

NOTES

LET’S PLAY GOD: COMMODIFYING THE HUMAN BODY

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ABSTRACT

The global shortage of viable organs for transplantation, exacerbated by the COVID-19 pandemic, highlights a stark contrast between organ donation systems, particularly evident in the United States and Iran. While the United States relies on an altruistic donation system, resulting in millions on its waiting list, Iran's compensation-based approach has nearly eradicated its waitlist. The legal framework of the United States, shaped by property law, historical views on the human body, and federal statutes, complicates its approach to organ donation. The reluctance to grant individual rights to body parts hampers success compared to Iran's incentivization approach. Beyond learning from Iran's legalized organ market, this Note argues that the United States should grant complete ownership rights in organs to the individual to provide more viable organs, promote autonomy, punish discriminatory behavior, and expand legal protections for the individual. Much like Dr. Frankenstein, the United States can no longer ignore the consequences of its own creation.

I. INTRODUCTION

“After days and nights of incredible labour and fatigue, I succeeded in discovering the cause of generation and life; nay, more, I became myself capable of bestowing animation upon lifeless matter.” *Frankenstein*.¹

Organ failure affects over six-million people internationally, yet around 150,000 people world-wide received a viable organ for transplantation in 2018.² Since the COVID-19 pandemic, “[t]he steep reduction in organ donations and transplant procedures exacerbate[d] the worldwide shortage of transplantable organs and the need for transplants.”³ The United States, which operates on an organ donation-based system, experienced a 50% reduction in deceased donor organ transplantation procedures in the aftermath of COVID-19.⁴

In 2021, the United States had over 107,000 people on the organ donation waiting list, while less than 40,000 individuals on that list had a transplant performed that year.⁵ Specifically, the United States kidney waiting list in 2021 had over 90,000 people on it with less than 25,000 operations performed that year.⁶ However, not all countries face these problems. In Iran, which operates a compensation-based donor system,⁷ “the number of renal transplants conducted has substantively enhanced such that . . . the renal transplant waiting list has been almost eliminated.”⁸

From this comparative lens, it becomes clear the success of eradicating an organ waitlist in Iran was a result of the way Iran incentivizes its citizens to engage in their system through compensation. This begs the question: why has the United States not adopted a similar regime? Many may argue the issue is statutory, noting that, since the enactment of the National Organ Transplant

¹ MARY SHELLY, *FRANKENSTEIN* (Judith Boss et al., Project Gutenberg 1993) (1818) (ebook), available at <https://www.gutenberg.org/files/84/84-h/84-h.htm>.

² Alexandre Loupy et. al, *Organ Procurement and Transplantation During the COVID-19 Pandemic*, 395 *LANCET* 95, 95-96 (2020).

³ *Steep Decline in Organ Transplants Amid COVID-19 Outbreak*, PENN MED. NEWS (May 12, 2020), <https://www.pennmedicine.org/news/news-releases/2020/may/steep-decline-in-organ-transplants-amid-covid19-outbreak>.

⁴ *Id.*

⁵ *Organ Donation Statistics*, HEALTH RES. & SERV. ADMIN.

<https://www.organdonor.gov/learn/organ-donation-statistics#:~:text=There%20are%20currently%20over%20106%2C000,and%20Transplantation%20Network%20National%20Data> (last updated March 2023).

⁶ *Id.*

⁷ Tannaz Moeindarbari & Mehdi Feizi, *Kidneys for Sale: Empirical Evidence From Iran*, 35 *TRANSPLANT INT'L* 1 (2022).

⁸ *Id.*; see also Siamak Rimaz et. al, *Organ Procurement and Transplantation During the COVID-19 Pandemic in Iran*, 36 *KOREAN J. TRANSPLANTATION* 79-80 (2022) (describing how Iran also suffered a decrease in organ donation as a result of the COVID-19 pandemic).

Act (NOTA) in 1984 by the United States Congress, organ purchasing and selling is illegal.⁹

However, this argument erroneously oversimplifies a multifaceted and complex problem. NOTA is merely a piece in the broader debate of how the United States has viewed the human body and its genetic materials as legal property,¹⁰ starting as early as 1865 with the adoption of the Fourteenth Amendment.¹¹

Comparing the two regimes, it is evident that United States property law weakens its organ donation system, inhibiting the success achieved by the Iranian system. This stems from the United States' refusal to attach any rights to individual body parts for fear of assigning fungible value to the whole.

II. THE UNITED STATES SYSTEM

"I will pioneer a new way, explore unknown powers, and unfold to the world the deepest mysteries of creation." *Frankenstein*.¹²

A. ORIGINS OF NOTA AND AMERICA'S DR. FRANKENSTEIN

NOTA¹³ makes it a federal crime to purchase or sell organs "for valuable consideration,"¹⁴ but may allow forms of compensation for items such as lost

⁹ In 1984, the United States passed the National Organ Transplant Act ("NOTA"), opting for "donation" through the Organ Procurement and Transplantation Network ("OPTN"). *Organ Donation Legislation Policy*, HEALTH RES. & SERV. ADMIN. <https://www.organdonor.gov/about-us/legislation-policy> (last visited Sept. 10, 2023). Under NOTA, it is "unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce." 42 U.S.C. § 274(e) (1984) [hereinafter "NOTA"].

¹⁰ Lisa Milot, *What Are We—Laborers, Factories, or Spare Parts? The Tax Treatment of Transfers of Human Body Materials*, 67 WASH. & LEE L. REV. 1053, 1082 (2010) (arguing that uncertainty surrounding the resolution of the appropriate tax treatment of transfers of human body materials is "underpinned by a broader legal ambivalence toward human bodies as both legal actors and as legal property").

¹¹ U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

¹² FRANKENSTEIN, *supra* note 1.

¹³ While this note focuses on the federal laws of the United States, it's important to the note that its constituent states adopted similar prohibitions on the commodification of human organs via the Uniform Anatomical Gift Act in 1983. UNIF. ANATOMICAL GIFT ACT, 8A U.L.A. 15 (1983) (amended 1987) [hereinafter UAGA].

¹⁴ According to NOTA, valuable consideration does not include "reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ or the expenses of travel, housing, and lost

wages or medical costs.¹⁵ The United States has an organ donation process whereby donating citizens engage with the Organ Procurement and Transplantation Network (OPTN) to transplant their organs to individuals with organ failure.

Despite its length and common application, the legislative history reveals NOTA was passed with little to no debate.¹⁶ The haste with which NOTA was passed may be due to Virginia physician D.H. Barry Jacobs. In 1983, Jacobs “offered to broker contracts between patients with end-stage renal disease and people willing to sell one kidney”¹⁷ through his International Kidney Exchange.¹⁸ Jacobs’s plan entailed the procurement of “kidneys from healthy

wages incurred by the donor of a human organ in connection with the donation of the organ.” See Robyn S. Shapiro, *Legal Issues in Payment of Living Donors for Solid Organs*, AM. BAR ASS’N (Apr. 1, 2003), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol30_2003/spring2003/hr_spring03_livingdonors/.

¹⁵ Consequences of NOTA violations include a \$50,000 fine, five-year imprisonment, or both.

¹⁶ For example, the Bill establishing NOTA and its task force was introduced to the Committee on Labor and Human Resources (“the Committee”) by the Senate in November of 1983. By October 1983 a public hearing was held and on March 21, 1984, “the Committee unanimously approved the bill and ordered that it be reported favorably to the Senate.” S. REP. NO. 382, p. 3, at 4 (1984). Congress approved NOTA on October 19, 1984. *National Organ Transplantation Act Enacted 30 Years Ago*, UNOS (Oct. 19, 2014) <https://unos.org/news/national-organ-transplant-act-enacted-30-years-ago/>. Additionally, the Committee itself used the word “timely” in expressing its direction to the Senate. S. REP. NO. 382, p. 6, at 13 (1984).

¹⁷ Though the legislative history does not directly mention Jacobs as a reason to enact the legislation, notes from committee meetings reveal the desire to prevent Jacobs’s goal of a kidney exchange network for profit. See Bernard D. Jr. Reams, *National Organ Transplant Act of 1984: A Legislative History of Pub. L. No. 98-509*, 4 (1990) (“[T]he prohibition on the buying and selling of human organs is directed at preventing the for-profit marketing of kidneys and other organs.”). See also Shapiro, *supra* note 14 (describing how a Senate committee concluded that “individuals or organizations should not profit by the sale of human organs for transplantation,” and noting that NOTA’s Task Force, in affirming the prohibition of commercialization of human organs and body parts, commented that “society’s moral values militate against rendering the body as a commodity”).

¹⁸ See Walter Sullivan, *Buying of Kidneys of Poor Attacked*, N.Y. TIMES (Sept. 24, 1983), <https://www.nytimes.com/1983/09/24/us/buying-of-kidneys-of-poor-attacked.html> (describing Jacobs’s idea to purchase and market kidneys as “immoral and unethical”); see also Margaret Engel, *Va. Doctors Plans Company to Arrange Sale of Human Kidneys*, WASH. POST (Sept. 19, 1983), <https://www.washingtonpost.com/archive/politics/1983/09/19/va-doctor-plans-company-to-arrange-sale-of-human-kidneys/afdfac69-62ed-4066-b296-fcf892eab758/> (quoting then U.S. Representative of Tennessee Al Gore who felt that Jacobs’s efforts to commercialize organs was “abhorrent to our system of values,” as Gore noted that “[i]t seems to be something inconsistent with our view of humanity . . . Prostitution is illegal for reasons that are similar. So is slavery”).

people, including indigent Third World residents, each of whom would sell one kidney at a negotiated price.¹⁹

B. UNDER NOTA, CITIZENS CAN ENGAGE IN ORGAN TRANSFERS ONLY BY DONATION

i. After-Life Donations

Even though 170 million people are registered for after-life donations, only three in 1,000 *actually* become donors.²⁰ The registration for becoming an after-life donor appears relatively simplistic: citizens opt in through their state's registry or their local department of motor vehicles.²¹ However, this is not enough because opting into the system does not ensure a donation will be possible. There are many hurdles the potential organs must pass before they reach their donor, each reducing the availability of overall donations, and, while in theory the donor's wishes are controlling, in practice, family members can, and often do, override the decision.²²

The first issue is the initial evaluation. At the time of death or near it, the hospital will contact the local Organ Procurement Organization (OPO).²³ In adherence to federal rules and, solely through that conversation, the OPO determines if the deceased is a "possible donor."²⁴ Next, if the OPO determines that the donation is viable, the OPO contacts the Organ Procurement and Transplantation Network (OPTN), a national database containing all the United States patients awaiting a transplant, and begins to search for a match for the donation.²⁵ The OPTN "offers each available organ to the transplant team of the best-matched patient."²⁶ Yet, even if the donation process makes it to this point, it still does not ensure an organ transplantation occurs, as the surgeon may still deny the organ for a patient.²⁷ Moreover, there is no incentivization system for OPOs to pursue all donation opportunities, so

¹⁹ See Shapiro, *supra* note 14. The patient would be responsible for both the payment of the surgery and the kidney.

²⁰ *How Donation Works*, HEALTH RES. & SERV. ADMIN, <https://www.organdonor.gov/learn/process> (last visited Sept. 10, 2023).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* The OPO additionally requires the patient's consent which is done via registering through the patient's state, verifying driver license against other legal forms, or consent from the next of kin. From here, the OPO will evaluate the patient's "complete medical and social history."

²⁵ See HEALTH RES. & SERV. ADMIN, *supra* note 20 ("The system creates a list of patients who match the donor [by organ].").

²⁶ *Id.*

²⁷ *Id.* ("The transplant surgeon makes the final decision. They decide whether the organ is good for their patient. They may refuse the organ if their patient is too sick or they can't reach them in time.")

organs are “wasted” because “OPOs may deprioritize ‘low-yield’ candidates, for lack of either financial or regulatory pressures to recover and place all transplantable organs,” resulting in OPOs “rejecting, or simply not showing up for, older donors with only single organs available— even though those single organs could each save a life.”²⁸ Critics have outlined many ways this multi-middleman system is flawed, which may explain the discrepancy in the number of willing donors versus those successfully donating.²⁹ As a result, hospitals waste a transplantable organ at the cost of those in need.³⁰

ii. During-Life Donations

Alternatively, some organs and tissues may be legally transferred while the donor is living³¹ in the U.S. Of these donations, the most commonly performed type is that between family members or close friends.³² There are

²⁸ This waste may be for a variety of reasons such as “[n]ot all donor referrals are made,” “OPOs fail to show up or decide not to pursue an organ,” “OPOs fail to obtain family authorization,” or “OPOs do not place organs or get them where they need to be in time.” Todd Park et al., *The Costly Effects of an Outdated Organ Donation System*, <https://bloomworks.digital/organdonationreform/Summary/> (last visited Sept. 10, 2023).

²⁹ Former Chief Technology Officers of the U.S. Department of Health and Human Services critique the referral system noting the number of referrals by hospital to OPO’s for viable donations “is far lower than it should be,” blaming the “poor OPO and hospital relationships and even guidance by OPOs to not call on specific circumstances to avoid reporting on cases when the OPO believes donation is unlikely.” *Id.* Additionally, the lack of accountability of OPOs lead to poor performance as “[e]ach of the 58 OPOs in the U.S. operate without competition from any other organizations in their respective regions, effectively making them monopolies. In addition, there is no standard way that OPOs operate. This leads to a wide variance of performance — up to a 470% difference between the best and worst OPOs in terms of potential organs recovered.” *Id.*

³⁰ *Id.*

³¹ While anyone 18 or older (21 in some transplant hospitals) in “good physical and mental health” may donate in this way, various medical conditions could harm a transplant recipient, preventing individuals from becoming donors. *Donate Organs While Alive*, HEALTH RES. & SERV. ADMIN., <https://www.organdonor.gov/learn/process/living-donation> (last visited Sept. 10, 2023). These medical conditions may include “uncontrolled high blood pressure, untreated psychiatric condition, cancer, diabetes, and certain infections.” *Living Donation*, HEALTH RES. & SERV. ADMIN., <https://optn.transplant.hrsa.gov/patients/about-donation/living-donation/living-donation/> (last visited Sept. 10, 2023).

³² *Donate Organs While Alive*, HEALTH RES. & SERV. ADMIN., <https://www.organdonor.gov/learn/process/living-donation> (last visited Sept. 10, 2023). Some organs that may be donated by live donors include a kidney, a segment of the liver, a lobe of the lung, a part of a pancreas, or a part of the intestines. Tissues that may be donated while the donor is alive are skin, bone, healthy cells from bone marrow or an umbilical cord blood, amnion (post-childbirth), blood, and platelets.

three common forms of organ donor transplants: (1) directed donation,³³ (2) kidney-paired donation (KPD),³⁴ and (3) non-directed donation.³⁵

Determining which type of living donation the donor wished to make is the first step in this pathway.³⁶ The next step includes a series of consented screenings where the hospital reviews the potential donor's medical conditions³⁷ and performs a blood test to see if the donor is "compatible with the intended transplant candidate."³⁸ A donor is required to receive an independent donor advocate (IDA) or an IDA team, who is not part of or related to the recipient's medical staff and is responsible for assisting the donor in the organ donation process.³⁹

C. THE CURRENT STATE OF UNITED STATES CASE LAW

i. Something Short of Ownership Rights in the Human Body

In the United States, since the Supreme Court's overturning of *Dred Scott v. Sandford*⁴⁰ via the Fourteenth Amendment,⁴¹ living bodies are not regarded as property. Likewise, in Iran, humans are unable to own their bodies or individual body parts despite a kidney meeting all four elements for a chattel

³³ *Id.* Directed donation is the most common form of living donation. The donor will name a specific person, either related or unrelated to the donor, to receive the transplant. Paired donation is not a guarantee even if tests reveal the organ is a good match.

³⁴ *See id.* (when a transplant candidate has someone who wants to donate a kidney to them, but tests reveal that the kidney would not be a good medical match, a "kidney-paired donation allows for two or more incompatible donor/recipient pairs to swap donors. The donors are . . . able to give their kidney to a compatible recipient in a different pair. By exchanging donors, a compatible match can be found for these recipients.").

³⁵ *Id.* In non-directed donations, the donor has no match in mind and donation is "arranged based on medical compatibility with a patient in need."

³⁶ If directed donation is the option a donor seeks, the donor and the individual he or she has chosen to help will "contact the transplant program where the person is listed." If the donor chooses a non-directed route, the donor will contact the transplant hospital of his or her choice "to find out if they have this type of donation program." *Id.*

³⁷ *See* HEALTH RES. & SERV. ADMIN, *supra* note 32 (describing the list of medical conditions that prevent a person from becoming a donor).

³⁸ *Living Donation*, UNOS (last visited Oct. 10, 2023), <https://unos.org/transplant/living-donation/> (describing one option a candidate has when incompatibility is determined, but there are other options besides KPD such as blood type incompatible donation or positive crossmatch donation).

³⁹ *Living Donation*, HEALTH RES. & SERV. ADMIN., <https://optn.transplant.hrsa.gov/patients/about-donation/living-donation/living-donation/> (last visited Sept. 10, 2023).

⁴⁰ 60 U.S. (19 How.) 393, 451 (1857) (holding that slaves were property under the Constitution of the United States).

⁴¹ *Supra* note 11.

under Iranian law.⁴² This is because, in the Muslim faith, God owns the body—humans merely enjoy it subject to limitations.⁴³ Like public trust property,⁴⁴ “humans have also been entrusted with their bodies and bound to use them towards their own best interests in a way that enables them to grow spiritually and do good in the world.”⁴⁵ As such, Muslims are unable to donate organs if the donations would end or greatly threaten the donor’s life.

However, prohibiting a human’s fully intact body from being property in the United States has not prevented the American legal system from attaching some form of property right to it. The necessity of cadavers, which hold economic value,⁴⁶ for nineteenth-century medical research is an example of and may explain this contradiction.⁴⁷ In response to increased claims “that

⁴² There are four elements to be chattel: (1) a reasonable person sees a rational benefit in transferring the item; (2) the item is attributable to a person; (3) the item is transferrable; and (4) the item is economically valuable. Because medical technology now allows the transfer of organs that save lives, which a reasonable person would deem beneficial and a kidney, being attributable to the one who houses it, is clearly marketable, a kidney seems to fall into property under Iran’s definition. However, “Iran’s Legal Office of the Judicial Branch stated in an advisory opinion that body organs are not property . . . [and] hold[s] that humans cannot be said to own their body in Islam.” Zahra Takhshid, *Kidney, Money, and the Shī’ah Implementation of the Rule of Necessity*, 19 U.C.L.A. J. ISLAMIC & NEAR E.L. 83, 91-92 (2021).

⁴³ “According to the Islamic view, the body, like the soul, is a ‘gift’ from God; therefore, [a] human being does not possess absolute ownership [of] his or her body. But, the ownership of human beings [of] their bodies can be described as a kind of ‘stewardship.’” Kiarash Aramesh, *The Ownership of Human Body: An Islamic Perspective*, 2 J. MED. ETHICS & HIST. MED. 4 (2009). “[H]umans are not the ultimate owners of their bodies; God is. Humans can enjoy the reasonable benefits of their physical bodies, but this does not grant them a full property interest over their own bodies.” Takhshid, *supra* note 42, at 93 (2021). *See also id.* at n.64 (“Some *Shī’ah fuqahā* [Islamic legal scholars] describe the right not as a right *per se*; it is a *hukm*, not a *haq* (right), meaning that you cannot forgo or transfer it; it also cannot be transferred upon death. . . . Therefore, the property interest in body is also for many of the *fuqahā*, a *hukm* not a *haq*.”).

⁴⁴ Public trust property “is an ancient common law principle of property law that establishes the obligation of the government to hold certain natural resources in trust for the public’s benefit.” Stephanie L. Faraci, *Public Trust Doctrine: Risks in Land Purchases from Governmental Agencies*, MORGAN LEWIS (July 1, 2020), <https://www.morganlewis.com/pubs/2020/07/public-trust-doctrine-risks-in-land-purchases-from-governmental-agencies#:~:text=The%20public%20trust%20doctrine%20is,trust%20for%20the%20public's%20benefit>.

⁴⁵ *See* Takhshid, *supra* note 42, at 93.

⁴⁶ *See* Milot, *supra* note 10, at 1083

⁴⁷ Medical schools were in desperate need of a steady supply of corpses, creating an avenue for compensation through graverobbing as early as the nineteenth century. Antero Pietila, *In Need of Cadavers, 19th-Century Medical Students Raided Baltimore’s Graves*, SMITHSONIAN MAG. (Oct. 25, 2018), <https://www.smithsonianmag.com/history/in-need-cadavers-19th-century-medical-students-raided-baltimores-graves-180970629/>.

bodies had been wrongfully taken or mutilated,”⁴⁸ some courts began to grant the next of kin an exclusive right “to possess and control the disposition of the bodies of their dead relatives” in relation to burial.⁴⁹ Under this quasi-property rights approach,⁵⁰ a right of custody is narrowly bestowed upon the next of kin and does not encompass a right of ownership or possession.⁵¹

ii. A Brief Look at How United States Case Law Leaves More Questions than Answers Surrounding Property Rights in Human Body Material

Despite the federal courts’ willingness to extend property rights to organs,⁵² *Moore v. Regents of the University of California*⁵³ exemplifies how the United States has created perplexing case law in its approach to establishing such rights.

In *Moore*, after removing a spleen and other various body materials from the body of a cancer patient, the doctors created and commercialized the “Mo” Line without the cancer patient’s consent.⁵⁴ The cancer patient sued under the premise that his body materials were his property and the unlawful, for-profit taking by the doctors was a form of conversion. The court held that cells and organs removed from a person’s body upon excision are not property, leaving the person without ownership interest.⁵⁵ Under this approach, “a third party can possess property rights in human body materials, but the person from whose body they have been removed cannot.”⁵⁶

However, a decade later, another United States court reached the opposite conclusion in *Kurchner v. State Farm Fire & Cas. Co.* There, the court held

⁴⁸ Milot, *supra* note 10, at 1083 (citing *Newman v. Sathyavaglswaran*, 287 F.3d 786, 792 (9th Cir. 2002) (recognizing that the exclusive right likewise includes the prevention of unauthorized intrusions after burial)).

⁴⁹ *Id.*

⁵⁰ Quasi-Property rights are not unanimously accepted in the United States. *See id.* at 1084 (“[T]his quasi-property approach has never been generally accepted.”) (citing *Carney v. Knollwood Cemetery Ass’n*, 514 N.E.2d 430, 435 (Ohio Ct. App. 1986)); *see also Rights and Obligations as to Human Remains and Burial*, LAW OFFICES OF STIMMEL, STIMMEL, & ROESER, <https://www.stimmel-law.com/en/articles/rights-and-obligations-human-remains-and-burial> (last visited Sept. 10, 2023) (“Although common law did not regard dead bodies as property, the courts, through the centuries, have treated them in a quasi-property context. The right to the remains of one’s deceased kin for the purpose of providing proper burial has long been recognized as a legal right.”).

⁵¹ *See* Milot, *supra* note 10, at 1084 (“[Q]uasi-property protection affords only a right to dispose of the body of a close relative in narrowly prescribed ways without interference from others.”).

⁵² *See Newman v. Sathyavaglswaran*, 287 F.3d 786 (9th Cir. 2002).

⁵³ 793 P.2d 479 (Cal. 1990).

⁵⁴ *Id.* at 492.

⁵⁵ *Id.*; *see also id.* at 504 (Broussard, J., concurring and dissenting).

⁵⁶ *See* Milot, *supra* note 10, at 1086.

that sperm cells are one's property even after being removed from the body.⁵⁷ In *Kurchner*, a man undergoing chemotherapy and his wife decided to cryopreserve his sperm because "[c]ryopreservation offered the Kurchners an opportunity to have children in the future should [the husband's] chemotherapy treatment make him sterile."⁵⁸ Ultimately, the husband's sperm samples "were destroyed when the storage tank's cooling apparatus failed."⁵⁹ The couple sued for damages under the storage facility's insurance policy, with the case hinging on the interpretation of the storage facility's insurance company's policy, which included coverage for "bodily injury, property damage, personal injury or advertising injury."⁶⁰ The Kurchners claimed their lost sperm was covered as "bodily injury" under the policy, stating that term "includes [the husband's] sperm as a part of his body according to the definition of 'bodily' defined as 'of or pertaining to the body.'"⁶¹ The court, however, rejected this theory, holding that sperm constitutes personal property and, therefore, the person to whom the sperm cells belongs has a property right therein.⁶²

Evidently, there is no one-size-fits-all solution to the way the United States conceptualizes human body materials.⁶³ Moreover, given the ambivalent nature of court decisions and contradictory results, more questions⁶⁴ remain than answers—none of which are simple problems, as demonstrated above. Yet, one thing remains clear: at least under certain conditions, courts are willing to assign property rights, or something short of property rights, to the human body and human body materials. Additionally, "the clear trend over the past century has been to increasingly recognize . . . that . . . human body materials can and should be understood as property."⁶⁵

⁵⁷ *Kurchner v. State Farm Fire & Cas. Co.*, 858 So. 2d 1200, 1221 (2003).

⁵⁸ *Id.* at 1220.

⁵⁹ *Id.*

⁶⁰ *Id.* at 1221.

⁶¹ *Id.*

⁶² *Id.*

⁶³ See Milot, *supra* note 10, at 1088. "Academics have attempted to distinguish [categorizing body materials as property and not property] 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)."

⁶⁴ See *id.* "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?"

⁶⁵ *Id.*

III. THE IRANIAN SYSTEM

“To examine the causes of life, we must first have recourse to death.” – *Frankenstein*.⁶⁶

Through its seemingly radical organ market, the Iranian Government has “managed to eradicate the country’s waiting list for the world’s most sought-after organ—the kidney.”⁶⁷ In 1988, Iran established the Iranian model of kidney transplantation (IMKT) to allow the compensation of living unrelated donors (LUDs).⁶⁸ Under the IMKT, “non-Iranian citizens are not eligible to participate in [the] organ procurement system as either donors or recipients.”⁶⁹ While deceased donors, or cadavers, and their families do not receive compensation, the government provides all living donors a fixed monetary stipend, “a year’s worth of medical insurance, transplantation, costs, and medicines” and compensation from the recipient resulting from direct negotiation between donor and recipient.⁷⁰ Despite religious obstacles,⁷¹

⁶⁶ FRANKENSTEIN, *supra* note 1.

⁶⁷ Emily Steeb, *The Gift of Life: Can the Organ Procurement Philosophies from Spain and Iran Help Eliminate the Organ Shortage in the United States?*, 25 *IND. INT’L & COMPAR. L. REV.* 311, 341 (2015).

⁶⁸ Moeindarbari & Feizi, *supra* note 7, at 3. Some theorize that the system was a direct consequence of war-time necessity as the economic sanctions of the Iran-Iraq war combined with the lack of dialysis facilities “created a dire situation which led to a growing number of deaths among renal patients without transplants.” Takhshid, *supra* note 42, at 86. Besides providing Iran with virtually no kidney waitlist since 1999, the IMKT also “prevents the horrors of the black market.” Adam Creppelle, *A Market for Human Organs: An Ethical Solution to the Organ Shortage*, 13 *IND. HEALTH L. REV.* 17, 62, 64 (2016).

⁶⁹ Behzad Einollahi, *Kidney Transplantation in Iran*, 35 *IRAN J. MED. SCI.* 1, 3 (2010).

⁷⁰ Sanwar Siraj, *How a Compensated Kidney Donation Program Facilitates the Sale of Human Organs in a Regulated Market: The Implications of Islam on Organ Donation and Sale*, 17 *PHIL., ETHICS, & HUMANS. IN MED.*, July 2022, at 1, 2. As mentioned, cadavers and their survivors receive no financial compensation under IMKT. In fact, it was not until 2000 that Iran passed the Brain Death and Organ Transplantation Act (“BDOTA”), which legalized deceased donations. Because Iran is a theocratic state, religious approval, known as *fatwa*, must first be obtained from the Supreme Religious Leader, Dr. Fazel, who “recognized brain death and allowed deceased-donor organ transplant” in 1989. Afterwards, hospitals began performing such procedures despite no legislation being passed until 2000. Prior to BDOTA, all deceased-donor transplants could be performed only with a religious leader’s *fatwa*. Ahad. J. Ghods, *The History of Organ Donation and Transplantation in Iran*, 12 *EXPERIMENTAL & CLINICAL TRANSPLANTATION* 38, 38-39 (2014).

⁷¹ Muslim practice and religion view the human body as sacred, noting that within the Qur’an the creation of the human body is one of God’s unique powers. “The connectedness of body and spirit is emphasized by the insistence on bodily resurrection” and is considered an essential Islamic doctrine. Valeria J. Hoffman, *Islamic Perspectives on the Human Body: Legal, Social, and Spiritual Considerations*, 6 *THEOLOGY AND MED.* 37, 38 (1995).

Shīah scholars have interpreted lifesaving organ transplantations as religiously permissible.⁷² For the sake of adequately explaining the safeguards within the IMKT, the focus of this note will be on LUDs, as opposed to living-related donors (LRDs).⁷³ The IMKT for LUDs can be understood in three phases.

First, if no LRD is willing or able to donate a kidney, the patient is referred to the Dialysis and Transplant Patients Association (DATPA). DATPA is an entirely volunteer-based organization and does not pay its volunteers for their services.⁷⁴ The lack of remuneration for DATPA volunteers creates a safeguard for donors and recipients since “[t]here is no place for a broker or matchmaker agency in this model.”⁷⁵ At this stage, doctors have already referred an LUD, aged 18-35, to a DATPA volunteer, who has received informed consent from the donor and the donor’s immediate family and has given DATPA’s national identification card to the LUD.⁷⁶

Second, DATPA formally introduces the potential donor to the potential recipient. A consent form is signed by a witness, usually either a parent or spouse. The consent form states that “the LUD will receive a fixed

⁷² See Takhshid, *supra* note 42, at 91 (quoting religious leader Imam Khomeini who stated that “[s]hould organ transplant save a person from dying, it is not religiously impermissible.”).

⁷³ This is because the IMKT process is mainly premised on the need for LUDs. A brief history of Iran shows that dialysis centers suffered as a result of economic sanctions. See Moeindarbari & Feizi, *supra* note 7, at 2. Because these facilities became so limited, patients requiring dialysis were allowed to undergo transplantation procedures overseas. However, to be accepted by an overseas transplant center, the Ministry of Health and Medicine Education (MOHME) required that dialysis patients apply with certain documentation identifying relatives who are willing to donate (LRDs). The system was faulty in that it limited the possible donors, requiring an extended wait period and MOHME approval. However, Iranian physicians today still encourage patients to first identify LRDs within their family for possible donations because “they have a longer graft survival rate.” See Siraj, *supra* note 70, at 3.

⁷⁴ DATPA acts as the sole liaison between donor and recipient and, unlike the U.S. system, “[n]either the transplant centers nor transplant physicians are involved in identifying potential donors.” See Einollahi, *supra* note 69. Due to translation alternatives, DATPA may be referred to by various names such as the Society for Supporting Dialysis and Transplantation Patients. *Id.*

⁷⁵ See Einollahi, *supra* note 69; see also Siraj, *supra* note 70 (“It is a government-controlled organ transplantation system where no surgical team or brokers are permitted to participate in a monetary transaction and no intermediary receives any payment. All financial transactions are settled directly between the LUD and the recipient.”). *But c.f.*, Park, *supra* note 28. As explained below, the black-market profits on the inaccessibility of organs worldwide. Moreover, the black market utilizes organ brokers who arrange illegal transplants and have a clear financial interest in the happening of the operation. See Crepelle, *supra* note 68, at 54.

⁷⁶ See Siraj, *supra* note 70. Registrations through DATPA is free for both donors and recipients.

amount of compensation (10 million Iranian rials)⁷⁷ and one-year of post-operative medical insurance and hospital charges from the government or the charity after transplantation.⁷⁸ Medical evaluations begin “for further evaluation, cross-match, and angiography,” and, like the U.S. system, certain medical conditions prevent some donors from successfully donating organs.⁷⁹ Importantly, physicians pay attention to the role of coercion at this stage as another safeguard in the process.⁸⁰

Thirdly, negotiations between the patient and the donor are held on the premises of a foundation or university, in a reserved space organized by DATPA.⁸¹ Here, “the LUD receives extra financial compensation from the recipients for their donation.”⁸² At the negotiation, DATPA plays a very limited role, having “no record of the agreed amount for the exchange of kidneys and . . . no role in the negotiation process.”⁸³ Despite this, DATPA maintains some form of oversight as it may offer another potential donor to the recipient in the event that the current LUD “requires an unusual amount of monetary compensation,” removing that “avaricious donor[] . . . from the potential donor lists.”⁸⁴ Moreover, the ability to receive a kidney does not hinge on economic status as DATPA and other charity organizations assist the recipient in paying the LUD financial compensation.

The actual transplant is performed in a university hospital licensed by the Iranian government.⁸⁵ Neither the donor nor the recipient bear the cost of the procedure as it is paid for by insurance companies or the Ministry of Health and Medicine Education (MOHME).⁸⁶ Once the transplant is complete, LUD's must submit certification from the hospital regarding the performance of the procedure through DATPA to receive the government stipend and the year of medical insurance.⁸⁷

⁷⁷ This is equal to \$238.00.

⁷⁸ *Id.*

⁷⁹ *Id.* (“However, tissue matching between organs donors and recipients is performed prior to transplantation.”).

⁸⁰ If the donor is female, physicians look for “any direct family pressure, resistance, or coercion” to ensure that the female donor is willingly engaging in the process. *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ The money recipients give to donors as a result of the negotiation for the kidney is unmonitored and requires no third-party involvement, ensuring there is “no chance of [the process] being abused by brokers.” *Id.*

⁸⁴ *Id.*

⁸⁵ See Einollahi, *supra* note 69, at 3; see also Siraj *supra* note 70.

⁸⁶ See Siraj, *supra* note 70; see also Einollahi, *supra* note 69, at 3 (“The [procedure's] expenses are fully paid by the government through the insurance system . . . As with dialysis, the administration assumes the cost of treatment, including the kidney procurement, transplant surgery, immunosuppressive medications, and postoperative care of the donor and recipient.”).

⁸⁷ See Siraj, *supra* note 70.

IV. AN EXISTING MARKET FOR ORGANS

“Who shall conceive the horrors of my secret toil as I dabbled among the unhallowed damps of the grave . . . ?” – *Frankenstein*.⁸⁸

“Science has created new conditions that the creators of traditional rules concerning human body materials did not envision.”⁸⁹ Moreover, the rate at which medical advances are expanding⁹⁰ has created a market for materials that has “matured before the underlying legal issues have been resolved.”⁹¹ The jurisprudence of the United States has made it clear that categorizing material as property does not hinge on “a positive economic or market value.”⁹² However, “the very possibility of a market can transform that which previously was not property into property.”⁹³

For example, the demand for eggs in the market transformed their status to that of property.⁹⁴ Yet despite the clear compensation for those individuals who opt to sell their eggs, donative language is used to describe this transaction and the transactions are recategorized as a sale of services.⁹⁵ In fact, Egg Bank America and Egg Donor America use the language “Donor

⁸⁸ FRANKENSTEIN, *supra* note 1.

⁸⁹ See Milot, *supra* note 10, at 1088; see also HEALTH RES. & SERV. ADMIN., *supra* note 31 (containing the list of the kinds of transplantable body materials).

⁹⁰ See e.g., *Face Transplants: The Changing Face of Medicine*, CLEVELAND CLINIC (Aug. 14, 2018), <https://newsroom.clevelandclinic.org/2018/08/14/face-transplants-the-changing-face-of-medicine/> (last visited Sept. 10, 2023) (“A face transplant is an intricately complicated, personalized medical procedure that replaces as much as 100 percent of the recipient’s facial tissue with that of a deceased donor. The surgery can integrate many different functional components, such as nose and lower eyelids as well as different tissue types including, skin, muscles, bony structures, arteries veins and nerves.”); see also *Human Craniomaxillofacial Allotransplantation, Reconstructive Transplant*, JOHNS HOPKINS MED., <https://www.hopkinsmedicine.org/transplant/programs/reconstructive-transplant/face-transplant> (last visited Sept. 10, 2023) (“Since 2021, more than 45 patients have received full or partial face transplants at institutions around the world.”).

⁹¹ See Milot, *supra* note 10, at 1089.

⁹² *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 169 (1988); See Milot, *supra* note 10, at 1089 (noting “the absence or existence of a market value does not determine whether an item is or can be property”).

⁹³ See Milot, *supra* note 10, at 1090.

⁹⁴ See Margaret Jane Radin, *Cloning and Commodification*, 53 HASTINGS L. J. 1123, 1124 (2002) (“So, if some things become part of a commercial structure and become subject to property and contract, that can create the implicit propertization of things that were formerly non-property. This is what has happened to eggs, for example. They were pretty clearly non-property at the time I was writing, some of the first of my work on commodification, and now they’ve become fairly well-propertized, just through the prospect of entering a market.”).

⁹⁵ See *Egg Donor Compensation*, EGG BANK AM., <https://www.eggdonoramerica.com/become-egg-donor/egg-donor-compensation> (last visited Sept. 10, 2023).

Compensation”—an oxymoron in itself.⁹⁶ What this demonstrates is the blatant stigma against commoditizing an object deemed important to the function of human beings.⁹⁷ Despite the donative language,⁹⁸ individuals are doing just that: assigning market value to human parts.

While there is no legal United States market for transplantable organs,⁹⁹ there is a current market in the United States and worldwide—the black market.

“It is well known that a thriving international black market in human kidneys exists.”¹⁰⁰ It is estimated that 10,000 kidneys are traded on the black market annually, which is “more than one every hour.”¹⁰¹ Given the increased

⁹⁶ *Id.* Note that the term compensation does not indicate assigning the value to the egg or eggs themselves. Rather, women are compensated for “their time and eggs.” See Jayne Leonard, *How Does the Egg Donation Process Work?*, MED. NEWS TODAY, <https://www.medicalnewstoday.com/articles/314750> (last visited Sept. 10, 2023). *But cf., id.* (listing various forms of compensation and coverage for an egg donor).

⁹⁷ See Radin, *supra* note 94 (“These objects are usually things close to personhood and things we think of maybe as internal to personhood or as constitutive of personhood, rather than things that can be thought of as external. . . . It’s possible that what makes people upset about market status for things that are self-consecutive or related to personhood is that there are monetary equivalents, and not that there are actual transactions.”).

⁹⁸ By using donative language, U.S. law does not regard the transaction as a sale. See MED. NEWS TODAY, *supra* note 96 (“In the U.S., it is legal for a woman to donate eggs either anonymously or not. It is also legal to receive financial compensation for donating eggs. Egg donation clinics will require all donors to sign a contract that ensures they have no legal rights or responsibilities to any resulting children or embryos. Although the woman who receives the egg will not be a genetic relation of the child, legal documents will record her as the birth mother.”).

⁹⁹ This is not to say organ sales only occur through a seemingly unknown, underground, and terrifying black market. For example, Nick Rosen was paid \$20,000 to travel from Tel Aviv, Israel to New York to sell his kidney to an American. Rosen made a video to document his transplantation experience. Rosen reported that “only one U.S. hospital he approached about performing the transplantation blocked his efforts to move forward due to its screening process.” See *e.g.*, Milot, *supra* note 10, at 1063; Carla K. Johnson, *Man Says He Sold Kidney in US for \$20k*, THE SUN (Aug. 18, 2009, 12:00 AM), <https://www.sbsun.com/2009/08/18/man-says-he-sold-kidney-in-us-for-20k/> (last visited Sept. 10, 2023). Rosen engaged in what is known as transplant tourism, whereby “patients travel[] across national borders for healthcare elsewhere.” See Jacob A. Akoh, *Key Issues in Transplant Tourism*, 2 WORLD J. TRANSPLANTATION 9 (2012). Besides organ transplantation tourism, cosmetic surgery tourism has also become a phenomenon. DR. BAYER CLINIC, *BBL Surgery Abroad*, <https://www.yetkinbayer.com/en/bbl-surgery-abroad.html> (Aug. 16, 2021).

¹⁰⁰ J.S. Taylor, *Black Markets, Transplant Kidneys and Interpersonal Coercion*, 32 J. MED. ETHICS 698, 698 (2006).

¹⁰¹ *Organ Trafficking: The Unseen Form of Human Trafficking*, ACAMS TODAY (June 26, 2018), <https://www.acamstoday.org/organ-trafficking-the-unseen-form-of-human-trafficking> (stating that kidneys are “the most prominent organs that are traded illicitly”) (citing Denis Campbell and Nicola Davison, *Illegal Kidney Trade Booms as New Organ*

need for kidneys and other organs worldwide, the black market established its global enterprise as “[l]egislation cannot stop the law of supply and demand,”¹⁰² especially given that countries like the United States have created a government-imposed restraint on the supply.¹⁰³ Given that the need for a viable organ for individuals facing death is so high, and the fact that humans only need one kidney to survive,¹⁰⁴ kidneys are extremely marketable.¹⁰⁵

Donors and recipients face many risks in obtaining an organ transplant through the black market. Improperly matched organs, contaminated organs with diseases like HIV and Hepatitis C or other diseases, and medical problems during the procedure are common occurrences.¹⁰⁶ While those seeking organs are typically “wealthy, sick patients,” the black market “target[s] the desperately poor from impoverished countries” as donors.¹⁰⁷ Some people are “coerced into selling their kidneys by their family members” due to their impoverished state.¹⁰⁸

Organ brokers arrange illegal transplants and have a financial stake in the procedure.¹⁰⁹ If the organ broker does not perform his obligations under the established deal, the victims of this breach are left with no legal recourse.¹¹⁰

The IMKT has found a way to decrease or virtually eliminate its kidney waitlist via a compensatory regime, avoiding the dangers of the black market

is Sold “Every Hour,” THE GUARDIAN (May 27, 2012), <https://www.theguardian.com/world/2012/may/27/kidney-trade-illegal-operations-who>).

¹⁰² See Crepelle, *supra* note 68, at 50; *see also id.* (citing Pierre Lemieux, *The Underground Economy: Causes, Extent, and Approaches*, MONTREAL ECON. INST. RSCH. PAPERS at 5 (Nov. 2007), https://www.iedm.org/files/cdr_nov07_en.pdf (“Every time the propensity to exchange is constrained, individuals try to circumvent the constraints in order to obtain what they perceive as the benefits of exchange.”)).

¹⁰³ *See id.* at 52 (the prohibition of the sale of organs “has caused a shortage of organs, reduced quality of available organs, and created a black market.”).

¹⁰⁴ *Living with One Kidney: What to Know*, HEALTHLINE (March 9, 2020), <https://www.healthline.com/health/can-you-live-with-one-kidney> (“Although most people have two kidneys, you only need one functioning kidney to live an active, healthy life.”); *see also* Crepelle, *supra* note 68, at 52 (quoting Judge Guido Calabresi who notes that having two kidneys is too much).

¹⁰⁵ *See* ACAMS TODAY *supra* note 101.

¹⁰⁶ Crepelle, *supra* note 68, at 53.

¹⁰⁷ *Id.* at 52, 53.

¹⁰⁸ *See* Taylor, *supra* note 100, at 698.

¹⁰⁹ Organ brokers, having targeted poorer individuals, frequently deceive these sellers by giving the seller less than what may have been asked for, less than market value, or by not giving the seller any compensation at all. *See* Crepelle, *supra* note 68, at 53, 55; *see also* Taylor, *supra* note 100, at 698.

¹¹⁰ In the United States, for example, making a contract for something illegal means the contract itself is illegal and, therefore, it is unenforceable. *See* U.C.C. § 2-302 (AM. L. INST. & UNIF. L. COMM’N 2012).

entirely.¹¹¹ Unlike the black market, where “[b]rokers have incentives to deceive both the patient and organ provider because a broker’s payment hinges on the deal going through,” DATPA, a non-profit volunteer-based organization, does not compensate its volunteers for their efforts in the process.¹¹²

Iran has found a way to virtually limit the oversight of a middleman, simultaneously eliminating risky self-interest and incentivizing legal self-interest. It is evident that one of the U.S. system’s faults rests in its multi-middleman donation system, creating more individual-leveled interests. For example, given the disparity between available donors and actual donation, one may blame the self-interest of OPOs, who often instruct hospitals to not refer certain patients even before an OPO can examine the viability of a donor’s organs in terms of donation value “to tamper with the numbers they have to report as referrals, [avoiding] documentation of a case if the healthcare providers (HCPs) or OPO anticipate that it will be an unlikely donation.”¹¹³

V. ANALYSIS ON CURRENT PROBLEMS OF THE UNITED STATES SYSTEM

“I thought . . . I might in process of time . . . renew life where death had apparently devoted the body to corruption.” – *Frankenstein*.¹¹⁴

In 2003, Apple co-founder and CEO Steve Jobs was diagnosed with pancreatic cancer.¹¹⁵ In 2009, Jobs “gamed the transplant allocation system to get a liver that could have saved somebody else” by registering on multiple organ waiting lists in various states. Despite his residency in North Carolina, he obtained a liver from Tennessee where he had a higher likelihood of receiving an organ due to a shorter wait list.¹¹⁶ Getting on multiple states’ registrations lists is not illegal, but it is an option which is unavailable to ordinary people.¹¹⁷ Ordinary people “can’t go to multiple states for evaluations[,] [t]hey don’t have private jets[, and] [t]heir insurance doesn’t

¹¹¹ Since transplantation in Iran occurs in government hospitals at the government’s expense, the IMKT is technically not a commercial transaction with a sale under Iranian law. See Einollahi, *supra* note 69, at 7; see also Siraj *supra* note 70.

¹¹² Crepelle, *supra* note 68, at 65-66; see also Einollahi, *supra* note 69, at 3 (explaining there is no room for a broker like entity or individual in the IMKT); see also Siraj, *supra* note 70.

¹¹³ Todd Park et al., *supra* note 28, at n. 27.

¹¹⁴ FRANKENSTEIN, *supra* note 1.

¹¹⁵ William Saletan, *How Did Steve Jobs Get His Liver?*, SLATE (Jan. 19, 2011, 8:55 A.M.), <https://slate.com/technology/2011/01/steve-jobs-liver-transplant-did-he-game-the-system.html>.

¹¹⁶ *Id.* (“Different parts of the country have different waiting lists, and the wait in Northern California was three times longer than the wait in Tennessee.”).

¹¹⁷ *Id.* (“Ordinary people cannot compete with billionaires.”).

cover multiple evaluations and may not cover much of the half-million dollar transplant, much less the follow-up care.”¹¹⁸

In our current system, money dictates an individual's ability to receive an organ, regardless of the donative language¹¹⁹ used in the process. Despite the language and perception of the system in the US, there is one truth which is clear: organs are marketable.¹²⁰ Moreover, organ transfer transactions occur regardless of their prohibition and will continue to occur in the black market to the detriment of donees and donors alike. Society and legislators can no longer deny an already present and powerful economic force.

For this reason, the U.S. can learn from the Iranian system which has accepted these facts and use them to the country's advantage. In the Iranian system, the government acknowledged that legitimized schemes of compensation for organs will increase the supply on the markets and limit, if not eradicate, organ waitlists.¹²¹ However, the U.S. should not merely implement a compensatory organ market; instead, it should allow individuals to retain ownership rights in their organs upon extraction, giving the individual autonomy over their person and the materials which compose it. Opposition to this kind of system can be summarized in three separate categories: religious aversion, fear of commercializing the human body and its materials, and disdain of economic coercion.

A. A BRIEF OVERVIEW OF RELIGIOUS INFLUENCE ON ORGAN TRANSPLANTATION AND COMMODOFICATION

Before diving into the more legally substantive debates regarding organ commodification, it is important to highlight one issue which may be fueling some of the animosity towards bodily marketability: religion.

In Islam, God governs the body, not humans.¹²² According to the Qu'ran, the sanctity of the human body is one of God's unique powers and an essential doctrine of Islam.¹²³ This religious influence may explain why the Iranian government does not consider their organ commodification regime as a recognition that organs are property.¹²⁴ The transplantation of organs initially

¹¹⁸ *Id.*

¹¹⁹ For example, despite the clear compensation for those individuals who opt to sell their eggs, donative language is used to describe this transaction and the transactions are recategorized as a sale of services. See EGG BANK AM., *supra* note 95.

¹²⁰ Johnson, *supra* note 99; see Taylor, *supra* note 100; see also ACAMS TODAY, *supra* note 101.

¹²¹ Moeindarbari and Feizi, *supra* note 7.

¹²² Aramesh, *supra* note 43; Takhshid, *supra* note 42.

¹²³ See Hoffman, *supra* note 71, at 38.

¹²⁴ See Takhshid, *supra* note 42, at 91-92.

hinged on a *fatwa*, a study by religious scholars, whereby Shīah scholars saw lifesaving procedures, like organ transplantation, as religiously permissible.¹²⁵

While “[n]o religion formally forbids donation or receipt of organs or is against transplantation from living or deceased donors,”¹²⁶ many Christian religious leaders¹²⁷ have discouraged the concept of commercializing the organ market. According to Pope John Paul II, “any procedure which tends to commercialize human organs or to consider them as items of exchange or trade must be considered morally unacceptable, because to use the body as an ‘object’ is to violate the dignity of the human person.”¹²⁸ Yet, Pope John Paul II “publicly supported organ donations” calling them “a praiseworthy example of Christian love.”¹²⁹

Likewise, one of Pope John Paul II’s predecessors, Pope Benedict XVI, “has publicly announced that he carries a donor card at all times.”¹³⁰ Jewish authorities have yet to outright forbid the sale of organs, and rhetoric by Jewish scholars is concerned about “solving some specific pragmatic problems” like ensuring informed consent and avoiding exploitation.¹³¹

The debate regarding commodification of human bodily materials demonstrates “culturally deeply-rooted ideas concerning human nature and existence, personhood, personal identity and the body.”¹³² The influence of

¹²⁵ See Takshid, *supra* note 42, at 91.

¹²⁶ Paolo Bruzzone, *Religious Aspects of Organ Transplantation*, 40 *TRANSPLANTATION PROC.* 1064 (2008).

¹²⁷ According to a minister of the Presbyterian Church, “the Sixth Commandment . . . requires us to respect the Lord as owner of our bodies, and therefore, ‘that I hurt not myself, nor willfully expose myself to any danger,’ much less offer my body parts for sale to the highest bidder. If by the donation of an organ, or by giving blood, I can do good to others, I will do so as an act of self-sacrificial love, and glorify God thereby, asking nothing in return. To make merchandise of body parts is nothing less than the crime of fencing stolen goods.” Another presbyterian minister stated, “The human body is a God-creation. It is beyond value, it is more than a commodity.” David J.B. Krishef, *Ethics and Religion Talk: Why Can’t I Sell Parts of My Body?*, *THE RAPIDAN* (May, 9, 2022 at 12:39 p.m.), <https://www.therapidian.org/ethics-and-religion-talk-why-cant-i-sell-parts-my-body>. Likewise, Methodist leaders generally agree with the prohibition of body parts. *Id.*

¹²⁸ See Bruzzone, *supra* note 127, at 1066. This line of rhetoric is especially relevant to the following section.

¹²⁹ Michael Oliver et al., *Organ Donation, Transplantation and Religion*, 28 *NEPHROLOGY DIALYSIS TRANSPLANTATION* 437, 438-39 (2011) (“Most Anglican, Catholic and Protestant scholars seem to agree that organ donation is an act of selflessness and endorse transplantation.”)

¹³⁰ *Id.* at 439.

¹³¹ William E. Stempsey, *Religion, Philosophy, and the Commodification of Human Body Parts*, 55 *DEPAUL L. REV.* 875, 879 (2006).

¹³² Mark Schweda & Silke Schicktanz, *The “Spare Parts Person”? Conceptions of the Human Body and Their Implications for Public Attitudes Towards Organ Donation and*

these concepts create arbitrary lines. We are willing to “admire those who are paid for using their bodies for a hard day’s work, but we frown on those who are paid for using their bodies in prostitution.”¹³³ Religion praises the giving of organs, but many loathe the concept of profiting off the altruistic act. If giving an organ is the praiseworthy example of what it means to show Christian love, according to Pope John Paul II,¹³⁴ or if the *fatwas* permit donations as a lifesaving function,¹³⁵ then donating an organ is not a religious requirement but morally and religiously viewed as going above and beyond the individual’s duty as a vessel of its faith. Therefore, it logically flows that demanding money for donation is not morally wrong, but perhaps not as “good”¹³⁶ because the act may be done more so for financial gain. Regardless of intention, the product is still the same: a life is saved. With that being said, the root of the issue lies deeper than religious perspective. It is an aversion to commodification of an already commodified entity, the human body and its materials.

B. THE COMMODIFICATION OF HUMANS AND THEIR BODILY MATERIALS

At one point in United States history, some humans were considered property. The Supreme Court cemented this unfortunate well-accepted law of the land through judicial approval in *Dred Scott v. Sandford*.¹³⁷ Further, well after the legislative superseding of *Scott*, the United States “depicted Black Americans as powerless individuals, bought and sold at will, without any

Organ Sale, 4 PHIL., ETHICS, & HUMANS IN MED (2009), <https://peh-med.biomedcentral.com/articles/10.1186/1747-5341-4-4>.

¹³³ Stempsey, *supra* note 132, at 883.

¹³⁴ See Oliver, *supra* note 130, at 439.

¹³⁵ See Takhshid, *supra* note 42, at 91.

¹³⁶ Stephen Wilkinson, *The Sale of Human Organs*, STAN. ENCYC. PHIL. (Oct. 17, 2011) <https://plato.stanford.edu/entries/organs-sale/> (substantially revised on Oct. 22, 2015).

¹³⁷ *Dred Scott v. Sanford*, 60 U.S. 393, 451 (1857) (holding slaves were an article of property under the Constitution of the United States). In *Scott*, a slave sued for his freedom after his owner took him into a “Once Free Always Free” state. Upon holding that slaves were property, the Court reasoned that slaves were never conceptualized within the political community when the U.S. Constitution was drafted by the Framers. The Fourteenth Amendment was passed to overturn *Scott*, declaring there can be no property rights in one’s person. U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”). Today, *Scott* continues to be one of the most controversial decisions in the United States. See Paul Finkelman, *Scott v. Sandford: The Court’s Most Dreadful Case and How It Changed History*, 82 CHI.-KENT L. REV. 3, 3 (2007) (noting that the reputation of the case as a “bad” decision but recognizing the constitutional significance for the rest of United States history).

autonomy, legal rights, or protection of the law”¹³⁸ in its media. According to Michele Goodwin, “[s]lavery is perhaps the clearest and most crude example of ‘body ownership’” in the United States and beyond.¹³⁹ Even after the end of chattel slavery in the United States, racism still exists¹⁴⁰ and has a prevalent role in all areas of life,¹⁴¹ including organ donations.¹⁴²

¹³⁸ MICHELE GOODWIN, *THE SUPPLY AND DEMAND OF BODY PARTS* 195 (2006) (citing examples such as Margaret Mitchell’s “Gone with the Wind” movie adaptation, *Uncle Tom’s Cabin* by Harriet Beecher Stowe, and Alex Haley’s *Roots*).

¹³⁹ Goodwin notes that “the institution of slavery extends beyond American involvement; it’s roots can be found in religious literature, dating back hundreds if not thousands of years, such as the Bible, Torah, and Koran, with roots in Africa[] and Europe.” *Id.* Further, body commoditization has long been a part of the world’s history as Goodwin states that “less well-known [] examples . . . involved doctors and medical hospitals purchasing corpses for research purposes and use in anatomy classes. Even Leonardo daVinci is said to have hired grave diggers to support his mapping of the human body.” *Id.*

¹⁴⁰ In 2013, a group known as Black Lives Matter (BLM) was formed in the United States with the mission “to eradicate white supremacy and build local power to intervene in violence inflicted on Black communities by the state and vigilantes.” *About*, BLACK LIVES MATTER, <https://blacklivesmatter.com/about/> (last visited Sept. 10, 2023). A study showed that “African Americans are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted, and they are more likely to experience lengthy prison sentences.” *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, THE SENTENCING PROJECT (Apr. 19 2018), <https://www.sentencingproject.org/publications/report-to-the-united-nations-on-racial-disparities-in-the-u-s-criminal-justice-system/>. Further, in 2020, Black Americans “were 93 percent more likely to be victims of hate crime.” Michael Warren, *Annual Report Shows Systemic Racism Continues to Bring down Black People’s Quality of Life*, PBS (Apr. 12, 2022 10:44 AM), <https://www.pbs.org/newshour/nation/annual-report-shows-systemic-racism-continues-to-bring-down-black-peoples-quality-of-life>. As of 2022, statistics “show[] not only that median household income for Black people, at \$43,862, is 37 percent less than that of white people, at \$69,823. Black people also are less likely to benefit from home ownership, the engine of generational wealth in America.” *Id.*

¹⁴¹ See Warren, *supra* note 141 (describing the “grim” findings of the 2022 annual report of the National Urban League which showed that Black Americans “still get only 73.9 percent of the American pie white people enjoy”).

¹⁴² “The organ donation system is failing patients and donor families of color through every phase of the process – from getting on the waitlist, to finding a match, to becoming a donor.” Todd Park et al., *supra* note 28. Despite people of color being far more likely to need an organ, they “are significantly *less* likely to be put on a waitlist, and also less likely than white patients to receive a life-saving organ transplant even once they are.” *Id.* According to the American Society of Nephrology, “Black Americans face disparities in nearly every step of transplant care. Black Americans are less likely than White Americans to be identified as a transplant candidate, referred for evaluation, put on the kidney transplant waitlist, receive a kidney transplant, receive a higher-quality kidney from a living donor, while also being more likely to receive lower quality kidneys and have poorer transplant graft survival.” *Id.*

Today, market transactions involving body materials occur frequently,¹⁴³ whether legal or not. Although there may be an inherent discomfort with the marketability of human body materials, it is undeniable that lives are saved¹⁴⁴ and critically important research is performed.¹⁴⁵ While the debate about slavery and human organ commodification is a concern by many opposed to this market system,¹⁴⁶ there are significant distinctions between slavery and a legal market based on compensation for organs that should not cloud the inherent benefits the system would bring.¹⁴⁷ First, compensatory organ procurement is “a life-saving system,” where the prevalence of more “African American organ donors might likely save the lives of African American patients.”¹⁴⁸ Black Americans would be “direct beneficiaries of such a system, unlike with slavery,” who at present experience unique inequities in the current organ donation system.¹⁴⁹ Second, involvement in the system is still entirely voluntary. A donor is financially compensated for his or her participation and is allowed to enter into contracts and bargain for a worthy amount.¹⁵⁰ Moreover, as previously indicated, the system is not compulsory—it's voluntary. Finally, unlike slavery, “African Americans would not be

¹⁴³ See e.g., Johnson, *supra* note 99; Milot, *supra* note 10, at 1063; ACAMS TODAY, *supra* note 101; Crepelle, *supra* note 68, at 52.

¹⁴⁴ For example, “[o]ne deceased organ donor can save up to eight lives[.]”6 *Quick Facts About Organ Donation*, PENN MED. (March 26, 2022), <https://www.pennmedicine.org/updates/blogs/transplant-update/2022/march/6-quick-facts-about-organ-donation>.

¹⁴⁵ GOODWIN, *supra* note 139, at 198.

¹⁴⁶ It is important to note that Black Americans are already systematically oppressed by the voluntary basis of the current organ procurement regime. See Park, *supra* note 28. The systematic racism inherent in United States culture and within its organ donation system against Black Americans and other people of color is an important separate topic requiring an analysis of its own. However, arguments that people of color would only be victims in a compensatory organ procurement system “detract attention from the possibility that African Americans might benefit from a market-based system.” *Id.*

¹⁴⁷ See Steeb, *supra* note 67, at 341 (noting the compensatory organ system of Iran has “eradicate[d] the country’s waiting list for the world’s most sought-after organ—the kidney”).

¹⁴⁸ GOODWIN, *supra* note, 139, at 199. According to Goodwin, “African Americans are critical in the fight to save the lives of African Americans.” *Id.*

¹⁴⁹ See Park, *supra* note 28. See also GOODWIN, *supra* 139, at 199. Further, slavery was a “financially exploitative system,” which “fail[ed] to prove compensation for the labor exchange.” *Id.* at 200.

¹⁵⁰ Such rights were entirely lacking in the slave system in the United States. Due to economic injuries of slavery, where Black Americans were “[w]ithout the right to engage in the marketplace, African Americans were effectively denied the opportunity to pursue the ‘American dream’ of economic independence and growth.” See GOODWIN, *supra* note 139, at 200.

threatened with risk of bodily injury were they to decline participation in the organ procurement process.”¹⁵¹

Further, the human body is already commodified by U.S. Models,¹⁵² athletes,¹⁵³ and celebrities¹⁵⁴ who all make money from their body and personhood. Prostitution is a clear example of the commodification of the body.¹⁵⁵ Despite a moral aversion¹⁵⁶ to the idea of an individual electing to pursue a career in sex work, it is legal in many countries internationally, including in some states within the United States.¹⁵⁷

Prostitution is the most dangerous type of sex work, affording the individual with the least number of safeguards legally and in terms of physical safety.¹⁵⁸ Another dangerous form of sex work is porn. Despite being

¹⁵¹ See GOODWIN, *supra* note 139, at 202.

¹⁵² Vogue instructs businesses to “[u]se models to tell a story” as “[e]very e-commerce platform is selling a unique story to its consumer about who they are—or could be—after making a purchase. . . . It’s easiest to tell these stories by styling products on a model rather than shooting products flat.” Jessica Schiffer, *How Fashion Brands Use Product Imagery to Sell their Story*, VOGUE BUSINESS (May 22, 2019), <https://www.voguebusiness.com/fashion/fashion-brands-use-product-imagery-to-sell-their-story>.

¹⁵³ Athletes are assessed by their body’s ability to accomplish great things. Further, “[m]any athletes push themselves to their physical limits in training and competitions. Spartan training methods are designed to put them in challenging situations and overcome their physical limitations with mental discipline. That approach also may result in potentially dangerous situations.” *Athletes Push Their Limits, But How Much is too Much?*, GAZETTE (Apr. 4, 2011, 8:43 AM), <https://www.thegazette.com/news/athletes-push-their-limits-but-how-much-is-too-much/>.

¹⁵⁴ “It’s not a new idea in marketing; celebrity endorsements sell products. . . . [W]hen famous people are seen in advertisements promoting a new product, audiences are prompted to buy that product. . . .” Steve Olenski, *How Brands Should Use Celebrities for Endorsements*, FORBES (July 20, 2016, 2:43 PM), <https://www.forbes.com/sites/steveolenski/2016/07/20/how-brands-should-use-celebrities-for-endorsements/?sh=7ed510665593>.

¹⁵⁵ I will be expanding more on prostitution under Economic Coercion. For purposes of this article, I am confining my discussion to women in prostitution. Male, gay, and transgender sex workers face unique and important issues, worthy of their own discussion, which is separate from the one at hand.

¹⁵⁶ See, e.g., Engel, *supra* note 18 (quoting then U.S. Representative of Tennessee Albert Gore who felt that efforts to commercialize organs was “abhorrent to our system of values,” as Gore noted that “[i]t seems to be something inconsistent with our view of humanity Prostitution is illegal for reasons that are similar.”).

¹⁵⁷ Prostitution is legal in the state of Nevada in the United States under certain conditions. Nev. Rev. Stat. Ann. § 201.354.

¹⁵⁸ See Serena Maszak, *Violence in Prostitution* (May 17, 2018) (M.A. Thesis, City University of New York) (on file with CUNY Libraries, City University of New York) (“The high rates of physical and sexual violence prevalent in prostitution have been well-established. It is estimated that anywhere from two-thirds to 100% of prostitutes have been victims of violence.” (citation omitted)).

physically removed from the consumer, porn actors and actresses face discrimination that weakens their autonomy in the face of porn websites and management teams.¹⁵⁹ The rise of OnlyFans, however, has “liberate[d] sex work and pornography, out of the grips of misogynistic businessmen and exploitative contracts, as the creators themselves gain control over the photography of their bodies.”¹⁶⁰ Onlyfans has granted sex workers with the highest form of autonomy available thus far in the industry, removing the middleman production company, allowing individuals to sell a product unique to the sex worker by curating their own content.¹⁶¹ Overall, OnlyFans bolstered the income and autonomy of sex workers—especially women in the industry.¹⁶²

In the same way that there is a well-established black market for sex work,¹⁶³ there is a similarly dangerous black market for organ procurement.¹⁶⁴ A legal organ market, analogous to other industries in which the body is commodified, would be the next step towards autonomy, however, it still denies the individual full rights and access to a product that is unique to the donor as it runs the risk of middleman exploitation.

Giving the donor ownership rights to their organs, analogous to OnlyFans, puts the individual in control of their own body by creating a personal one-on-one sale, whereby the individual can negotiate the value of their organ—an item which is marketable, desirable, and unique to the individual.

Further, by denying women a market to sell their eggs, a bodily material unique to female anatomy, society perpetuates the current economical

¹⁵⁹ Mia Khalifa, after three months of being in the industry several years ago, is “still [a] top-ranked presence bringing in cash for websites, yet leaving her without a cut.” Alex Horton, *Mia Khalifa is among the world's most-watched women. Yet the porn industry is keeping the profits*, WASH. POST (Aug. 16, 2019), <https://www.washingtonpost.com/business/2019/08/16/mia-khalifa-is-among-worlds-most-watched-women-yet-porn-industry-is-keeping-profits/>.

Khalifa is ranked number two on these sites “with an eye-popping 784 million views alone — more than two for every person in the United States. But she does not get any residuals from that site or any others.” *Id.*

¹⁶⁰ Beth Wright, *OnlyFans has the potential to empower pornographic creators but the platform needs to do more*, VARSITY (June 19, 2020 at 12:30 PM),

<https://www.varsity.co.uk/opinion/19488>. “The horror stories of non-consensual, abusive and manipulative behaviour continue to haunt the sex industry; however OnlyFans takes the step to strip away the middle man figure of a director, agent or ‘pimp’ as women create their own footage from their bedrooms.” *Id.*

¹⁶¹ *Id.* “Not only do creators have power over their content, but the platform is intrinsically safer and more flexible than traditional forms of sex work.” *Id.*

¹⁶² *Id.*

¹⁶³ See Margaret Jane Radin, *CONTESTED COMMODITIES* (1996), *reprinted in* RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE 88 (Martha M. Ertman & Joan C. Williams, eds., 2005)).

¹⁶⁴ See ACAMS TODAY, *supra* note 101.

hierarchy.¹⁶⁵ Overall, denying the ability to sell such products on the market is not denying the market exists, but instead systematically oppressing women's autonomy and potential for economic prosperity.

C. THE FEAR OF ECONOMIC COERCION IN A LEGAL MARKET

Beyond conditions of slavery, many fear that “[e]ven in a regulated, government-run version . . . , ‘unethical realities’ lead to exploitation of the poor and the vulnerable.”¹⁶⁶ Concerns about commodification of organs are interwoven with concerns about the exploitation of those in poverty, who feel compelled to engage in a system for economic gain.¹⁶⁷ The oversimplified response would be to welcome those concerned with this argument to the albeit unfortunate realities of capitalism¹⁶⁸—a main component of capitalism is its motive to incentivize individuals to make profit.¹⁶⁹ However, this ignores the already-present happening of the exploitation of those deemed legally incompetent in United States jurisprudence and the economically less fortunate through the black market internationally.

One fear that builds off notions of slavery is that society could use a human, without their consent, to grow and harvest organs for another person. According to this mindset, a donative class of people will be pressed into service for the greater good of society at their expense, creating immense individual harm for the donative class members.¹⁷⁰ Moreover, many people

¹⁶⁵ Women globally are paid significantly less than men. See *Closing gender pay gaps is more important than ever*, UNITED NATIONS (Sept. 18, 2022), [https://news.un.org/en/story/2022/09/1126901#:~:text=On%20average%2C%20women%20globally%20are,Sunday%2C%20International%20Equal%20Pay%20Day](https://news.un.org/en/story/2022/09/1126901#:~:text=On%20average%2C%20women%20globally%20are,Sunday%2C%20International%20Equal%20Pay%20Day.). Women are statistically more likely to be poor in 2022 than men. *Poverty deepens for women and girls, according to latest projections*, UN WOMEN (Feb. 1, 2022), <https://data.unwomen.org/features/poverty-deepens-women-and-girls-according-latest-projections#:~:text=New%20projections%20of%20global%20poverty,372%20million%20men%20and%20boys>). Moreover, most of the world's current poor population are women. *Why the Majority of the World's Poor are Women*, OXFAM INT'L, <https://www.oxfam.org/en/why-majority-worlds-poor-are-women> (last visited Sept. 10, 2023).

¹⁶⁶ Corydon Ireland, *The ethics of the organ bazaar in Science & Technology*, HARV. GAZETTE (Feb. 13, 2008), <https://news.harvard.edu/gazette/story/2008/02/the-ethics-of-the-organ-bazaar/>.

¹⁶⁷ See, e.g., MARGARET JANE RADIN, *CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS, AND OTHER THINGS* 8 (2001).

¹⁶⁸ The moral issues behind capitalism have been criticized for decades. However, it is an important conversation separate from the one at present, worthy of its own discussion.

¹⁶⁹ Sarwat Jahan & Ahmed Saber Mahmud, *What Is Capitalism?*, 52 FIN. & DEV. 44 (2015).

¹⁷⁰ I refer to this class of fear as the “scare of My Sister’s Keeper.” The novel follows the life of a young girl born with the purpose of saving her sister’s life by donating her bodily materials. JODI PICOULT, *MY SISTER’S KEEPER* (2004). Eventually, she sues her family for

fear that, by creating a legal market, the legally incompetent will be compelled to give their organs to siblings, family members, or strangers in need. However, despite the lack of a legal market for organ transplantation, this practice already occurs and many United States courts “have addressed whether consent from a parent, guardian, or court for the removal of a kidney or bone marrow for transplantation from a healthy child to a terminally ill sibling is legally effective,” whereby “[s]ome have answered . . . in the affirmative.”¹⁷¹

The first case in the U.S. to directly address “whether a parent could authorize removal of one child’s kidney for procurement to another”¹⁷² occurred in 1969 in the Kentucky Court of Appeals. According to the court’s *Strunk* decision, “if that person is legally incompetent, such as a minor, the court’s authority gives rise to decision making about his health as well as his property.”¹⁷³ Interestingly, the court utilized substituted judgment to reach its conclusion, which was formerly exclusively used for property disposition.¹⁷⁴

The decisions that followed upheld *Strunk*’s reasoning¹⁷⁵ that it would be in the incompetent person’s best interest to give his kidney to his sibling, as

medical emancipation when her parents attempt to force her to sell her kidney to her sister dying of leukemia. *Id.* While this book is fiction, stories of this nature have happened. Cheyann Miller, a young girl from Australia “was born to save her [sister, Sara Miller’s] life” as “Cheyann was born and doctors immediately collected four bags of her umbilical cord blood in the hope of saving her sister’s life.” Cindy Tran, *My Sister’s Keeper: How a little girl was conceived to save her older sibling’s life after she developed an extremely rare condition and needed a world-first triple organ transplant*, DAILY MAIL (Aug. 7, 2019, 9:49 PM), <https://www.dailymail.co.uk/femail/article-7335181/Cheyann-Miller-born-save-sister-Sara-Millers-life.html>. Cheyann also gave bone marrow to her sister and other bodily materials were donated to strangers. *Id.* Other family members besides Cheyann donated to her sister, including their father, who gave Sara a kidney. *Id.*

¹⁷¹ GOODWIN, *supra* note 139, at 73 (citing a string of cases: *Strunk v. Strunk*, 445 S.W.2d 145 (Ky. 1969); *Hart v. Brown*, 289 A.2d 386 (Conn. Super. Ct. 1972); *Bonner v. Moran*, 126 F.2d 121 (D.C. Cir. 1941); *Little v. Little*, 576 S.W.2d 493 (Tex. Civ. App. 1979); *Hurdle v. Currier*, 5 Va. Cir. 509 (1977); *In re Guardianship of Pescinski*, 226 N.W.2d 180 (Wis. 1975); *In re Richardson*, 284 So.2d. 185 (La. App. 1973)).

¹⁷² *Id.* at 74 (describing *Strunk*, 445 S.W.2d at 145-46, where a mother of a mentally incompetent twenty-seven-year-old consented to his transfer of a kidney to her older twenty-eight-year-old child who suffered from a kidney disease and would die absent transplantation).

¹⁷³ *Id.* at 75-76.

¹⁷⁴ *Id.* at 76 (noting despite “intense scrutiny” of the Kentucky Court of Appeals’ “provocative evocation of arcane legal tenants such as substituted judgement,” many states have adopted this jurisprudence) (citing to *Hart v. Brown*, 289 A.2d 386 (Conn. Super. Ct. 1972); *Little v. Little*, 576 S.W.2d 439 (Tex. Civ. App. 1979); and *Hurdle v. Currier*, 5 Va. Cir. 509 (Va. Cir. Ct. 1977)).

¹⁷⁵ GOODWIN, *supra* note 139, at 74 (suggesting that “emotionally and psychologically . . . his well-being would be jeopardized more severely by the loss of his brother than by the removal of a kidney”) (quoting *Strunk v. Strunk*, 445 S.W.2d 145 (Ky. 1969)).

his sibling's life was far more valuable than his kidney.¹⁷⁶ Some courts have even expanded the *Strunk* ruling, finding “it would be of ‘immense benefit’” for a child to donate her kidney to her sick family member and “that she would be happy if her family were happy, thus permitting her parents to substitute their legal judgement for her.”¹⁷⁷

Additionally, organ donation has been used in exchange for one's liberty in the United States. For example, in 2011, Mississippi's then-Governor Haley Barbour conditioned the release of two sisters, Gladys and Jamie Scott, who were serving life sentences in prison since 1993, on Gladys donating her kidney to Jamie.¹⁷⁸

Moreover, organ traffickers target the poor with money or even threats.¹⁷⁹ Given the known dangers of the black market, impoverished individuals still risk such dangers to potentially get out of poverty.¹⁸⁰ Even more disheartening

¹⁷⁶ *Strunk* occurred at a particularly unique time in America's jurisprudence and history—one particularly unforgiving of the mentally ill and mentally disabled. This arcane treatment of disabled individuals reaches far back in United States history, and *Strunk* personified it. For example, Michelle Goodwin, in analyzing the *Strunk* decision, states “[t]hat Jerry was mentally incompetent with an IQ of 35 may have been more revealing and probative for the court than the close bond between the brothers that the justices allude to but fail to substantiate with any clear evidence.” See GOODWIN, *supra* note 139, at 74. Moreover, *Strunk* demonstrates how those suffering with mental illness were viewed as “compromised” and “more easily at the disposal of courts for less sensitive treatment.” *Id.* at 75 (noting how the amicus brief submitted to the court by the Kentucky Department of Mental Health described Jerry as “defective”). Based on the court's reasoning, the healthy brother, Tom, was recognized by the court and society as socially valuable and as the court builds toward its holding, Goodwin notes that “the court observed that Tom was married, working, and going to college; undoubtedly he would benefit society,” which is juxtaposed with Jerry, who had the mental capacity of a 6six-year-old who had been “confined to Frankford State Hospital as a ward of the state.” *Id.* at 74-75. Despite its emphasis on the mentally incompetent, the court did not limit its holding therein, instead it opened the door for any individual deemed legally incompetent to make independent decisions of this sort, and, therefore, according to Goodwin, “the ruling was more about judicial authority to interpose its judgement when an appropriate situation involving a legally incompetent person was presented to the court.” See *id.* at 75.

¹⁷⁷ *Id.* at 76.

¹⁷⁸ Amanda Seals Bersinger & Lisa Milot, *Posthumous Organ Donation as Prisoner Agency and Rehabilitation*, 65 DEPAUL L. REV. 1193, 1200-01 (2016).

¹⁷⁹ E.g., David Glovin, Michael Smith & Daryna Kransnolutska, *Organ traffickers prey on world's poor with money, threats*, SEATTLE TIMES (Nov. 8, 2011, 12:00 AM), [¹⁸⁰ Glovin, *supra* note 177 \(describing a donor's desire to donate his kidney on the black market was rooted in “a step toward getting out of poverty”\).](https://www.seattletimes.com/seattle-news/health/organ-traffickers-prey-on-worlds-poor-with-money-threats/#:~:text=An%20international%20black%20market%20in,of%20victims%20around%20the%20world;Crepelle, supra note 68, at 52 (“Organ brokers target the desperately poor from impoverished countries”).</p>
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is, absent a legal market, those negatively affected by organ procurement and transplantation on the black market lack a form of recourse for their illegal contract and will generally not be covered by health insurance for complications.¹⁸¹

Instead of focusing on the underlying harms of capitalism, we should shift our focus towards making the situation less harmful for individuals who desire to engage in the marketplace: a harm-reduction approach. Rhetoric should shift to “the likely level of harm that would occur within a properly regulated system.”¹⁸²

Currently many people have no good options but are motivated to choose jobs like coal mining, prostitution, or drug dealing due to pressures of economic forces that likely would not be chosen absent these external forces. Put simply, we will not cure the desperation of individuals pursuing monetary compensation for their organs on the black market by banning these sales.¹⁸³

Prostitution, for example, is clearly an inherently dangerous job for women that decide to pursue it.¹⁸⁴ It is also a career path viewed with moral scrutiny.¹⁸⁵ However, “sex is already commodified”¹⁸⁶ as a legal market for prostitutes exists in the U.S. and internationally and there is a well-established black market. Further, a practice of commodification of sexuality and sexual intercourse is tolerated in traditional male-female prostitution where “[t]hose who purchase prostitutes' services are often not prosecuted.”¹⁸⁷ Decriminalization of the sale of sexual services is the most obvious solution

¹⁸¹ Insurance will not cover “healthcare costs caused by your participation in an illegal act” if there is an illegal act exclusion and does not uniformly enact this blanket refusal in the exclusion’s absence. Elizabeth Davis, *Surprising Things not Covered by Health Insurance*, VERYWELL HEALTH (Sept. 17, 2020), <https://www.verywellhealth.com/things-health-insurance-wont-cover-1739008#:~:text=Breaking%20the%20Law&text=Your%20health%20insurance%20might%20not,participation%20in%20an%20illegal%20act.> (last visited Sept. 10, 2023).

¹⁸² Wilkinson, *supra* note 137.

¹⁸³ “Perhaps worse injury to personhood is suffered from the desperation that caused the attempt to sell a kidney or cornea than would be suffered from actually selling it. The would-be sellers apparently think so. Then justice is not serviced by a ban on ‘desperate exchanges.’” RADIN, *supra* note 168, at 125 (2001).

¹⁸⁴ “Poor women who believe that they must sell their sexual services in order to survive are subject to moral opprobrium, disease, arrest, and violence.” *Id.* at 88 (Martha M. Ertman & Joan C. Williams, eds., 2005).

¹⁸⁵ See Engel, *supra* note 18 (quoting then U.S. Representative of Tennessee Al Gore who felt that efforts to commercialize organs was “abhorrent to our system of values,” as Gore noted that “[i]t seems to be something inconsistent with our view of humanity . . . Prostitution is illegal for reasons that are similar. So is slavery”).

¹⁸⁶ *Supra* RADIN note 168, at 88.

¹⁸⁷ *Id.* “I am confining the present discussion to traditional male-female prostitution because I am considering a set of would-be commodities that women would control. Gay male prostitution is an important separate topic requiring an analysis of its own.” See RADIN, *supra* note 168, at 249 n.1.

as “[w]e should not subject poor women to the degradation and danger of the black market nor force them into other methods of earning money that seem to them less desirable than selling their bodies.”¹⁸⁸

Likewise, by shutting off a legal market, we leave the individual to the confines of the dangers of the black market. And, though we have viewed the commodification of bodily materials with, among other things, moral scrutiny, we have already commodified it.¹⁸⁹ It is well-established practice that “[i]ndividuals and corporations interact in the public marketplace . . . for a range of human biological materials” through advertisements.¹⁹⁰

A kidney operation, for example, is not a dangerous procedure when performed in good conditions by a medical team.¹⁹¹ Further, living organ donations are actively recommended by surgeons due to the safety of the procedure, expecting “virtually all donors [to] make a full recovery to normal health.”¹⁹² Therefore, “if paid donation is wrong because of the danger to which the donor is subjected, then free donation must also be wrong on the very same ground.”¹⁹³ Organ donation, though, is widely accepted and praised.¹⁹⁴ Morally, the aversion is rooted in the unsettling feeling of someone undergoing a potentially dangerous task for pay, however, as previously stated, taking on unpleasant employment is common.¹⁹⁵ Yet, we are not applying this same objection to other dangerous jobs like logging, piloting, aviation engineering, or roofing.¹⁹⁶ We need roofs over our heads, but under

¹⁸⁸ See RADIN, *supra* note 168, at 90.

¹⁸⁹ See *e.g.*, Schiffer, *supra* note 152; Gazette, *supra* note 153; Olenski, *supra* note 154; ACAMS Today, *supra* note 100.

¹⁹⁰ MICHELE GOODWIN, BLACK MARKETS: THE SUPPLY AND DEMAND OF BODY PARTS 175 (2006).

¹⁹¹ In the United States, for example, “perioperative mortality after donor nephrectomy is approximately 3 per 10,000 cases, and major and minor peri-operative complications affect approximately 3–6% and 22% of donors, respectively.” Krista L. Lentine & Anita Patel, *Risks and Outcomes of Living Donation*, 19 *ADVANCES CHRONIC KIDNEY DISEASE* 220, 220 (2012). Under a legal system, insurance will be able to take care and cover any major or minor complication post-operation. However, doing this same procedure on the black market means no health insurance coverage and the potential for an array of medical complications, including receiving an HIV positive organ. See, *e.g.*, Crepelle, *supra* note 68, at 52.

¹⁹² Wilkinson, *supra* note 137, at 4.

¹⁹³ *Id.*

¹⁹⁴ See, *e.g.*, Oliver, *supra* note 130, at 439.

¹⁹⁵ RADIN, *supra* note 168.

¹⁹⁶ Logging working, deemed the most dangerous job in America, has a rate of fatal accidents that is “28 times higher than the all-worker rate of 3.5 fatalities per 100,000 full-time equivalent workers.” Likewise, log workers have a median annual wage of \$40,650. Beth Braverman, *The 10 Most Dangerous Jobs in America*, CNBC (Dec. 28, 2019, 10:31 AM), <https://www.cnbc.com/2019/12/27/the-10-most-dangerous-jobs-in-america-according-to-bls-data.html>.

this logic, is it not wrong to pay a roofer to endanger themselves?¹⁹⁷ Of course not. It is hard to defend this objection where "the work is done voluntarily for fair pay."¹⁹⁸ The same logic should apply with equal force to organ compensation, just like we would for any job we deem "unpleasant."

Even if we are not paying the donor directly for their organs or other body materials, organ procurement organizations will "sell hearts, veins, tendons, bones, and other human biological material directly to tissue banks,"¹⁹⁹ "generat[ing] significant revenue for corporations, their stockholders, and savvy chief executive officers."²⁰⁰ Despite arguments that the job is risky and that society should not encourage endangerment for pay, there is an increased willingness to compensate corporations who face no dangers of bodily harm while the individuals take on the brunt of the risk.

By denying ownership rights to the individual who originally holds the organ within themselves via property law, we are ensuring that corporations, not the individual, reap the economic gain from sale of the organ.²⁰¹ Establishing a legal compensatory market for organs not only incentivizes more individuals to give their organ to another in need, it provides safer options to those in desperate conditions, assuring more autonomy in the hands of the individual.

D. BESIDES GIVING RECIPIENTS MORE OPTIONS ON AN OPEN MARKET, ASSIGNING PROPERTY RIGHTS TO ORGANS AND OTHER BODILY MATERIALS UPON EXTRACTION PROMOTES AUTONOMY AND OFFERS MORE BENEFITS THAT THE INDIVIDUAL MAY RECEIVE, WHICH INCENTIVES THE TRANSACTION.

As of now, the U.S. system allows corporations to profit off organ donation,²⁰² instead of the individual holding the organ within them, by

¹⁹⁷ "Much of the job for roofers requires spending time on top of buildings, repairing or installing their roofs. Given that they're often multiple stories above ground, any slip or fall can become a deadly event. The job is a physical one, requiring heavy lifting, climbing, and bending, often in uncomfortable weather conditions." *Id.* Roofers have 51.5 fatal injuries per 100,000 full-time equivalent workers. *Id.*

¹⁹⁸ Wilkinson, *supra* note 137, at 5.

¹⁹⁹ GOODWIN, *supra* note 191.

²⁰⁰ *Id.*

²⁰¹ "[I]n 2000, [William Heisel and Mark Katches] found that almost 70% of the 59 organ procurement agencies regulated by the federal government sell body parts directly to for-profit firms. Another 18% sell body parts to other nonprofit tissue banks that 'act as middlemen,' who then ship the tissues to for-profit companies. Over 20% of those selling directly to for-profit companies have expanded their cadaver and tissue recovery programs, arguably to meet the growing demand from corporate clients, which in turn increases their revenue." *Id.* at 179.

²⁰² *See id.*; *see also* Moore v. Regents of Univ. of Cal., 793 P.2d 479 (1990).

arbitrarily prohibiting the sale of organs and²⁰³ leaving the individual to the confines of the black market without legal recourse on a faulty deal²⁰⁴ and without the benefit of health insurance for medical complications.²⁰⁵

The U.S. can learn many important lessons from the Iranian system. First, through its compensatory regime, Iran exponentially decreased, if not eliminated, waitlists for various organs, including kidneys.²⁰⁶ Second, the lack of middleman-remuneration through government-funded non-profits safeguards the independence and autonomy of the process.²⁰⁷ Third, a legalized market eliminated the threatening force of the black market in Iran.²⁰⁸ Finally, negotiations for the organ's value remain between the donor and the recipient, with the middleman playing a role limited to guarding against the "avaricious donor."²⁰⁹

However, the U.S. should not stop just at legalizing the sale and compensation of organ transplantation for the benefits outlined above. Instead, the U.S. should grant individuals ownership rights in their organs upon extraction.

First, it grants individuals autonomy not only over their body and its materials, but autonomy to choose a form of income that appears better than other options to that individual.²¹⁰ By allowing individuals more options for compensation, society opens the door for more organs, while giving individuals the freedom to pursue compensation that fits their lifestyle and needs²¹¹ and alters the economic hierarchy.²¹²

Second, private property rights in organs will punish discriminatory behavior, including the system designed to distribute those organs.²¹³ Market

²⁰³ See *NOTA*, *supra* note 9.

²⁰⁴ See *Crepelle*, *supra* note 68, at 52; see also *Taylor*, *supra* note 100, at 698.

²⁰⁵ See *Davis*, *supra* note 182.

²⁰⁶ See *Steeb*, *supra* note 67.

²⁰⁷ *Einollahi*, *supra* note 69 (listing the expenses covered and provided by the Iranian government); see *Siraj*, *supra* note 70.

²⁰⁸ *Shmuly Yanklowitz*, *Give a Kidney, Get a Check*, *ATLANTIC* (Oct. 27, 2015), <https://www.theatlantic.com/business/archive/2015/10/give-a-kidney-get-a-check/412609/>.

²⁰⁹ See *Siraj*, *supra* note 70.

²¹⁰ See *e.g.*, *Braverman*, *supra* note 197 (describing dangerous jobs); *RADIN*, *supra* note 168.

²¹¹ See *RADIN*, *supra* note 168 (describing the true harm to personhood is the denial of a right to pursue economic gain via contested commodities).

²¹² By denying women a market to sell their eggs, a bodily material unique to female anatomy, society further perpetuates the current economical hierarchy. See, *e.g.*, *UNITED NATIONS*, *supra* note 166; *UN WOMEN*, *supra* note 166; *OXFAM INTERNATIONAL*, *supra* note 166.

²¹³ Currently, Black Americans are systematically discriminated against in drastic numbers within the U.S. organ procurement and transplantation system. See, *e.g.*, *Park*, *supra* note 28.

exchange values for items granting more complete ownership rights become more influential and, therefore, “more complete property rights make discrimination more costly.”²¹⁴ Solely granting a legalized market where the bar is arbitrarily set for an organ’s price by the government does not reduce the demand for the organ, but only ensures the discriminator faces no repercussions by reducing the benefit of competition in the market itself.²¹⁵

Finally, individuals will be able to “exclude others from the uses and benefits of their property.”²¹⁶ Notwithstanding the current commercialization of organs and economic prosperity within non-profits and corporations,²¹⁷ U.S. jurisprudence allows doctors to profit off the benefits of organs and cells from a sick cancer patient without their consent, leaving the individual uncompensated for a scientific advancement that would not have been possible but for the bodily materials of that individual.²¹⁸ Granting complete ownership rights expands the legal remedies an individual can get for this kind of transgression and inequity, such as conversion.²¹⁹

VI. CONCLUSION

“Life, although it may only be an accumulation of anguish, is dear to me, and I will defend it.” *Frankenstein*.²²⁰

Organ failure is an international problem, affecting over six-million people who face long organ transplantation waiting lists.²²¹ COVID-19 has

²¹⁴ Armen A. Alchian, *Property Rights*, ECONLIB, <https://www.econlib.org/library/Enc/PropertyRights.html#:~:text=The%20fundamental%20purpose%20of%20property,with%20competition%20by%20peaceful%20means> (last visited Sept. 10, 2023).

²¹⁵ *Id.* (“Consider the case of a black woman who wants to rent an apartment from a white landlord. She is better able to do so when the landlord has the right to set the rent at whatever level he wants. Even if the landlord would prefer a white tenant, the black woman can offset her disadvantage by offering a higher rent. A landlord who takes the white tenant at a lower rent anyway pays for discriminating. But if the government imposes rent controls that keep the rent below the free-market level, the price the landlord pays to discriminate falls, possibly to zero. The rent control does not magically reduce the demand for apartments. Instead, it reduces every potential tenant’s ability to compete by offering more money. The landlord, now unable to receive the full money price, will discriminate in favor of tenants whose personal characteristics—such as age, sex, ethnicity, and religion—he favors. Now the black woman seeking an apartment cannot offset the disadvantage of her skin color by offering to pay a higher rent.”).

²¹⁶ Will Kenton, *What Are Property Rights, and Why Do They Matter?*, INVESTOPEDIA (last updated May 22, 2022), https://www.investopedia.com/terms/p/property_rights.asp.

²¹⁷ See GOODWIN, *supra* note 191.

²¹⁸ See *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479 (Cal. 1990).

²¹⁹ *What You Need to Understand About Conversion*, GREEN L. FIRM, (last visited Sept. 10, 2023) <https://billgreen.law/glossary/conversion>.

²²⁰ FRANKENSTEIN, *supra* note 1.

²²¹ Lopy, *supra* note 2.

further exacerbated the shortage of transplantable organs and the growing need for transplantation surgery.²²² The United States, which operates on an organ donation-based system, suffers from great waiting lists.²²³ Iran, however, which legally compensates those willing to engage in their organ procurement system, has both enhanced available organs and either decreased or eliminated organ waiting lists.²²⁴ Through this decision, Iran has eradicated the horrors of the black market,²²⁵ a pre-existing means for exchanging organs to the detriment of both parties in the transaction.

Comparing the two regimes, it is evident that United States property law weakens its organ donation system, inhibiting the success that could be achieved by adoption of the Iranian system. Beyond learning from Iran regarding the benefits of a legalized organ market, the U.S. should go further by granting complete ownership rights in organs to the individual. In addition to allowing more organs on the market, this decision promotes individual autonomy, punishes discriminatory intentions, and expands legal protections for the individual. Legislators can no longer deny the existing economic forces pushing individuals into organ transactions, nor can they ignore the market's necessity.

²²² PENN MED. NEWS, *supra* note 3.

²²³ HEALTH RES. & SERV. ADMIN., *supra* note 5.

²²⁴ Moeindarbari & Feizi, *supra* note 7.

²²⁵ See Crepelle, *supra* note 68.