.org/index.php/Discussion:Taxability_of_%22Donating%22_an_Egg_Cell_%28Ovum%29 (last visited Sept. 20, 2010) (reporting that the I.R.S. assessed a deficiency for failure to pay self-employment taxes on a payment for egg donation on a taxpayer who reported it as miscellaneous income) (on file with the Washington and Lee Law Review).

137. *See, e.g.*, *California Cryobank Sperm Donor Compensation*, CAL. CRYOBANK, <http://www.spermbank.com/newdonors/index.cfm?ID=4> (last visited Sept. 20, 2010) ("[S]perm donor[s] . . . will be classified as [independent contractors] under the [IRC]. Although no taxes are deducted from reimbursement checks, we are required to report the reimbursement paid In 1995, the IRS instructed California Cryobank to issue 1099's to all sperm donors earning \$600 or more in any . . . year.") (on file with the Washington and Lee Law Review).

guidance, except Revenue Ruling 162.¹³⁸ There, the author concluded that most human body materials should be treated as capital assets and that gains from their sale should be considered long-term.¹³⁹ In a more recent article, Jay Soled argued that eggs are capital assets that produce long-term gain on sale.¹⁴⁰ Both of these analysts, however, miss important points and leave many questions unanswered, including whether all human body materials are properly classified as capital assets and, for those that are, how the holding period should be calculated. Neither author discusses payroll taxes and neither develops a framework for considering these materials in the context of estate and gift taxes. Instead, the author of the 1973 Note proposes statutory exclusions for gratuitous transfers of human body materials, suggesting that in the absence of such provisions their transfer would be taxable.¹⁴¹ Most recently, Bridget Crawford discussed the appropriate tax treatment of income from surrogacy, but did not extend the analysis to other transactions that involve human body materials.¹⁴²

These works are the most comprehensive analyses of the issue; other scholars identifying the issue of the proper tax treatment of human body materials have simply opined that a legislative solution of some sort is needed.¹⁴³ They are correct. In the meantime, however, sound rules must be built from the statutes and guidance that currently exist so

138. Note, *supra* note 18, at 842 (discussing the tax consequences of "anatomical transfer[s]").

139. *Id.* at 856–57.

140. See Soled, *supra* note 135, at 923–29 (basing his conclusion on holdings in the charitable contribution, tax accounting, and installment sales contexts).

141. Note, *supra* note 18, at 865–66.

142. See generally Bridget J. Crawford, *Taxation, Pregnancy and Privacy*, 16 WM. & MARY J. WOMEN & L. 327 (2010).

143. See Frederick R. Parker, Jr., *Taxation and the Human Body: An Analysis of Transactions Involving Kidneys*, 94 J. TAX'N 367, 367 (2001) (noting that the "literal application of existing tax law and jurisprudence could lead to results that are counterintuitive and inconsistent with existing notions of both tax and health policy," but failing to identify a solution); see also Frederick R. Parker, Jr. et al., *Organ Procurement and Tax Policy*, 2 HOUS. J. HEALTH L. & POL'Y 173, 173–75 (2002) (observing that current tax law does not adequately accommodate transfers of human body materials and suggesting a full income, gift, and estate exclusion for gratuitous organ transfers); Frederick R. Parker, Jr. & William J. Winslade, *Tax Policy and the Blood Supply*, 42 EXEMPT ORG. TAX REV. 89, 90 (2003) ("Recognizing that many factors affect the appropriate alignment between tax policy and the blood supply, we do not propose here to set any specific boundaries."); Note, *The Sale of Human Body Parts*, 72 MICH. L. REV. 1182, 1256–64 (1973) (suggesting generally that a legislative solution to the problem of the appropriate characterization of human body materials as services or products is needed, but providing no specifics).

that taxpayers know their tax obligations before entering into transactions involving their body materials.

IV. The Problem Is Multifaceted and Complex

Resolving the appropriate tax treatment of transfers of human body materials is not easy. There are multiple and distinct tax systems involved. As a result, characterizations that seem appropriate for income tax purposes may not make sense when viewed from a gift or estate tax perspective. Larger philosophical debates about whether human bodies or their constituent materials are ever properly regarded as property contribute to legal uncertainty. Finally, the development of markets for human body materials has pressed the issue with respect to taxes in advance of well-developed—or any—governing frameworks.

A. The Debate Is Framed by Broader Dispute over How We View Human Bodies and Their Materials

The uncertainty in tax law about the proper characterization of human body materials is underpinned by a broader legal ambivalence toward human bodies as both legal actors and as legal property.¹⁴⁴ While federal tax law questions focus on the proper classification of income produced from transfers of body products and whether there is property for estate and gift tax purposes, most federal and state law in this area focuses on more fundamental matters—whether, when, and how human body materials are transferrable at all. The importance of these questions has increased dramatically as the demand for body materials for transplantation and research has grown.

Since the abolition of slavery in 1865, and the subsequent adoption of the Fourteenth Amendment, property rights have not existed in living human bodies.¹⁴⁵ Instead, the interests we have in our bodies are formulated as liberty interests, protected by substantive due process.¹⁴⁶

144. There are other contexts in which this issue is arising, for example, products liability. However, this Article is limited to the legal understanding and classifications of human body materials under federal tax law.

145. See *Newman v. Sathyavagiswaran*, 287 F.3d 786, 789 (9th Cir. 2002) (discussing Fourteenth Amendment substantive due process protection of an individual's exclusive right to possess and control his body, and to prevent unauthorized physical invasions).

146. See *Dunham*, *supra* note 43, at 51 ("Historically, the rights in a living body have

The more difficult question is what rights exist in excised body parts and corpses and how those rights are protected. Historically, these materials were not property and, thus, personal ownership of them was not legally protected.¹⁴⁷ Public health laws required that a decedent's family properly dispose of his or her body, but did not provide any personal remedy if this obligation was interfered with.¹⁴⁸

As the demand for cadavers for medical research and training grew in the late nineteenth century, however, corpses gained economic value and there was a corresponding increase in claims that bodies had been wrongfully taken or mutilated.¹⁴⁹ In response, some "courts began to recognize an exclusive right of the next of kin to possess and control the disposition of the bodies of their dead relatives, the violation of which was actionable at law."¹⁵⁰ Many courts that addressed the issue developed a "quasi-property" right, in which a decedent's next of kin was held to have an exclusive right to possess and control the decedent's body for the sole purpose of burial, and to prevent unauthorized disturbances thereafter.¹⁵¹

Under this approach, the right to custody of the decedent's body, to receive it free of mutilation, and to have it treated respectfully vest in the decedent's next of kin.¹⁵² Instead of being an affirmative right to

been viewed as a liberty interest, and not as property."); see also Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 365–400 (2000) (distinguishing when human bodies are protected by liberty interests and when as property).

147. See 1 WILLIAM BLACKSTONE, COMMENTARIES *429 (noting that an heir has no property in the "bodies or ashes [of decedents]; nor can he bring any suit or action against such as indecently, at least, if not impiously, violate and disturb their remains, when dead and buried").

148. See 22A AM. JUR. 2D *Dead Bodies* § 1 (2003) ("[T]he matter of the disposition of the dead is so involved in the public interest, including the public's health, safety, and welfare, that it is subject to control by law . . .").

149. See Dorothy Nelkin & Lori Andrews, *Do the Dead Have Interests? Policy Issues for Research After Life*, 24 AM. J. L. & MED. 261, 262–63 (1998) (tracing connection between increasing value of corpses for medical scholarship and bodysnatching from the Renaissance to the nineteenth century).

150. *Sathyavaglswaran*, 287 F.3d at 792.

151. See, e.g., *Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227, 238 (R.I. 1872) (holding that a corpse could "be considered as a sort of *quasi* property"); see also *Pollard v. Phelps*, 193 S.E. 102, 107 (Ga. Ct. App. 1937) ("[A] quasi property right belongs to the husband or wife, and, if neither, to the next of kin.").

152. See *Whitehair v. Highland Memory Gardens*, 327 S.E.2d 438, 441 (W. Va. 1985) ("[Q]uasi-property rights of . . . survivors include the right to custody of the body; to receive it in the condition in which it was left, without mutilation; to have the body treated with decent respect, without outrage or indignity thereto; and to bury or otherwise dispose of the

ownership and possession, quasi-property protection affords only a right to dispose of the body of a close relative in narrowly prescribed ways without interference from others.¹⁵³ Because this quasi-property right is neither pecuniary in nature nor transferable, it falls well short of conferring true property rights on the heirs.¹⁵⁴ Whatever rights there are emerge at the moment of death and are not predicated upon any interest the decedent might have had in his or her own body during life.¹⁵⁵ Moreover, any such right generally covers only an intact corpse, not individual organs removed from that corpse.¹⁵⁶ The disconnect between human bodies and property rights is even more clearly shown by the fact that this quasi-property approach has never been generally accepted¹⁵⁷

body without interference." (citing *Infield v. Cope*, 270 P.2d 716, 719 (N.M. 1954))).

153. See, e.g., *Dunham*, *supra* note 43, at 50 (stating that a quasi-property right is a "protected 'negative right' to be free from interference with possession of the decedent's body, rather than a 'positive right' of ownership to demand possession of the body").

154. See, e.g., *Ga. Lions Eye Bank v. Lavant*, 335 S.E.2d 127, 129 (Ga. 1985) (finding that quasi-property rights in corpses are not constitutionally protected property rights).

155. See, e.g., *Bauer v. N. Fulton Med. Ctr.*, 527 S.E.2d 240, 244 (Ga. Ct. App. 1999) ("The quasi-property right in a corpse is not pecuniary in nature, nor should it be [The law] will not impose a pecuniary value on the flesh itself. To do so would make the strangest thing on earth that much stranger."); see also *Dougherty v. Mercantile-Safe Deposit & Trust Co.*, 387 A.2d 244, 246 n.2 (Md. 1978) ("It is universally recognized that there is no property in a dead body in a commercial or material sense."); *Hasselbach v. Mount Sinai Hosp.*, 159 N.Y.S. 376, 379 (N.Y. App. Div. 1916) ("It is well settled . . . that there are no property rights, in the ordinary commercial sense, in a dead body . . ."); RESTATEMENT (SECOND) OF TORTS § 868 cmt. a (1979) (noting that the right to control a corpse does "not . . . 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 or cremation"); W.L. PROSSER, *THE LAW OF TORTS* 58–59 (4th ed. 1971) (referring to a quasi-property right as a "dubious 'property right' to a body . . . which did not exist while the decedent was living, cannot be conveyed, [and] can be used only for the one purpose of burial"). In some cases the right could be relinquished. See *McCoy v. Ga. Baptist Hosp.*, 306 S.E.2d 746 (Ga. Ct. App. 1983) (indicating that a release of their stillborn child to a hospital ended the parents' quasi-property right in their child's body).

156. See, e.g., *Fuller v. Marx*, 724 F.2d 717, 719 (8th Cir. 1984) ("We know of no Arkansas cases which extend this quasi-property right to all of the body's organs"); see also *Albrecht v. Treon*, 889 N.E.2d 120, 129 (Ohio 2008) ("[T]he next of kin of a decedent upon whom an autopsy has been performed do not have a protected right under Ohio law in the decedent's tissues, organs, blood, or other body parts that have been removed and retained by the coroner for forensic examination and testing."). But see *Hainey v. Parrott*, No. 1:02-CV-733, 2005 WL 2397704, at *6 (S.D. Ohio Sept. 28, 2005) (holding that there is a cognizable property interest in a decedent's body parts, in the context of a suit over the failure to return the brain of a decedent upon completion of an autopsy).

157. See, e.g., *Carney v. Knollwood Cemetery Ass'n*, 514 N.E.2d 430, 435 (Ohio Ct. App. 1986) (criticizing quasi-property as legal fiction). The *Carney* court's rejection of the quasi-property regime was recently affirmed in *Albrecht*, 889 N.E.2d at 124, 128–29, which

and has more recently fallen out of favor even where it was previously used.¹⁵⁸

Federal courts have at times been willing to extend constitutional protection to the rights of a next of kin in a decedent's corpse on a property-based theory.¹⁵⁹ In three cases concerning the harvesting of decedents' corneas without the consent of the next of kin, courts held that the interests at stake were legitimate claims of entitlement that deserved due process protection whether or not labeled "property" in the forum jurisdiction.¹⁶⁰ The courts focused on the substance of the rights afforded under state law instead of the label formally assigned to the claimant's interest. Commentators have endorsed this approach.¹⁶¹

declined to find a quasi-property right in autopsy specimens. *See also* Scarpaci v. Milwaukee County, 292 N.W.2d 816, 820 (Wis. 1980) (couching cause of action not in property, but in "the personal right of the family of the deceased" to have a proper burial, and basing damages on "mental suffering").

158. *See, e.g.,* Mansaw v. Midwest Organ Bank, No. 97-0271-CV-W-6, 1998 U.S. Dist. LEXIS 10307, at *11 (W.D. Mo. July 8, 1998) (noting that Missouri has "abandoned the 'early fiction that the cause of action [for interference with the right of sepulchre] rested on the infringement of a right of the nearest kin to the body'"). In reference to quasi-property rights, Dean Prosser famously noted that "[i]t seems reasonably obvious that such 'property' is something evolved out of thin air to meet the occasion, and that in reality the personal feelings of the survivors are being protected, under a fiction likely to deceive no one but a lawyer." W.L. PROSSER & W.P. KEETON, PROSSER AND KEETON ON TORTS 63 (5th ed. 1984).

159. *See* Newman v. Sathyavaglswaran, 287 F.3d 786, 788 (9th Cir. 2002) (finding a constitutionally protected property interest in a decedent's body where there was nonconsensual corneal removal); *see also* Whaley v. County of Tuscola, 58 F.3d 1111, 1117 (6th Cir. 1995) (determining that "the next of kin [have] a legitimate claim of entitlement and thus a property interest in a dead relative's body, including the eyes"); *see also* Brotherton v. Cleveland, 923 F.2d 477, 482 (6th Cir. 1991) (indicating that next of kin had rights under Ohio law to possess the decedent's body for burial purposes, as well as to make an anatomical gift of the relative's organs).

160. *See* Sathyavaglswaran, 287 F.3d at 793, 795-98 (despite label of quasi-property, plaintiffs held sufficient rights with respect to the decedent's body materials as to have property rights for due process protection analysis); *see also* Whaley, 58 F.3d at 1117 (reasoning that the rights granted under state law corresponded closely enough with the traditional bundle of rights that comprise property); Brotherton, 923 F.2d at 481-82 (finding the court did not need to decide whether the implicated interest was property, quasi-property or not property). Moreover, the California Court of Appeals held that a plaintiff's unrestricted right to use, control and dispose of his spleen under California law "are so akin to property interests that it would be subterfuge to call them anything else." Moore v. Regents of the Univ. of Cal., 249 Cal. Rptr. 494, 505 (Cal. Ct. App. 1988). However, on appeal the California Supreme Court reversed on this point. Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 497 (Cal. 1990).

161. *See, e.g.,* Donna M. Gitter, *Ownership of Human Tissue: A Proposal for Federal Recognition of Human Research Participants' Property Rights in Their Biological Material*, 61 WASH. & LEE L. REV. 257, 345 (2004) (proposing federal legislation regulating the sale of human tissue and establishing a tort of conversion to protect the rights of individuals in this

However, few courts have recognized property rights in human body materials since the rights granted under state law do not include the right to sell or otherwise transfer the body.¹⁶² Instead, the rights exist only to allow proper burial of a corpse and compliance with public health statutes. The ability of a decedent's next of kin to sell or generally transfer a decedent's body materials has been found to be a critical—and conspicuously absent—stick in the bundle of rights. Instead, property rights in human body materials seem to emerge only after the materials have been transferred to a commercial middleman.¹⁶³

The California Supreme Court highlighted the tension created by legal rules under which a third party can possess property rights in human body materials, but the person from whose body they have been removed cannot. In *Moore v. Regents of the University of California*,¹⁶⁴ the majority found that the plaintiff, whose excised spleen and blood had been used to form the

context); see also Charles M. Jordan, Jr. & Casey J. Price, *First Moore, Then Hecht: Isn't It Time We Recognize a Property Interest in Tissues, Cells, and Gametes?*, 37 REAL PROP. PROB. & TR. J. 151, 168–71 (2002) (proposing implementation of a right of commerciality with respect to excised body parts to resolve the issues presented in *Moore* and *Hecht*); see also Remigius N. Nwabueze, *Biotechnology and the New Property Regime in Human Bodies and Body Parts*, 24 LOY. L.A. INT'L & COMP. L. REV. 19, 21 (2002) (arguing for recognition of "a property interest in human corpses and tissue"). But see Lesley A. Sharp, *The Commodification of the Body and Its Parts*, 29 ANN. REV. ANTHROPOLOGY 287, 296 (2000) ("Among the most disturbing historical trends is the tendency within the medical marketplace to exploit the bodies of the poor and disenfranchised, where paupers frequently emerge as being of greater worth dead than alive.").

162. See, e.g., *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 497 (Cal. 1990) (finding that plaintiff could not bring an action for conversion against medical researchers for their use of his removed spleen, blood cells and other tissues in the development of a cell line since he did not have property rights in the materials); see, e.g., *Colavito v. N.Y. Organ Donor Network, Inc.*, 860 N.E.2d 713, 719, 722 (N.Y. 2006) (finding a limited right in a decedent's body to ensure proper burial is not a property right and does not provide a plaintiff who is the intended recipient of a kidney that is misdirected a cause of action for conversion of property); *State v. Powell*, 497 So. 2d 1188, 1191 (Fla. 1986) (noting that the right to possess a decedent's body is "'for the purpose of burial, sepulture or other lawful disposition'" (citing *Kirksey v. Jernigan*, 45 So. 2d 188, 189 (Fla. 1950))); *Albrecht v. Treon*, 889 N.E.2d 120, 129 (Ohio 2008) (holding that under Ohio law, next of kin were afforded only the right to inter or cremate a body after autopsy).

163. Upon transfer of a human body material from a clinic to a hospital, for example, it is well-established that the materials are property.

164. See *Moore*, 793 P.2d at 492 (determining that there was no conversion claim for use of the plaintiff's cells in medical research without permission because the applicable state statute eliminates many traditional rights associated with "property," leaving the court unconvinced "that what is left amounts to 'property' or 'ownership' for purposes of conversion law").

basis for a commercial cell line, had no property rights in the materials.¹⁶⁵ Justice Broussard, in a concurrence and dissent, noted that the defendant medical center had property rights in those materials since it would undoubtedly be able to maintain an action for conversion against a drug company that removed the cells at issue from the medical center without authorization.¹⁶⁶ Thus, the decision must "rest[] on the proposition that a *patient* retains no ownership interest in a body part once the body part has been removed from his or her body."¹⁶⁷ Human body materials here are potentially the property of a third party, but not of the person from whom the material was removed.¹⁶⁸

This distinction is also reflected in the Revised Uniform Anatomical Gift Act (RUAGA),¹⁶⁹ which has been adopted in thirty-nine jurisdictions.¹⁷⁰ Under RUAGA, donees of human body materials are granted rights superior to that of third parties in the material;¹⁷¹ for example, a third party may not revoke the donation.¹⁷² However, these

165. *Id.*

166. *Id.* at 501 (Broussard, J., concurring and dissenting).

167. *Id.*; see also *id.* at 498 (Arabian, J., concurring) ("[T]he majority view is not unmindful of the seeming injustice in a result that denies [Moore] a claim for conversion of his body tissue, yet permits defendants to retain the fruits thereof.").

168. See also *Hecht v. Cal. Superior Court*, 20 Cal. Rptr. 2d 275, 283–84 (Cal. App. Dep't Super. Ct. 1993) (holding that a decedent had sufficient decision making authority in his sperm to bequeath it to his girlfriend).

169. RUAGA § 14(h).

170. See National Conference of Commissioners on Uniform State Laws, Enactment Status Map, ANATOMICALGIFTACT.ORG, <http://www.anatomicalgiftact.org/DesktopDefault.aspx?tabindex=2&tabid=72> (last visited Sept. 20, 2010) (listing the thirty-nine U.S. jurisdictions that have adopted the RUAGA) (on file with the Washington and Lee Law Review). The states that have adopted the RUAGA are Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Jersey, New Mexico, North Dakota, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. The District of Columbia has also adopted it.

171. See RUAGA § 14(h) (describing the rights granted to donees of human body materials). RUAGA provides that

the rights of the person to which a part passes . . . are superior to the rights of all others with respect to the part. The person may accept or reject an anatomical gift in whole or in part. . . . If the gift is of a part . . . upon the death of the donor and before embalming, burial, or cremation, [the donee] shall cause the part to be removed without unnecessary mutilation.

Id.

172. See *id.* § 8(a) ("[I]n the absence of an express, contrary indication by the donor, a person other than the donor is barred from making, amending, or revoking an anatomical gift

rights are not property rights, and the donee is given no remedy should the transfer not occur.

Underlying much of the debate about human body materials is a resistance to a one size fits all solution. Instead, it is becoming increasingly obvious that in some instances we—both as individuals and through our legal system—conceptualize our body materials as property and sometimes as simply "not property." Academics have attempted to distinguish the two categories¹⁷³ and have recognized that they are not fixed. Instead, at critical moments, human body materials can move between these realms, as when blood formed in an individual's body (not property) is removed and donated to a clinic (potentially property), which then sells the blood to a medical center (clearly property), which uses it in a transfusion for another individual (not property).¹⁷⁴ This adaptive approach to applying the property/not property distinction raises many questions, among them: Who can decide to move human body materials between these categories? At what point is the transition complete? Who may hold title at any point the material is property? How is title acquired? These questions do not have simple answers. They help reveal, however, that the clear trend over the past century has been to increasingly recognize at least the possibility that, in certain circumstances, human body materials can and should be understood as property.

B. Markets for Human Body Materials Are Growing and Changing

Science has created new conditions that the creators of traditional rules concerning human body materials did not envision. Kidneys, hearts, lungs, livers, pancreases, intestines, middle ears, corneas, skin, cardiovascular tissue, bones, veins, cartilage, tendons, and ligaments are all transplantable

of a donor's body or part if the donor made an anatomical gift of the donor's body or part . . .").

173. See, e.g., Rao, *supra* note 146, at 365–400 (identifying the relevant divisions as being whether the body is living or a corpse; whether the body is intact or materials have been excised; and whether the body has been commercialized or is in a sphere of relational privacy); Philippe Ducor, *The Legal Status of Human Materials*, 44 DRAKE L. REV. 195, 198–200 (1996) (categorizing human materials as either the object of rights (property) or the subject of rights (legal actor)); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 966 (1982) (arguing that it is "appropriate to call parts of the body property only after they have been removed from the [intact bodily] system").

174. See, e.g., Ducor, *supra* note 173, at 219–24 (discussing the transition from legal subject to object, as with death or the harvesting of human body materials, and the reverse, as when an organ is transplanted to a new body or a child is born from a dead mother).

today, and stem cells, blood, platelets, sperm, eggs, and embryos are all transferable from one human body for use in another.¹⁷⁵ In addition, recent medical advances have expanded transplant opportunities to include whole hand and face transplants.¹⁷⁶

The resulting markets for these materials have matured before the underlying legal issues have been resolved. In *Garber*¹⁷⁷ and *Green*,¹⁷⁸ for example, the companies that purchased the blood products had no interest in the details of state property law or federal tax law; they cared only that Dorothy Garber and Margaret Cramer Green controlled access to substances the companies wished to purchase. Moreover, the taxpayers did not concern themselves with legal classifications until required to do so by the Service. In short, these cases involved the emergence of new markets that required the development of tax classifications in the absence of guidance from either tax or nontax law.¹⁷⁹

These markets, which are still developing, are driving our understandings of human bodies. While the absence or existence of a market value does not determine whether an item is or can be property,¹⁸⁰

175. See *What Can Be Donated*, ORGANDONOR.GOV, http://www.organdonor.gov/donation/what_donate.htm (last visited Sept. 20, 2010) (listing all organs and tissue except sperm and eggs) (on file with the Washington and Lee Law Review); see also U.S. DEP'T. OF HEALTH & HUMAN SERVS. & CTRS. FOR DISEASE CONTROL & PREVENTION, 2006 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 3 (2008), available at <http://www.cdc.gov/art/ART2006/508PDF/2006ARTCoverNational.pdf> (discussing the transfer of fertilized human eggs).

176. See Jon W. Jones et al., *Successful Hand Transplantation: One Year Follow-Up*, 343 NEW ENG. J. MED. 468, 469–70 (2000) (discussing the protocol for human hand transplantation); see also Omar Ford, *1st Near-Total Face Transplant in U.S. 'Definitely a Triumph'*, MED. DEVICE DAILY, Dec. 22, 2008, at 1 (hypothesizing that facial transplants will become more common).

177. *United States v. Garber*, 607 F.2d 92, 94 (5th Cir. 1979); see *supra* notes 4, 101–10 and accompanying text (describing the legal issues faced and conclusions reached in the *Garber* case).

178. *Green v. Comm'r*, 74 T.C. 1229, 1232 (1980); see *supra* notes 113–22 and accompanying text (describing the legal issues faced and conclusions reached in the *Green* case).

179. *Garber*, 607 F.2d 92, 95–100; *Green*, 74 T.C. 1229 1233–38.

180. See, e.g., *Newman v. Sathyavaglswaran*, 287 F.3d 786, 791 (9th Cir. 2002) (dissociating markets and property on the basis of *Phillips v. Washington Legal Foundation* and Justice Holmes's dissent in *International News Service v. Associated Press*). In *Phillips*, the Supreme Court made clear that it has "never held that a physical item is not 'property' simply because it lacks a positive economic or market value." *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 169 (1988). In *International News Service*, Justice Holmes noted that "[p]roperty, a creation of law, does not arise from value." *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 246 (1918).

Margaret Jane Radin has observed that the very possibility of a market can transform that which previously was not property into property.¹⁸¹ In any event, the emergence of new markets requires solutions to the new tax issues these markets create. This is true regardless of whether nontax law has finally resolved the underlying questions about whether, when, and how human body materials can be property.

V. Developing a Framework

Any framework for taxing transfers of human body materials must take into account the complexity of the issues presented: No single characterization of these materials as property or not is appropriate across the variety of situations in which the issue arises. However, despite the complexity and inexact fit with the current statutory framework, the immediate tax treatment of these materials is more appropriately handled from within the current tax regimes than by development of an entirely new system tailored to the situation. To this end, based on the existing law and associated cultural understandings of our bodies, we can derive three principles distinguishing transfers of human body materials as the provision of services, as property, and as simply not property. These principles, then, provide the appropriate tax treatment of the most common transfers of these materials. Until such time as the Service issues a new and binding ruling retracting Revenue Ruling 162 and Congress passes the legislation necessary to fully implement this approach, courts addressing the question of taxpayer liability in connection with these transfers should follow these guidelines.

A. No Uniform Characterization of Human Body Materials

Human beings are legal subjects, and their bodies and body materials are potentially legal objects. As subject, the body is the physical embodiment of the self, inextricable from our very being. It is potentially a laborer, performing services, and cannot itself be property. But human bodies—particularly when viewed as a composite of the material they

181. See Margaret Jane Radin, *Cloning and Commodification*, 53 HASTINGS L.J. 1123, 1124 (2002) (using the example of the commodification of human eggs between her early writings and the twenty-first century).

include and produce—can also be seen as factories producing commodities or as the source of spare parts available for occasional sale.

State law has attempted to deal with these multiple roles by declining to apply the label "property" to human body materials when held by the individual whose body produced them. At most, it has afforded "quasi-property" status in the limited context of the disposal of corpses¹⁸² or vague "superior rights" to an individual designated as the donee of a body material.¹⁸³ However, in commercial contexts—for example, the transfer of blood from a blood bank to a medical center or with respect to spleen cells held by a medical center—treatment as property seems unproblematic and courts have not hesitated to endorse this characterization. The law, including tax law, has inched toward recognizing that differences in contexts can and should play a key role in the laws governing the transfer of human body materials.

B. Despite Complications, Can Make Sense Within Current Tax Framework

In an ideal world, Congress would devise a sound, coherent and comprehensive treatment of the full range of issues related to the tax treatment of transfers of human body materials. No such solution, however, is likely to emerge soon as the complexity of the problem and the reality of the deep underlying philosophical debates pose obstacles to such resolution. It is also unlikely that a legislative fix—even if achieved—would work well in this area: Congress, especially when acting quickly, has often failed in its efforts to graft new tax systems onto the existing tax regime.¹⁸⁴

182. See *supra* notes 150–58 and accompanying text (discussing the property rights to a deceased's body by their next of kin).

183. See *supra* note 171 and accompanying text (discussing pre-death anatomical gifts).

184. For example, in 1976 Congress enacted a "generation skipping transfer tax" to supplement the gift and estate tax systems and ensure all property is subject to tax at least once in each generation. See Tax Reform Act of 1976, Pub. L. No. 94-455, §§ 2001–09, 90 Stat. 1520, 1846–1905 (reforming tax laws). However, the new transfer tax was only incompletely integrated with the existing systems, and in 1986 it was repealed, retroactive to the law's original implementation date. Tax Reform Act of 1986, Pub. L. No. 99-514, §§ 1431–1433, 100 Stat. 2085, 2717–32. While new provisions became effective as of October 1985, they have required later modifications to bring them into accord with the existing estate and gift tax systems. Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 511, 111 Stat. 788, 860–61; Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7811, 103 Stat. 2106, 2406–12. Moreover, transfers between 1976 and 1985 that were intended to be subject to the tax have instead avoided the tax entirely.

In any event, current U.S. tax law is flexible enough to permit development of a sound system of taxation of transfers of human body materials without requiring legislative intervention. While the subject/object duality of human beings and our body materials is unique in the law, there is precedent for differential tax consequences depending on the context in which a transfer occurs. Moreover, tax law is already headed—albeit haltingly and incompletely—in the right direction. As a general matter, the law already recognizes the critical notion that human body materials need not be treated as property or not-property in an all-or-nothing categorization. The law in this area need not be created anew. Instead, building on the already existing movement towards contextualism, it need only be further adapted, clarified, and refined.

C. Guiding Principles

The foregoing review of current tax jurisprudence and broader state law jurisprudence regarding human body materials is consistent with several principles that, together, provide a context-specific basis for characterizing these materials for tax purposes. First, intact living bodies are subjects, and thus transactions with respect to them are only taxable as services. Second, human body materials removed from a living person and transferred in a commercial transaction are property; to the extent they are transferred gratuitously or disposed of, they are not property. Finally, a cadaver disposed of by burial or other traditional means does not constitute or give rise to property rights; only if it or its constituent parts are sold commercially would it or they become property. Underlying these principles is a rejection of the binary approach which views all transactions in human body materials as either transfers of property or as the performance of a service that finds expression in current tax jurisprudence.

Intact living bodies are legal subjects. To the extent the human body materials involved in a transaction are part of an integrated living human, they are not property.¹⁸⁵ Instead, the transaction is appropriately characterized as the performance of services and taxed as such. Here, the tax treatment is no different than that of income from massages,

185. See *supra* note 145 and accompanying text (discussing Fourteenth Amendment substantive due process protection of an individual's exclusive right to possess and control his body and to prevent unauthorized physical invasions); see also Rao, *supra* note 146, at 454 (arguing that intact, living human bodies are protected under the rubric of privacy, not under property law).

prostitution, or physical therapy, where a taxpayer uses his or her body to perform services in exchange for payment.

Excised body materials transferred in commercial transactions are property. As a predicate to finding property in human body materials from a living person, the material must first be excised.¹⁸⁶ Only once the material is removed from its intact, living state is it possible to have property rights in these human body materials. This distinction is evident in jurisprudence recognizing third party property rights in human body materials, where no such rights would be possible in an intact, living human body.¹⁸⁷

However, not all excised human body materials are property. Radhika Rao distinguishes between the legal treatment of human body materials that become property because they are commodified and those excluded from treatment as property by their transfer as part of an "intimate and consensual relationship[]" marked by "relational privacy."¹⁸⁸ Similarly, one principle distinguishing human body materials as property or not is between excised body materials involved in commercial transactions—human body materials as commodities—and those transferred gratuitously or disposed of at death.¹⁸⁹

This distinction can be seen in jurisprudence denying property rights in instances where human body materials are excised for therapeutic purposes even though the medical researchers involved may gain a property interest in the very same materials,¹⁹⁰ and in the denial of property rights where materials are transferred for personal incorporation into an individual's body.¹⁹¹ Moreover, it is consistent with the approach

186. See *id.* (observing that only once human body materials are excised from a living body are they appropriately protected by property rights rather than the right of privacy); see also Courtney S. Campbell, *Body, Self, and the Property Paradigm*, 22(5) HASTINGS CENTER REP. 34, 35–36 (1992) (asserting that the concept of the human body as property relies on the alienability of body parts).

187. See *supra* notes 145–72 and accompanying text (discussing the multifaceted problem of the appropriate tax treatment of transfers of human body materials).

188. Rao, *supra* note 146, at 446.

189. This principle requires valuation of human body materials only when they are transferred in a commercial transaction.

190. See *supra* notes 165–68 and accompanying text (discussing *Moore v. Regents of the University of California*, 793 P.2d 479 (Cal. 1990)).

191. See, e.g., *Colavito v. N.Y. Organ Donor Network*, 860 N.E.2d 713, 722 (N.Y. 2006) (rejecting plaintiff's cause of action for conversion when a kidney intended for transplantation into him was instead transplanted into another person due to plaintiff's lack of property rights in the kidney).

of RUAGA, in which a donee receives something less than property rights in the human body materials he or she is designated to receive.¹⁹²

1. Tax Consequences of Gratuitous Transfers

Once a distinction is drawn between excised human body materials that have entered the stream of commerce (as in *Garber*¹⁹³ and *Green*¹⁹⁴) and those that are transferred in a gratuitous transaction (as in *Lary*,¹⁹⁵ Revenue Ruling 162,¹⁹⁶ and G.C.M. 36418¹⁹⁷), only those in the former category should be considered property. Thus, transfers of human body materials should not be subject to gift tax because they do not involve property, and no gift tax return need be filed upon their transfer. This approach may seem counterintuitive at first blush because gratuitous transfers generally are the very transactions subject to gift tax.¹⁹⁸ This result, however, is not unprecedented. In several places, the Code explicitly or implicitly treats intimate transfers as nontaxable; for example:

- property and labor may be shared or transferred within the marital unit without taxation;¹⁹⁹

192. See *supra* notes 169–72 and accompanying text (discussing RUAGA).

193. See *United States v. Garber*, 607 F.2d 92, 93 (5th Cir. 1979) (reversing taxpayer's conviction for tax evasion based on failure to report income from sale of blood plasma); *supra* notes 101–10 and accompanying text (discussing *United States v. Garber*, 607 F.2d 92 (5th Cir. 1979)).

194. See *Green v. Comm'r*, 74 T.C. 1229, 1235 (1980) ("[W]e find that petitioner was in the trade or business of selling blood plasma."); see also *supra* notes 113–25 and accompanying text (discussing *Green*).

195. See *Lary v. United States*, 787 F.2d 1538, 1539 (11th Cir. 1986) (disallowing tax deduction for donation of blood); see also *supra* notes 23, 111, 127–31 and accompanying text (discussing *Lary*).

196. See Rev. Rul. 162, 1953-2 C.B. 127 ("Furnishing blood for a transfusion, or to a blood bank, is analogous to the rendering of a personal service by the donor rather than a contribution of 'property.'"); see also *supra* note 14 and accompanying text (discussing Revenue Ruling 162); *supra* notes 86–87 and accompanying text (same).

197. See I.R.S. Gen. Couns. Mem. 36418, *supra* note 89, at *3 (arguing that a "donation of mother's milk is clearly a donation of property"); see also *supra* notes 14–18 and accompanying text (discussing the limited legal guidance available on these issues); *supra* notes 100–01 (discussing unclear guidance from the IRS and courts).

198. See I.R.C. § 2501(a)(1) (2006) (imposing a tax "on the transfer of property by gift").

199. See *id.* § 2523 (granting deductions for transfers within marital unit).

- property may be transferred tax-free between former spouses within one year after divorce;²⁰⁰
- the annual exclusion from the gift tax is a recognition that most personal gifts should not be taxed;²⁰¹ and
- even lavish wedding ceremonies paid for by parents are not pursued by the Service as gifts.²⁰²

Moreover, donations of human body materials should not be eligible for a charitable donation deduction under current tax law under this framework. This outcome is appropriate conceptually; only in very limited circumstances (and as the result of policy-oriented statutory provisions) are amounts never taken into income in the first instance allowed as deductions to offset income.²⁰³ Of course, if it is determined that, as a matter of policy,

200. See *id.* § 1041 (providing that no gain or loss will be recognized under these circumstances).

201. See *id.* § 2503(b)(1) (allowing for the exclusion of up to \$10,000, as annually adjusted for inflation). This exclusion is not available in the commercial context. See *id.* § 102(c)(1) (disallowing gift treatment in transfers from an employer to an employee due to the fundamentally commercial nature of the relationship).

202. While not explicitly excluded from taxation under the Code, it is likely these expenditures fall either under a "traditional familial matters" exception or are excepted as a payment primarily for the benefit of the parent. See *Dickman v. Comm'r*, 465 U.S. 330, 341 (1984), which states that:

[I]t is not uncommon for parents to provide their adult children with such things as the use of cars or vacation cottages, simply on the basis of the family relationship. We assume that the focus of the Internal Revenue Service is not on such traditional familial matters. When the government levies a gift tax on routine neighborly or familial gifts, there will be enough time to deal with such a case.

Id.; see also *Stern v. United States*, 436 F.2d 1327, 1330 (5th Cir. 1971) (concluding, prior to the enactment of I.R.C. § 2501(a)(5), that the taxpayer did not make taxable gifts when she contributed to election campaigns of public officials since she was "motivated by [her] desire to promote a slate of candidates that would protect and advance her personal and property interests").

203. One such exception is that of charitable contributions of qualified appreciated stock. See I.R.C. § 170(e)(5)(A) (allowing full deduction for qualified appreciated stock). The full fair market value of such stock may be deducted, even though the taxpayer is never subject to tax on the capital gain inherent in such securities. See *id.* (providing the tax treatment of qualified appreciated stock). However, this exception was explicitly enacted to encourage high income taxpayers to make charitable donations of this property. H.R. Rep. No. 432, pt. 2 (1984); JOINT COMMITTEE ON TAXATION STAFF, 98th Cong., GENERAL EXPLANATION OF REVENUE PROVISIONS OF THE DEFICIT REDUCTION ACT OF 1984 667 (Comm. Print 1984); see generally Lisa Milot, *The Case Against Tax Incentives for Organ Transfers*, 45 WILLAMETTE L. REV. 67 (2008) (discussing why no charitable donation deduction is currently available for donations of human body materials and arguing against the provision of tax incentives for this purpose more generally).

a tax incentive for such transfers should be provided, a specific provision affording such an incentive can be added to the Code. However, absent such addition, no tax benefit for a donation would be available.

2. Tax Consequences of Commercial Transactions

Excised human body materials transferred in commercial transactions should be considered property, with the gain from their transfer subject to income tax. In determining the appropriate characterization of the income, excised human body materials should be considered capital assets unless fitting one of the eight exceptions to the capital asset definition.²⁰⁴ To the extent a taxpayer is considered to be in the trade or business of selling his or her human body materials, payroll taxes should be due on the proceeds from their sale as well.²⁰⁵

Jay Soled persuasively argues that human eggs do not fit any of the exceptions to capital asset treatment provided in the Code.²⁰⁶ First, he finds that they are clearly not depreciable or real property, notes receivable, or government publications.²⁰⁷ Next, he concludes that they cannot be considered to be held primarily for sale in the ordinary course of business since women do not hold their eggs primarily for sale, do not "merchandise" their eggs, and are generally limited to selling their eggs no more than two or three times in their lifetime so that sales cannot be in the ordinary course of business.²⁰⁸ Moreover, the purpose and wording of the exception for self-created copyrights and similar works excludes eggs from

204. See *supra* note 60 and accompanying text (listing exceptions to the definition of capital asset).

205. See *supra* note 68 and accompanying text (discussing payroll tax provisions). The *Green* court notes in summary fashion that Dorothy Green did pay these taxes on her income from sales of her blood. *Green v. Comm'r*, 74 T.C. 1229, 1234–38; see *supra* note 115 and accompanying text (discussing the IRS stance in *Green*).

206. See Soled, *supra* note 135, at 933 (contending that human eggs do not fit within exceptions to capital asset treatment). This accords with the Service's observation in G.C.M. 36418 that mother's milk should be considered a capital asset since it does not meet any of the exceptions that would make it ordinary income property. See I.R.S. Gen. Couns. Mem. 36418, *supra* note 89, at *7 n.2 ("Since the milk in question does not seem to fall within any exception under Code § 1221, it is a capital asset."); see also Note, *supra* note 18, at 857 (concluding that nonregenerative human body materials are capital assets).

207. See Soled, *supra* note 135, at 933 (noting that human eggs fit in none of these categories).

208. See *id.* at 933–36 (concluding that human eggs cannot be held primarily for sale in the ordinary course of business).

its coverage.²⁰⁹ By extension of this analysis, then, all human body materials that constitute property should usually be regarded as capital assets.²¹⁰

However, in a limited number of cases human body materials may qualify as property held primarily for sale to customers in the ordinary course of a trade or business.²¹¹ This exception from capital asset treatment distinguishes between ordinary profits generated by a taxpayer's business and those that result from the appreciation of property over a period of time.²¹² Individuals who create property for rapid resale are thus prevented from receiving the benefit of preferential capital gains tax rates, since "[t]here is little to distinguish their efforts from those [persons] performing services."²¹³

The exception requires that the assets be (1) held primarily for sale, (2) to customers, (3) in the ordinary course of the taxpayer's trade or business.²¹⁴ In *Malat v. Riddell*,²¹⁵ the Supreme Court has held that the first requirement be read literally: "'[P]rimarily,' for purposes of the statute, means 'of first importance' or 'principally.'"²¹⁶ The requirement is intended to distinguish sales by dealers or merchants, on the one hand, and those by investors or securities traders, on the other.²¹⁷ In addition, the second requirement has been interpreted to include any purchaser of the

209. See *id.* at 939–40 (stating that human eggs are not a copyright or similar property).

210. *Id.* At the time Soled was writing, exceptions (6)–(8) were not in the Code. Ticket to Work and Work Incentives Improvement Act of 1999, Pub. L. No. 106-170, § 532, 113 Stat. 1860, 1928–29 (adding I.R.C. §§ 1221(a)(6)–(8)). However, eggs are clearly not financial instruments or hedging transactions, and it would be a stretch to label a taxpayer's own human body materials as supplies used or consumed in the ordinary course of the taxpayer's business. Given the narrow scope of the exception, such an extension is inappropriate.

211. See I.R.C. § 1221(a)(1) (2006) (stating that the term "capital asset" means property held by the taxpayer, but does not include "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business").

212. See *Malat v. Riddell*, 383 U.S. 569, 572 (1966) ("The purpose of the statutory provision with which we deal is to differentiate between the 'profits and losses arising from the everyday operation of a business' on the one hand and 'the realization of appreciation in value accrued over a substantial period of time' on the other." (citations omitted)).

213. Howard J. Rothman, et al., *Portfolio 561-2nd: Capital Assets § IV.A.* (BNA).

214. See I.R.C. § 1221(a)(1) (listing exceptions to the definition of capital asset).

215. *Mallat*, 383 U.S. at 572 (requiring that the "primarily for sale" element be read literally).

216. See *id.* ("A literal reading of the statute is consistent with this legislative purpose.").

217. See BORRIS BITTKER & LAWRENCE LOKKEN, *FEDERAL TAXATION OF INCOME, ESTATES, AND GIFTS* ¶ 47.2.1. (2005) (discussing I.R.C. § 1221(a)(1)).

taxpayer's assets other than purchasers from securities or commodities traders.²¹⁸ Thus, assets sold by individuals who are best characterized as merchants or dealers are potentially covered by this exception, while those sold by investors or traders are not.

Determining whether any sales are "within the ordinary course of [the taxpayer's] trade or business" is based on a consideration of factors.²¹⁹ Many of the cases interpreting the provision have been decided by the Fifth Circuit,²²⁰ which has developed a multi-factor test with the factors weighted differently depending upon the specific facts of the case.²²¹ None of the factors is controlling.²²² Because the factors were primarily developed in cases dealing with the subdivision and sale of real property, it is important to look at the underlying principles being reviewed by courts before applying the factors to a novel asset, such as human body materials.

In *United States v. Winthrop*,²²³ the taxpayer subdivided and sold real property over a period of thirty years.²²⁴ While he initially reported the gains as capital gains, he later began reporting them as ordinary income.²²⁵ After his death, his executrix filed a claim for refund, alleging that the sales actually produced capital gain income.²²⁶ The Fifth Circuit held that the proceeds from the sales were ordinary income.²²⁷ It distilled a seven-part test from prior caselaw to differentiate sales of real property that qualify for capital asset treatment from those properly taxed at ordinary income tax rates, considering:

218. *Id.*; see also *Guardian Indus. Corp. v. Comm'r*, 97 T.C. 308, 317 n.2 (1991) (stating that, other than in the dealer/trader area, the term "customer" has been given such a broad interpretation so as to be virtually meaningless).

219. See *Biedenharn Realty Co. v. United States*, 526 F.2d 409, 415 (5th Cir. 1976), *cert. denied*, 429 U.S. 819 (1976) (noting that the determination is based on multiple factors).

220. Many of the cases are originally decided by the Tax Court. Tax Court cases may be appealed to the Fifth Circuit.

221. See *Biedenharn Realty Co.*, 526 F.2d at 415 ("No one set of criteria are applicable to all economic structures. Moreover, within a collection of tests, individual factors have varying weights and magnitudes, depending on the facts of the case.").

222. See, e.g., *id.* ("[E]ach case must be decided on its own peculiar facts. Specific factors, or combinations of them are not necessarily controlling.").

223. See *United States v. Winthrop*, 417 F.2d 905, 912 (5th Cir. 1969) (concluding that taxpayer was not entitled to capital gains treatment sale of land acquired, subdivided, and sold over a period of years).

224. See *id.* at 906 (discussing taxpayer's purchases and sales of land).

225. See *id.* at 907 (discussing taxpayer's reporting position).

226. See *id.* (discussing claim by taxpayer's executrix for tax refund).

227. See *id.* at 912 (denying capital gains treatment for the income at issue).

(1) the nature and purpose of the acquisition of the property and the duration of the ownership; (2) the extent and nature of the taxpayer's efforts to sell the property; (3) the number, extent, continuity and substantiality of the sales; (4) the extent of subdividing, developing, and advertising to increase sales; (5) the use of a business office for the sale of the property; (6) the character and degree of supervision or control exercised by the taxpayer over any representative selling the property; and (7) the time and effort the taxpayer habitually devoted to the sales.²²⁸

Ultimately it emphasized that it is whether the sales were in the ordinary course of the *taxpayer's* business that mattered.²²⁹ Sales of human body materials should be evaluated on the same fact-specific basis as other assets in determining whether they fit this exception to capital asset treatment.

While no single weighting of factors is possible across all cases, the Fifth Circuit has recognized that the most important of the *Winthrop* factors is "the frequency and substantiality of taxpayer's sales."²³⁰ Where the taxpayer's sales "extend over a long period of time and are especially numerous, the likelihood of capital gains is very slight indeed."²³¹ Moreover, the activity is apt to be found substantial where the income received from the activity represents a high proportion of the taxpayer's gross income for the year.²³² In the context of sales of human body materials, then, a taxpayer is likely to be found to be engaged in a trade or business where the sales are not isolated or occasional, but are instead part of a pattern of commercial activity over an extended time period and where the proceeds represent a substantial portion of the taxpayer's income.

In addition, under this test, the purpose for which the material was excised from the body should be considered. The *Winthrop* court considered the acquisition purpose and holding duration factors to be considered in differentiating capital assets from ordinary income property.²³³ Where the property is acquired for a business purpose, or has

228. *Id.* at 910.

229. *See id.* at 912 ("[T]he sales were not only ordinary, they were the sole object of [the taxpayer's] business.").

230. *See Biedenharn Realty Co. v. United States*, 526 F.2d 409, 416 (5th Cir. 1976), *cert. denied*, 429 U.S. 819 (1976) (referring to this as "the most important of *Winthrop's* factors").

231. *Id.*

232. *See United States v. Winthrop*, 417 F.2d 905, 907 (5th Cir. 1969) (noting that proceeds from the taxpayer's sales of the real property in question constituted 52.4% of his gross income over a twelve-year period).

233. *See id.* at 910 (listing relevant factors).

acquired such a purpose by the time of sale,²³⁴ and is disposed of relatively quickly, it is more likely that the asset is not a capital asset.²³⁵ Since human body materials are not potentially property until removed from a living body,²³⁶ it is not the original purpose of the material within the human body that is critical; instead, it is the purpose for which the material was excised. In the case of materials removed solely for commercial (as opposed to therapeutic or donative) purposes, the excision should be understood as an acquisition for a business purpose—sale. Because human body materials do not appreciate in value after removal from a living body—and in fact are generally only usable within a short time period thereafter unless appropriately preserved—removal for "investment" purposes is highly unlikely. Moreover, sale within a reasonable period of time after excision should provide further evidence of a business purpose to the acquisition of the material outside the body.

Other factors to be considered within the specific sphere of human body materials, based on the factors for real property set forth by the *Winthrop* court, but reduced to general principles to apply more broadly, include whether the taxpayer invested in "improvements" to the materials to make them more marketable (e.g., ingesting supplements and special diets, or undergoing testing to enhance the value of the material); whether the taxpayer claimed business expenses (e.g., mileage or a home office deduction) to offset the gain; and the time and effort devoted to the sales.²³⁷

For a material classified as a capital asset, the tax rate for gains depends upon the material's holding period.²³⁸ As noted by the Service in G.C.M. 36418, the time period could begin to run either upon production of the material in a human body or upon excision.²³⁹ This distinction is

234. See, e.g., *Redwood Empire Savings & Loan Assoc. v. Comm'r*, 628 F.2d 516, 518 (9th Cir. 1980) (finding intent at the time of sale to be determinative); *Van Sickle v. Comm'r*, Y.C. Memo 1988-115, at 10 (relying on *Redwood Empire Savings & Loan* for this proposition).

235. See *Winthrop*, 417 F.2d at 910 (noting time and effort devoted to sales as a factor in analysis).

236. Or, in the case of a corpse, until transferred in a commercial transaction.

237. See *Winthrop*, 417 F.2d at 910 (listing factors).

238. See *supra* notes 60–61 and accompanying text (discussing capital asset taxation rates).

239. See I.R.S. Gen. Couns. Mem. 36418, *supra* note 89, at *7 n.2 (discussing holding periods for mother's milk and for blood). The Service noted:

Ordinarily the holding period for mother's milk would be less than [the required long-term holding period] whether the period includes production time . . . or starts at the time of withdrawal. It is arguable that the holding period [for mother's milk] should start at the time of withdrawal because at that time the

important because human body materials are typically (and for the most part necessarily) transferred immediately upon excision from the body. Thus, if the holding period commences at excision (the moment the materials are first characterized as property), any gain can only be short-term. However, if commencing at production, the holding period for materials existent in a human body for more than one year prior to excision and transfer would be sufficient to afford them long-term capital gain treatment.

Both Soled, with respect specifically to eggs, and the author of the 1973 Note, more generally, assume without rigorous analysis that the holding period for human body materials should begin to run from the time of the material's formation in the body.²⁴⁰ However, classifying human body materials as long-term capital assets ignores the reality that, prior to excision and commercialization, they are simply not assets and thus cannot properly be considered to be held within the meaning of the tax statute. Moreover, it unnecessarily complicates the analysis to consider them as such, by requiring that each extracted cell be classified by age, with a precision that is not always possible. Finally, assigning a holding period that begins only with commercialization after excision to all human body materials means that all such materials are treated equally under tax law rather than arbitrarily favoring some materials (for example, eggs) over others (like sperm).

Ultimately, the principle that human body materials once excised from a living body are only properly considered property upon commercialization embodies the idea that, given the lack of consensus over whether or when human body materials should be property, it is most appropriate to recognize that many transfers of human body materials are

milk is property separate and apart from the person producing it.

Id. Further, it observed:

[T]he greater part of whole blood (by volume) has a life of less than six months in the body. Therefore, if sold upon withdrawal, the sale arguably would not give rise to long-term capital gain whether the holding period includes the lifetime of the blood in the body or begins at the time of withdrawal when it is property separate and apart from the person.

Id. at *8 n.3.

240. See Soled, *supra* note 135, at 944 & n.143 (making no general statement but concluding that, because women selling their eggs have had them since birth and must have reached the age of majority by the time of sale, any gain resulting from their disposition is properly characterized as long-term capital gain); Note, *supra* note 18, at 856–57, 864 (asserting without analysis that gain from the sale of human body materials would be "accorded long term capital treatment").

transfers of a part of the donor's self, not of his or her property. Only once commercialized do these materials become property, with any resulting gain subject to income taxation and no gift tax consequences. In most such instances, the materials should be considered capital assets, and gains from their transfer should be classified as short-term capital gain.

3. Cadavers (And Their Constituent Parts) That Are Buried or Otherwise Disposed of in Traditional Ways Should Not Be Considered Property

Cadavers that are buried or otherwise disposed of in traditional ways are not property. This principle recognizes the legal classification of decedents' bodies as other than property or as quasi-property—but in any event as nonproperty.²⁴¹ On the other hand, if a cadaver or its parts are transferred commercially, they would become property and be subject to the same rules concerning capital asset or ordinary income property treatment as human body materials excised from living beings.

Unlike human body materials from a living body that are sold, those sold upon a decedent's death raise a second set of issues. As a technical matter, only the value of property held by the decedent *at the moment of his or her death* is includible in the value of an estate.²⁴² Because human body materials are part of an intact body and not yet property at the moment of death, under this rule no amount would be includible in a decedent's estate even if all the saleable materials were sold immediately thereafter, becoming property after the moment of death. This result makes little sense. If in fact a cadaver or its materials are sold, they are no less property transferred from the decedent's estate than other assets that are included in the value of the decedent's estate.

Thus, proper estate tax treatment requires that the property status of material sold posthumously relate back to the moment of death, being deemed to be property at that moment. As a practical matter, because human body materials must be transferred immediately after death to be usable for transplantation or research, whether a cadaver or any materials

241. See *supra* notes 150–58 and accompanying text (discussing the concept of corpses as quasi-property). However, Radhika Rao argues that cadavers should be protected under a property rubric instead of a privacy one due to their status as "quasi-property." See Rao, *supra* note 146, at 364 ("[W]hen the human body is fragmented from the person . . . we should employ the property paradigm."). As I have discussed, though, quasi-property status is something less than property and is not a majority approach. See *supra* notes 149–58 and accompanying text (discussing cases).

242. See *supra* note 80 and accompanying text (discussing the estate tax).

therefrom were commercialized would be known long before the estate tax return was due.²⁴³ If they were, their value would be included in the decedent's gross estate for estate tax purposes.²⁴⁴ If not, they would be excluded. The proceeds from the posthumous sale of human body materials would not be subject to income tax, since their basis would be their value in the decedent's estate, and thus equal to the sale price. As a result, in that instance there would be no gain to tax, preventing double taxation (income and estate) of these proceeds.

D. Application to Common Scenarios

Application of these three principles to five common transfers of human body materials reveals how an adaptive application of tax law principles in this area can generate sound results. These now-common transfers involve (1) surrogacy arrangements, (2) sales of eggs, (3) sales of plasma and sperm, (4) black market kidney sales, and (5) kidney donations.

1. Surrogacy Arrangements

Surrogacy, even where the pregnancy is achieved using the surrogate's egg, is properly characterized as a service for federal tax purposes.²⁴⁵ This accords with legal proscriptions against sales of human beings, as well as a broader cultural understanding that the "product" exchanging hands, here a baby, is not property. This is the human body as a laborer in its most direct form.

As a result, proceeds received by the surrogate mother are subject to taxation at ordinary income tax rates. However, since in at least most instances the surrogate mother will not be an employee of the clinic or individual employing her, she may deduct her ordinary and necessary

243. Unless extended, the estate tax return is due nine months after the taxpayer's death. Treas. Reg. § 20.6081-1(b).

244. See I.R.C. § 2031 (2006) (stating that in general, "[t]he value of the gross estate of the decedent shall be determined by including . . . the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated").

245. See generally Crawford, *supra* note 142 (explaining the appropriate taxation of proceeds from surrogacy); James Edward Maule, *Federal Tax Consequences of Surrogate Motherhood*, 60 TAXES 656 (1982) (same).

business expenses prior to determining her tax due.²⁴⁶ Self-employment taxes may also be due on the proceeds.²⁴⁷

2. Sales of Eggs

Once removed from a woman's body and transferred in a commercial transaction, eggs are property. Specifically, eggs are capital assets because they do not fit any of the exceptions to this classification provided in the Code.²⁴⁸ Although all of the eggs a woman will ever have are in existence in her body at birth,²⁴⁹ the holding period would not commence until they were extracted and commercialized. As a result, they would be properly categorized as short-term capital assets. Only if a woman is able to establish specific capital expenditures will she have a basis in the eggs, as her acquisition cost is zero dollars. Thus, in almost all instances the entire proceeds from the sale of eggs are taxable at ordinary income tax rates. Here, the human body is acting as a repository of spare parts which may upon occasion be sold.

3. Sales of Plasma and Sperm

Like eggs, once removed from the body and sold, plasma and sperm would be property. Moreover, in instances in which they were sold as spare parts they would be properly characterized as capital assets.²⁵⁰ As with eggs, any gain from their sale would be short-term capital gain and taxable at ordinary income tax rates. Any amounts the taxpayer could prove he or she expended specifically to build a supply of plasma or sperm for sale would add to his or her basis in the material and reduce the taxable gain accordingly.

246. See Maule, *supra* note 245, at 657 (noting that a woman could deduct ordinary and necessary business expenses under these circumstances).

247. See Crawford, *supra* note 142, at 18 (discussing the tax consequences of surrogacy arrangements); Maule, *supra* note 245, at 657 (same).

248. See *supra* notes 211–16 and accompanying text (discussing capital asset definition).

249. See Soled, *supra* note 135, at 944 n.143 ("Donors are born with their eggs.").

250. See *supra* notes 211–16 and accompanying text (discussing capital asset definition).

However, sperm and plasma both may be sold as often as twice each week.²⁵¹ Under these circumstances, it is possible that these human body materials may properly be regarded as property held primarily for sale to customers in the ordinary course of a trade or business; here, the human body is acting as a factory, producing commodities for sale on the market. As with other manufacturers, the products produced should be considered as exceptions to the definition of capital assets.

A taxpayer who sells his sperm may have ordinary income where the sales occur once or twice each week and constitute a substantial portion of his income. This may occur, for example, with taxpayers who elect to be "open ID" donors and, thus, may earn \$400–\$1000 per week from such sales.²⁵² In order to sell sperm this frequently, the taxpayer would need to abstain from outside sex to increase the concentration of the sperm present;²⁵³ such abstinence could properly be deemed to be an "improvement" to the product. In addition, testing of the material is a further improvement that is required prior to compensation by a clinic.²⁵⁴

Similarly, sales of plasma on a weekly or bi-weekly basis may produce ordinary income if constituting a trade or business of the taxpayer based on: the frequency and substantiality of sales; the extraction of the plasma with the intent of sale; improvements made in the form of the ingestion of supplements or a specific diet to affect the quality of the plasma; evidence of a business intent by the taxpayer as with, for example, claimed mileage deductions; and the time and effort invested by the taxpayer.

In *Green*, in fact, the taxpayer reported her income from selling her plasma as income from a trade or business, and neither the Service nor the court disagreed with this characterization.²⁵⁵ Applying the revised

251. See *supra* notes 26–27 (discussing how often sperm and plasma may be donated).

252. See Rebecca Said, *Earn \$400 to \$1,000 a Month as a Sperm Donor*, Associatedcontent.com, http://www.associatedcontent.com/article/401791/earn_400_to_1000_a_month_as_a_sperm.html (last visited Sept. 23, 2010) (discussing this type of sperm donor) (on file with the Washington and Lee Law Review). "Open ID" or "Identity Release" donors agree to allow their adult offspring to contact them. Such donors may be paid \$500 per sale. *Id.* However, even donors electing for confidentiality may meet this substantiality requirement, depending on their income from other sources. *Id.*

253. See, e.g., GIVF Cyrobank Frequently Asked Questions, *supra* note 27 (discussing requirements for sperm donation).

254. See, e.g., *Become a Donor*, FAIRFAX CRYOBANK, <http://www.fairfaxcryobank.com/BecomeAdonor.shtml> (last visited Sept. 23, 2010) (listing sperm quality testing and medical infectious disease testing prior to acceptance of the first specimen from a donor, then blood testing at three month intervals prior to the release of samples from quarantine) (on file with the Washington and Lee Law Review).

255. See *Green v. Comm'r*, 74 T.C. 1229, 1235 (1980) (agreeing that the income from

Winthrop factors above illuminates this characterization: The taxpayer had plasmapheresis performed ninety-five times in a single year for the sole purpose of selling her plasma; she did, in fact, sell it each time; the proceeds from the sales comprised 60% of her income in the year in question; she ingested supplements and a high protein diet to improve the quality of her plasma; she claimed business deductions for these products; and she traveled forty miles (round trip) for each sale.²⁵⁶

Once such human body materials are classified as noncapital assets, the proceeds from their sale, after reduction for the associated ordinary and necessary business expenses,²⁵⁷ would be subject to tax at ordinary income tax rates. Moreover, they would be subject to payroll taxes either as employee or self-employment income.

4. Black Market Kidney Sales

At this time, sales of kidneys are not legal in the United States or most other countries.²⁵⁸ However, even proceeds received from illegal activities are taxable income to the extent they represent gain.²⁵⁹ Thus, black market sales of kidneys and other human body materials are subject to the same tax treatment as legal sales of those materials would be.

A kidney, once excised and entered into the stream of commerce, would be property. Because it does not fit any of the exceptions to capital asset treatment, the kidney would be classified as a capital asset, and its holding period would be short-term. A U.S. taxpayer who sold his or her kidney would owe tax at ordinary income tax rates on the proceeds from the sale, reducible only by any basis he or she can prove in the kidney. Nonresident aliens selling their kidneys in the United States would not be subject to U.S. income taxation on the transaction.²⁶⁰

sale of blood plasma arose from taxpayer's trade or business).

256. See *id.* at 1230–32 (describing taxpayer's blood plasma sale activities).

257. See *id.* at 1236–37 (describing taxpayer's deductions). The taxpayer in *Green* was allowed business deductions for, *inter alia*, "special drugs" and high protein foods. See *id.* (approving deductions). Because the court found that these substances were necessitated by the taxpayer's business of selling her plasma, the court held that, to the extent they exceeded her personal needs and were properly substantiated, they were deductible. *Id.*

258. See *supra* note 24 and accompanying text (discussing the ban on the sale of organs for transplantation in the United States).

259. See *supra* note 57 and accompanying text (noting taxability of illegal gains).

260. See *supra* note 58 and accompanying text (noting the rule that sales and services performed by nonresidents in the United States are not subject to income taxation under the Internal Revenue Code).

5. *Kidney Donations*

One important application of the principles developed here involves the tax treatment of gifts and donations of human body materials. If a kidney is viewed as property, then gift tax would be due, for example, upon its uncompensated transfer between a parent and a child, unless eligible for the annual exclusion.²⁶¹ Under the methodology developed here, however, that result would not occur. Because only commercial transfers of human body materials are deemed to involve "property," no property would be involved in a kidney donation. Thus, no gift tax liability would arise when the potentially life-saving gift of a kidney is made.

However, a further consequence of this principle is that no charitable donation deduction is available if, instead of giving the kidney to an individual, the donor gave it to a charitable organization. Since a charitable donation deduction is only available for *gratuitous* transfers of *property* to a qualified charitable organization,²⁶² and the very involvement in a gratuitous transfer means the kidney is not property, the transfer would be a nonevent from a tax perspective.

E. *Implementing the Framework*

Courts and the Service should look to these three principles in determining the appropriate tax treatment of the transfers of human body materials. By aligning the tax treatment with broader cultural and legal frameworks, the tax system's legitimacy is bolstered. Moreover, implementation of these principles would allow taxpayers to understand when and how they have reporting obligations, increasing their compliance, and limiting their costs in doing so.

To provide further clarity, the Service should issue a new revenue ruling overturning Revenue Ruling 162²⁶³ that recognizes that excised body materials are properly understood, and subject to tax, as property once entered into the stream of commerce. In addition, the Treasury Department should issue regulations that track the principles set forth here. Moreover, Form 706, United States Estate (and Generation-Skipping Transfer) Tax

261. See *supra* note 71 and accompanying text (discussing gift tax provisions).

262. See *supra* notes 65–67 and accompanying text (discussing "property" requirement).

263. See *supra* note 14 and accompanying text (discussing Revenue Ruling 162).

Return, should be revised to include a specific question about proceeds received from the sale of any of the decedent's body materials.

As previously indicated, there is no need for—and little likelihood of—comprehensive legislation in this area. In time, however, Congress should adopt new Code provisions that provide for the appropriate gift and estate tax exemptions for human body materials. To this end, a provision excluding gifts of human body materials from taxation under Code § 2501 should be enacted.²⁶⁴ In addition, Congress should, in due time, enact a provision clarifying that the value of a cadaver is includable in a decedent's gross estate only to the extent it, or any of its materials, is transferred commercially. This approach would bring clarity to a recurring set of issues that is currently muddled, in a way that best integrates both our more general understandings of human bodies and current tax law.

VI. Conclusion

Transfers of human body materials have become increasingly common.²⁶⁵ However, an understanding of the appropriate tax treatment of these transactions has not developed in pace. Instead, an amalgamation of imprecise statutory provisions, outdated and contradictory I.R.S. issuances, and narrowly written court decisions make tax planning and compliance in this area difficult at best. Recognizing that the context in which transfers of human body materials are made determines whether the materials are properly characterized as property for tax purposes would be consistent with our evolving legal and cultural understandings of human bodies and provide clarity to this currently muddled area.

So what are we after all? Laborers, incurring both ordinary income and payroll taxes on compensation for our services? Factories, producing ordinary income property that is subject to transfer taxes and resulting, at times, in payroll taxes being due? Or a compilation of spare parts, held for investment until the time to sell is ripe? With modern technology, we have become all three.

264. Such a provision could be added to Code § 2503, which provides exclusions from gifts more generally. *See* I.R.C. § 2503 (2006) (providing exclusions for an annual amount, direct payments for educational or medical expenses, and waiver of certain pension rights).

265. *See supra* notes 1–6 (providing examples of common transfers of human body materials).

NOTES