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You've Got to Be Kidneying Me!

THE FATAL PROBLEM OF SEVERING RIGHTS AND REMEDIES FROM THE BODY OF ORGAN DONATION LAW

> Death is unique. It is unlike aught else in its certainty and its incidents. A corpse in some respects is the strangest thing on earth. A man who but yesterday breathed, and thought, and walked among us has passed away. Something has gone. The body is left still and cold, and is all that is visible to mortal eye of the man we knew. Around it cling love and memory. Beyond it may reach hope. It must be laid away. And the law—that rule of action which touches all human things—must touch also this thing of death. It is not surprising that the law relating to this mystery of what death leaves behind can not be precisely brought within the letter of all the rules regarding corn, lumber, and pig-iron.[1]

"I'd give my left kidney to meet Sean Connery . . . ," and who wouldn't? Clearly this statement is understood to refer to the declarant's passionate desire to become acquainted with an aged celebrity, and certainly not as a literal offer to exchange a kidney for what admittedly would be an amazing experience. But what if I really did give my left kidney to meet Sir Sean Connery, and while we were visiting he were to say, "I'd give my right kidney to play James Bond again." Applying common idiomatic knowledge, one should reasonably conclude that Mr. Connery is whimsically wishing he were not so old, not proposing a potentially illegal transaction.[2] But what if during our visit Sir Sean Connery were to say, in reference to his good friend Sir Roger Moore, "I'd give him a kidney"? Again, it is unlikely that one would take Sir Sean Connery's proposition literally, but rather a reasonable observer would conclude that Sean Connery's statement refers to his intense friendship with Sir Roger Moore. But what if these statements went beyond the idiotic and idiomatic and were all reasonably understood as literal expressions of legitimate subjective desires?

To take the hypothetical one step further, suppose that Sir Sean Connery ("Connery") moves to New York and Sir Roger Moore ("Moore") moves to Florida.[3] Moore, at eighty years of age, is in dire

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[1] Bauer v. N. Fulton Med. Ctr. Inc., 527 S.E.2d 240, 243 (Ga. Ct. App. 1999) (quoting Louisville & Nashville R.R. Co. v. Wilson, 123 Ga. 62, 63 (1905)).

[2] *See infra* Part I.B (discussing illegal intransfers).

[3] The following facts are adapted from: Colavito v. N.Y. Organ Donor Network, Inc. (*Colavito I*), 356 F. Supp. 2d 237 (E.D.N.Y. 2005), *aff'd*, 486 F.3d 78 (2d Cir. 2007); Colavito v. N.Y. Organ Donor Network, Inc. (*Colavito II*), 438 F.3d 214 (2d Cir. 2006), *certifying questions to* 860 N.E.2d 713 (N.Y. 2006); and Colavito v. N.Y. Organ Donor Network, Inc. (*Colavito III*), 860 N.E.2d 713 (N.Y. 2006) (certified question). Robert Colavito was on a waiting list for a kidney

need of a kidney transplant. Connery promises Moore that he can have his kidneys upon his death. Upon Connery's death, Connery's wife, Lady Connery, a French artist also known by the name of Micheline Roquebrune ("Micheline"), fills out the requisite forms in order to direct a donation of Connery's kidneys to Moore consistent with Connery's wishes. Upon Connery's death, the New York Organ Donor Network ("NYODN") immediately transports Connery's left kidney to Florida for transplantation. Moore is immediately notified and prepped for the transplantation by Moore's surgeon, Dr. No. Upon examining the kidney, however, Dr. No realizes that it has been irreparably damaged and is unsuitable for transplantation. Contrary to Micheline's wishes, the right kidney remained in New York. Dr. No immediately contacted the NYODN to request the other kidney, but unfortunately for Moore, the kidney had already been transplanted into another patient.

What are Moore and Micheline's cognizable legal claims in this situation? What remedies are available? What if it were subsequently discovered that Connery's kidneys were incompatible with Moore, such that neither kidney could have been successfully transplanted?[4] What if the NYODN's actions were taken under the direction of a county coroner?[5] While this hypothetical may appear ridiculous on its face, it is based on a real-life set of facts.[6] In *Colavito v. New York Organ Donor Network, Inc.*, Mr. Colavito (played by Mr. Moore in our hypothetical) sued for relief[7] but died while waiting for another kidney, not even surviving long enough to witness the eventual dismissal of his lawsuit.[8]

While Moore's situation seems unique, the final resolution of his situation is not. An average of seventeen people die daily, waiting in vain

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transplant. *Colavito I*, 356 F. Supp. 2d at 238. Peter Lucia, a good friend of Colavito, passed away and his widow directed a donation of both kidneys to Colavito. *Id.* at 238-39. One of Lucia's kidneys was sent from New York to Colavito in Florida; however, the New York Organ Donation Network ("NYODN"), despite Lucia's widow's wishes to the contrary, allocated the other kidney to a recipient in New York. *See id.* at 239-40. Upon arrival of Lucia's kidney to Florida, and after Colavito had been fully prepped for the transplant surgery, the surgeon discovered that the kidney had been irreparably damaged. *See id.* at 239. Subsequently it was discovered that Lucia's kidney was incompatible with Colavito, and even had the kidney been in good condition, the organ would not have been of use to Colavito. *See id.* at 240. After dismissal of Colavito's claims at the district court level, in part because of public policy against "broad property rights in the body of a deceased," Colavito appealed to the second circuit. *Id.* at 246-48; *Colavito II*, 438 F.3d at 216. The Court of Appeals for the Second Circuit left open the possibility of relief, but due to several unclear questions of state law, specifically property interests in the body and state statutory interpretation, the second circuit certified a question the N.Y. Court of Appeals on these issues. *Id.* at 216-17. The Court of Appeals disposed of the question on the narrow issue of incompatibility. *See Colavito III*, 860 N.E.2d at 719-22. More detailed analysis of Colavito's claims and the courts' treatment of those claims is discussed in detail throughout this Note.

4 *See Colavito III*, 860 N.E.2d at 719-22 (finding no cause of action under New York law).

5 *See infra* Part II.C.

6 *See supra* note 3.

7 *Colavito I*, 356 F. Supp. 2d at 238.

8 *See Colavito II*, 486 F.3d at 79 n.1.

for needed organs.[9] These tragedies are preventable, and as post-mortem, directed donations comprise an increasingly important segment of the organ donation system in the United States, the uncertainty surrounding the enforceability of directed donations will become an increasingly important impediment to the resolution of the growing organ deficit.[10] Approaching the problem from the legal realist school of thought, the existence of rights for those involved in the organ donation process is wholly dependent upon, and indeed is defined by, the extent to which the law provides a meaningful remedy for the protection or assertion of these rights.[11] Therefore, the absence of substantive legal remedies for organ donors, donees, and their families directly calls into question whether rights to these organs exist at all.[12] The absence of these rights may deter potential donees and undermine the integrity of the organ donation system in the United States.[13] Alternatively, increasing the rights of donors, donees, and their families will lead to more efficient allocation of organs, encourage donation, and reduce the growing waitlists of those in need of life-saving organ transplants.[14]

This Note specifically addresses the deficiencies and, in some cases, the utter lack of remedies currently available to plaintiffs asserting valid claims to the organs of a cadaveric organ donor, its effects on organ donation generally, and potential solutions to the problem. Part I of this Note examines the common law history and evolution of property in deceased bodies, as well as modern statutory schemes regulating organ donation and procurement. Part II outlines the scope of enforceable rights in post-mortem organs, or rather the lack thereof, through actual and potential remedies to vindicate such rights. The analysis focuses on the failures of both the courts and the legislatures to directly address this growing problem. Finally, Part III of this Note highlights the potentially tragic effects of poorly defined rights in deceased bodies and explores potential solutions to the dilemma.

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[9] Sean Arthurs, *No More Circumventing the Dead: The Least-Cost Model Congress Should Adopt to Address the Abject Failure of Our National Organ Donation Regime*, 73 U. CIN. L. REV. 1101, 1101 (2005); *see also* National Kidney Foundation, *25 Facts About Organ Donation and Transplantation*, ¶ 2, http://www.kidney.org/news/newsroom/printfact.cfm?id=30 (last visited Sept. 13, 2008); Ann McIntosh, Comment, *Regulating the "Gift of Life"—The 1987 Uniform Anatomical Gift Act*, 65 WASH. L. REV. 171, 185 (1990) ("Although the number of potential cadaveric donors each year is difficult to estimate, studies often find that number could provide enough transplant organs to meet or exceed the demand.").

[10] *See infra* Part III.A-B.

[11] *See* K. N. LLEWELLYN, THE BRAMBLE BUSH: SOME LECTURES ON LAW AND ITS STUDY 84 (1930); *see also* Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 677, 679-80 (2005).

[12] *See supra* note 11.

[13] *See infra* Part III.A.

[14] *See infra* Part III.B.

I. UBI JURIS UBI REMEDIUM: RIGHTS? YOU'RE DEAD WRONG

Currently, the remedies available to enforce the rights of organ donors and organ donees are inadequate. In order to understand the current state of organ donation law, a brief history of the law of property in the body and the influence it has on the common law today is instructive. Additionally, analysis of the current federal and state statutory law governing the organ donation process reveals the lack of enforceable remedies for donors and donees.

A. The Uncommon Law of Corpses

The primary complication to legal ownership of a body part is that it is part of a body, and the law of property in the body is anything but certain.[15] The earliest common law pronouncement concerning property interests in the deceased comes from a fifteenth century English opinion that set forth the general rule that there can be no property in a corpse.[16] This general rule, based upon questionable foundations,[17] has been reinforced, repeated, and misapplied in subsequent cases and treatises,[18] despite the fact that an absolutist position against the recognition of property in a corpse has been widely criticized by scholars and often by judges applying the rule themselves.[19] Judges confronted with this conflict have generally preferred bending the common law rule

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15 Bauer v. N. Fulton Med. Ctr. Inc., 527 S.E.2d 240, 240-43 (Ga. Ct. App. 1999).

16 *See* Haynes's Case, 12 Co. Rep. 113, 113 (1614).

17 *See* Roger S. Magnusson, *The Recognition of Proprietary Rights in Human Tissue in Common Law Jurisdictions*, 18 MELB. U.L. REV. 601, 603 (1992) (suggesting that the oft cited edict that there is no property in a corpse is a misquoted statement from *Haynes's Case*); *see also* Kathryn Lewis, *Hands Off My Kidney! Who Owns a Donated Organ?* SLATE, Dec. 26, 2006, http://www.slate.com/id/2156220 (same). In *Haynes*, a grave robber was accused of stealing sheets in which human corpses were wrapped. *Haynes*, 12 Co. Rep. at 113. Magnusson and others argue that the case really stands for nothing more than the proposition that there can be no property in a corpse, meaning that corpses cannot own anything, and that it has been incorrectly cited for the proposition that corpses are not property. *See, e.g.*, Magnusson, *supra*, at 603.

18 The British courts widely "accept that, however questionable the historical origins of the principle, it has now been the common law for 150 years at least that neither a corpse nor parts of a corpse are in themselves and without more capable of being property protected by rights." Regina v Kelly, [1999] Q.B. 621, 630-31.

19 Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 509 (Cal. 1990) (Mosk, J., dissenting). In *Moore*, plaintiff had his spleen removed at the Medical Center of the University of California, Los Angeles. *Id*. at 481. University researchers failed to inform Moore that his cells were very unique and very valuable for research and commercial purposes. *Id.* The University subsequently developed a cell-line from Moore's cells with potential value in the billions of dollars. *Id*. at 481-82. In dismissing the conversion suit on a variety of grounds, the majority held that only property can be converted, and that Moore has no property interest in his genetic materials. *Id.* at 488-89. Justice Mosk, in criticizing the majority's invocation of the rule that there is no property rights in the human body in order to dismiss the conversion claim, argued in favor of applying a "bundle of rights" theory of property in the body. *Id.* at 509. Mosk further argued that statutory restrictions on property in the body may diminish the right without extinguishing it. *Id.* at 510.

with creative exceptions rather than attempting to straighten out its doctrinal foundations.[20]

Throughout the eighteenth and nineteenth centuries, partly in response to the increased value of bodies and body parts in medicine and science,[21] courts responded to these changes as they were faced with more legal challenges and the demand for corpses increased.[22] The courts in both the United States and England moved in two directions: (1) protecting the rights of the deceased by creating a so called "quasi-property right" which vests in the next of kin;[23] and (2) creating exceptions acknowledging the property rights of scientists and researchers to lawfully obtained cadavers for exhibitions and medical research.[24] While the legal rights extended to researchers and scientists were expanded to convert corpses to chattel,[25] parallel developments in the law governing the next-of-kin "quasi-property" right remained extremely limited and were often stated to be nothing more than a right and corresponding duty to bury or dispose of a body.[26] The remedies available for families to enforce these rights were correspondingly narrow.[27]

A second field of judicial innovation developed at the turn of the century in the field of tort law. Prior to the recognition of a cause of

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20 *See* Richard Taylor, *Human Property: Threat or Saviour*, 9 MURDOCK U. ELEC. J.L. ¶¶ 9-38 (2002), *available at* http://www.murdoch.edu.au/elaw/issues/v9n4/taylor94.txt (detailing examples of exceptions to the general prohibition against property in the body, including exceptions for the next of kin, medical cadavers, biotechnology, and museum exhibitions).

21 *See In re* Johnson's Estate, 7 N.Y.S.2d 81, 85-86 (1938).

22 *Id.* at 86.

23 *See, e.g.*, Bauer v. N. Fulton Med. Ctr. Inc., 527 S.E.2d 240, 243-44 (Ga. Ct. App. 1999) ("The quasi-property right in a corpse is not pecuniary in nature, nor should it be. The right encompasses only the power to ensure that the corpse is orderly handled and laid to rest, nothing more.").

24 *See* Taylor, *supra* note 20, ¶¶ 20-23.

25 *Id.* This approach may be justified under a Lockean labor theory, specifically the law of accession, where mixing labor with another's property to greatly enhance the value of the property deprives the original possessor of ownership. JESSE DUKEMINIER ET AL., PROPERTY 14 (6th ed. 2006). The labor theory, rather ironically premised on ownership of one's own body, tends to work in favor of those who would put organs to scientific use and against a family member who does not want labor to be mixed with the organs of the deceased and against putative organ donees who have yet to expend any labor. *Id.* The law of accession also presents interesting damages issues, although the courts can generally avoid these issues by invoking the common law rule that there are no property rights in a corpse, thereby completely avoiding the question of whether there has been harm committed to one's property. *See also* Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 488-89 (Cal. 1990) (finding no "ownership or right of possession" in cells removed from a patient's body based in part on "no reported judicial decision support[ing the] claim, either directly or by close analogy") (emphasis omitted); Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 367-68 (2000).

26 *See Bauer*, 527 S.E.2d at 244.

27 *See* Grad v. Kaasa, 314 S.E.2d 755, 758 (N.C. Ct. App. 1984) (right to the claim of "wrongful autopsy" based in a quasi-property right vesting in the next of kin). *But see* Scarpaci v. Milwaukee County, 292 N.W.2d 816, 820 (Wis. 1980) (upholding an action for "wrongful autopsy" while rejecting that such a right is based on a property theory); Snyder v. Holy Cross, 352 A.2d 334, 341 (Md. Ct. Spec. App. 1976) (finding that the state had a compelling state interest in performing an autopsy on a boy who died without cause despite objections by his Orthodox Jewish father).

action for pure emotional distress under tort law, the courts satisfied the traditional requirement of physical harm as a prerequisite for damages[28] by recognizing a "quasi-property right" in a corpse where the corpse was negligently mishandled or defaced.[29] Modern courts generally recognize this property interest as a legal fiction,[30] although it did provide tangible remedies to plaintiffs seeking vindication of post-mortem wrongs.[31]

B. *Life, Death, Transplantation, and Legislation*

Against this uncertain background of corporeal property law, the first successful organ transplant took place in 1954.[32] Since that time both the effectiveness of transplantation as well as the need for viable organs have substantially increased.[33] This ever-increasing demand contributes to the ever-increasing shortage of organs and ever-increasing waitlists for potential organ recipients.[34] The legal response to this phenomenon has

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[28] *See* Lynch v. Knight, 9 H.L.C. 577, 598 (1861) ("Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone . . . .").

[29] *See* Fitzsimmons v. Olinger Mortuary Ass'n, 17 P.2d 535, 536-37 (Colo. 1932) (awarding damages for emotional distress while recognizing that "insult and indignity . . . inflict no injury on the dead, but they can visit agony akin to torture on the living"); *see also* Christensen v. Super. Ct., 820 P.2d 181, 183 (Cal. 1991) (finding that close family members may recover for emotional distress for an action based on negligent mishandling of a loved one's remains).

[30] Colavito v. N.Y. Organ Donor Network, Inc. (*Colavito I*), 356 F. Supp. 2d 237, 356 (E.D.N.Y. 2005), *aff'd*, 486 F.3d 78 (2d Cir. 2007) ("In most [cases involving the mishandling of dead bodies], the courts have talked of a somewhat dubious 'property right' to the body, usually in the next of kin, which did not exist while the decedent was living, cannot be conveyed, can be used only for the one purpose of burial, and not only has no pecuniary value but is a source of liability for funeral expenses. It seems reasonably obvious that such 'property' is something evolved out of thin air to meet the occasion, and that it is in reality the personal feelings of the survivors which are being protected, under a fiction likely to deceive no one but a lawyer.") (quoting WILLIAM PROSSER, THE LAW OF TORTS 58-59 (4th ed. 1971)).

[31] Quasi-property rights provide a remedy which is in and of itself a recognition of a right:

> "Quasi property" seems to be . . . simply another convenient "hook" upon which liability is hung,—merely a phrase covering up and concealing the real basis for damages, which is mental anguish. The plaintiff, in these actions, does not seek to vindicate any "quasi-property" right. He sues simply because of the mental suffering and anguish that he has undergone from the realization that disrespect and indignities have been heaped upon the body of one who was close to him in life.

Note, *Damages: Pleading Property: Who May Recover for Wrongful Disturbance of a Dead Body*, 19 CORNELL L.Q. 108, 110 (1933) (internal quotation marks omitted).

[32] Erik S. Jaffe, Note, *She's got Betty Davis'[s] Eyes: Assessing the Nonconsensual Removal of Cadaver Organs Under the Taking and Due Process Clauses*, 90 COLUM. L. REV. 528, 530 & n.8 (1990).

[33] National Kidney Foundation, 25 Facts About Organ Donation and Transplantation, http://www.kidney.org/news/newsroom/fsitem.cfm?id=30 (last visited Sept. 13, 2008).

[34] The United Network for Organ Sharing maintains a running count of waitlist candidates. The United Network for Organ Sharing, Data: Waiting List Candidates, www.unos.org (last visited Feb. 1, 2009). As of February 1, 2009, the count was at 100,679. *Id.*

occurred primarily through legislative rather than judicial reform.[35] In 1968, in an attempt to address growing concerns surrounding organ procurement, the National Conference of Commissioners of Uniform State Laws ("NCCUSL") promulgated the Uniform Anatomical Gift Act ("UAGA").[36] The UAGA has been adopted in one form or another by all fifty states.[37]

The UAGA's purpose is to promote organ donation while attempting to balance the rights and interests of the deceased and their families with both the interests of the state and the societal need for post-mortem donations and scientific research.[38] The UAGA applies only to post-mortem donations and allows adults to consent to donation generally or to a specified donor.[39] Significantly, the UAGA requires that post-mortem organ donations be made as gifts, expressly prohibiting "valuable consideration" in exchange for an organ donation.[40] The UAGA does not expressly govern the inter vivos transfer of organs. Also, under the 1968 UAGA, most states permitted the surviving family members to override a donor's wishes upon death,[41] which remains a reality today in many states.[42]

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[35] Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 498 (Cal. 1990) (Arabian, J., concurring opinion) (finding that resolution of who owns human biological material is better suited to legislative rather than judicial reform); *see infra* Part II.A.2.

[36] McIntosh, *supra* note 9, at 172; UNIF. ANATOMICAL GIFT ACT (1987), 8A U.L.A. 17 (2003).

[37] *Id.*

[38] *Colavito III*, 860 N.E.2d at 713, 720. The *Colavito* court, quoting the prefatory note to the UAGA, notes that the competing interests are:

> (1) the wishes of the deceased during his lifetime concerning the disposition of his body; (2) the desires of the surviving spouse or next of kin; (3) the interest of the state in determining by autopsy, the cause of death in cases involving crime or violence; (4) the need of autopsy to determine the cause of death when private legal rights are dependent upon such cause; and (5) the need of society for bodies, tissues and organs for medical education, research, therapy and transplantation.

Id. (internal quotation marks and citation omitted).

[39] UNIF. ANATOMICAL GIFT ACT § 6(b) (1987), 8A U.L.A. 54 (2003).

[40] *Id.* § 10(a), 8A U.L.A. 62 (2003).

[41] UNIF. ANATOMICAL GIFT ACT (1968), 8 U.L.A. 100 (1993); T.D. Overcast et al., *Problems in the Identification of Potential Organ Donors*, 251 J.A.M.A. 1559 (1984). According to a 1983 survey, only four states fully rely on the authority of donor documents as a basis for organ removal without familial consent. *Id.* at 1561-62. UAGA § 2 (e)-(g) protect the validity of organ donations by will from the effects of probate and testamentary invalidities. UNIF. ANATOMICAL GIFT ACT § 2 (e)-(g) (1987), 8A U.L.A. 24 (2003). The common law and statue of wills generally supports this view. *See* Snyder v. Holy Cross Hosp., 352 A.2d 334, 341 n.12 (Md. Ct. Spec. App. 1976) (A corpse "is not part of the assets of the estate (though its disposition may be affected by the provision of the will)."); *In re* Estate of Moyer, 577 P.2d 108, 110 (Utah 1978) (Utah "laws relating to wills and the descent of property were not intended to relate to the body of a deceased." However, a testamentary disposition of the deceased's body is "binding after his death, so long as that is done within the limits of reason and decency as related to the accepted customs of mankind."); Hecht v. Super. Ct. 20 Cal. Rptr. 2d 275, 288-91(1993) (girlfriend of the decedent could maintain an action to recover sperm preserved in a sperm in accordance with the wishes of the deceased and against the protest of the decedent's family).

[42] Despite legal authority to harvest organs where evidence of the deceased's documented consent to make a donative gift of organs is on hand, hospitals and organ procurement

Although the UAGA was adopted in every state, the organ deficit continued to grow and both the NCCUSL and the federal government took action. In 1984, Congress passed federal legislation to supplement state regulations in the form of the National Organ Transplant Act ("NOTA").[43] NOTA responded to the emerging commercial market[44] for inter vivos transplants not regulated by the UAGA by expressly making it "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."[45] In addition, NOTA created a task force to deal with organ procurement and transplantation[46] and established the Organ Procurement and Transplantation Network (OPTN), which maintains a centralized system for matching donors with those in need of organs. The OPTN also sets standards for organ procurement organizations ("OPOs").[47] OPOs, in conformity with the OPTN, coordinate the physical transportation of organs to recipients in need.[48]

In 1987, after the adoption of the NOTA, the NCCUSL proposed a revised version of the UAGA.[49] The revised UAGA placed an increased emphasis on the wishes of the deceased over the surviving family's rights,[50] calling for routine inquiry and requests for donations by hospital personnel from patients and their families.[51] Although these measures were designed to increase the number of donors,[52] to date only twenty-six states have adopted 1987 UAGA.[53] Many states, instead of adopting the

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agencies are often hesitant to proceed without consent from family. *See, e.g.*, Mark F. Anderson, *The Future of Organ Transplantation: From Where Will New Donors Come, to Whom Will Their Organs Go?*, 5 HEALTH MATRIX 249, 264 (1995); *Developments in the Law: Medical Technology and the Law*, 103 HARV. L. REV. 1519, 1619 (1990) (citing "unwarranted fears of legal liability, a legitimate concern that negative publicity might damage further organ procurement efforts, [and] a desire to respect the family's wishes") (citations omitted). Where too many individuals have the right to override donations, there is a strong danger of inefficient under-use of resources. *See* Michael Heller, *The Tragedy of the Anti-Commons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 624 (1998).

[43] 42 U.S.C. §§ 273-274 (2006).

[44] RONALD MUNSON, RAISING THE DEAD: ORGAN TRANSPLANTS, ETHICS, AND SOCIETY 108-09 (2002) (noting that in 1983 Dr. H. B. Jacobs established International Kidney Exchange Ltd., a for profit company in the business of procuring organ donors who were paid for their services).

[45] 42 U.S.C. § 274(e) (penalty for violation of the statute includes a fine of up to $50,000 and up to 3 years in prison).

[46] 42 U.S.C. §§ 273-274.

[47] *Id.*

[48] 42 U.S.C. § 273; *see also* New York Organ Donor Network Website, *available at* http://www.donatelifeny.org/glossary/glossary3.html#opo.

[49] UNIF. ANATOMICAL GIFT ACT (1987), 8A U.L.A. 17 (2003).

[50] *Id.* § 2(h), 8A U.L.A. 25 (2003).

[51] *Id.* § 5, 8A U.L.A. 44-45 (2003).

[52] *See* REVISED UNIF. ANATOMICAL GIFT ACT (amended 2007), *available at* http://anatomicalgiftact.org/DesktopDefault.aspx?tabindex=1&tabid=63.

[53] *Id.*

UAGA, passed varying local reforms that have led to incongruity among the states.[54]

In 2006, the NCCUSL proposed an updated version of the UAGA.[55] Thirty-seven states and the District of Columbia have adopted the 2006 UAGA,[56] which includes provisions to strengthen the rights of the deceased as well as to expand the list of those who may consent to donation on behalf of the deceased.[57] However, while the UAGA purports to increase donors' rights, the remedies available under UAGA remain largely unchanged from the 1968 and 1987 versions.[58] Most importantly, the UAGA grants broad good faith immunities for nearly everyone involved in the organ procurement process.[59] Indeed, the NCCUSL commentary to the UAGA recognizes the weakness of statutory remedies provided by the UAGA, noting that remedies and sanctions for bad faith violations may be found in "other laws of the state and federal governments . . . including those under regulatory rules, licensing requirements, Unfair and Deceptive Practices acts, and the common law."[60] While the real world effects of the legal changes in the 2006 UAGA have yet to be fully determined, the current reality of organ donation in the U.S. is that the demand is rapidly outpacing the supply, despite legislative attempts to remedy the problem.[61] The common law and the statutory overlay both fail to provide meaningful remedies through which the rights of the donors and donees may be enforced.

II. RIGHTS OR WRONG

Returning to the aforementioned hypothetical and the question of what legal recourse might be available for Moore and Micheline, there are a number of alternatives available. Many of these potential claims turn directly, or indirectly, on whether claimants can articulate a legitimate entitlement to some form of property in the body of the deceased.[62] Traditionally, plaintiffs have framed claims for misappropriated organs under common law tort theories such as conversion,[63] breach of fiduciary duty, or some form of dignitary tort.[64] In

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[54] *Id.*

[55] *Id.*

[56] The National Conference of Commissioners on Uniform State Laws, Revised Uniform Anatomical Gift Act: Enactment Status (2006), http://anatomicalgiftact.org/DesktopDefault.aspx?tabindex=2&tabid=72 (maintaining a running tally of enactments of the 2006 UAGA).

[57] UNIF. ANATOMICAL GIFT ACT § 5 (1987), 8A U.L.A. 44-45 (2003).

[58] *Compare* REVISED UNIF. ANATOMICAL GIFT ACT §§ 9, 14, *with* UNIF. ANATOMICAL GIFT ACT §§ 3, 4, 8A U.L.A. 33-39.

[59] REVISED UNIF. ANATOMICAL GIFT ACT § 18.

[60] *Id.*

[61] *Id.*

[62] *See* Grad v. Kaasa, 314 S.E.2d 755, 758 (N.C. Ct. App. 1984) (stating the right to the claim of "wrongful autopsy" based in a quasi-property right vesting in the next of kin).

[63] *See infra* Part II.A.1.

a handful of cases, plaintiffs have attempted to proceed under some lesser-explored theories, including an implied right of action under UAGA,[65] contract,[66] and, in certain cases, claims for the violation of Constitutional rights.[67] In the end, as each of these avenues for recovery are applied to Moore and Micheline's situation, the legal remedies available are clearly inadequate and cannot enforce the wishes of Connery or even provide compensation for damages they have sustained.

A. Tort-like Conduct

Moore has what appears to be a good argument for a valid claim of conversion,[68] provided that the court is willing to accept the proposition that he obtained a property interest in Connery's kidney.[69] Micheline, as Connery's next of kin, also may have obtained some form of property interest in Connery's kidney, which could establish a prima facie claim for conversion.[70] In traditional post-mortem corporeal mutilation cases, putative family members have forgone conversion claims in favor of dignitary torts of emotional distress.[71] However, such claims are more difficult to sustain in the case of wrongfully appropriated organs because intentionally wrongful or negligent conduct may be difficult to prove.[72] The burden of proving that the wrongful conduct was intentional or negligent is thus especially high in Micheline's case, where consent to remove the organs was given, despite the fact that her wishes were not expressly followed.[73] Given the obvious difficulties of sustaining an action for breach of fiduciary duty in this and

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[64] This Note currently does not address in detail claims for fraud or breach of fiduciary duties. While these tort theories may be tangentially relevant, they do not turn on issues of property interests in the body and are less relevant to the discussion in this Note and to Roger and Micheline's situation. The major barriers to these claims lie in the required showing of intentionally wrongful or negligent conduct. *See infra* note 72. Indeed, Mrs. Colavito's failure to show intentional misstatements by the NYODN in *Colavito II* led the second circuit to affirm the district courts' dismissal of Mr. Colavito's claim for fraud. Colavito v. N.Y. Organ Donor Network, Inc. (*Colavito II*), 438 F.3d 214, 222 (2d Cir. 2006), *certifying questions to* 860 N.E.2d 713 (N.Y. 2006).

[65] *See infra* Part II.A.2.

[66] *See infra* Part II.B.

[67] *See infra* Part II.C.

[68] Mr. Colavito's primary claim was an action for conversion. *Colavio II*, 438 F.3d at 223.

[69] *See infra* Part II.A.1.

[70] *See infra* Part II.A.1.

[71] *See* Christensen v. Super. Ct., 820 P.2d 181, 183 (Cal. 1991) (negligence action sustained against defendants' mishandling of a corpse). *But see* Wint v. Ala. Eye & Tissue Bank, 675 So. 2d 383, 283 (Ala. 1996).

[72] To establish a claim for fraud, plaintiffs must show (1) a material misrepresentation, (2) that defendants are aware of its falsity, (3) that the plaintiff relied upon the statement, and (4) that harm was suffered by plaintiff as a result of such reliance. *Colavito II*, 438 F.3d at 222. Colavito's claim for fraud was dismissed by the court due to lack of proof. *Id*. Claims for breach of fiduciary duty, even assuming such a duty exists, while perhaps not establishing as onerous a burden as fraud in many cases, are still grounded in negligence and require more proof than actions for conversion.

[73] Colavito v. N.Y. Organ Donor Network, Inc. (*Colavito I*), 356 F. Supp. 2d 237, 238 (E.D.N.Y. 2005), *aff'd*, 486 F.3d 78 (2d Cir. 2007).

other similar cases, the subsequent analysis will focus on Micheline and Moore's respective claims for conversion under the common law,[74] as well as the complications arising from the application of the UAGA.[75]

1. Micheline and Moore's Conversion Claim

To establish an action for conversion, the defendant must "intentional[ly] exercise . . . dominion or control over a chattel."[76] The primary barrier preventing Moore from maintaining a conversion claim is establishing a cognizable property interest in Connery's organs.[77] Consistent with the common law tradition,[78] courts have generally refused to recognize property in the body.[79] *Wint v. Alabama Eye & Tissue Bank* is a notable exception, wherein the court recognized a widow's claim for the conversion of her deceased husband's corneas, removed post-mortem by a tissue bank, although ultimately the court ultimately dismissed the claim because the evidence was insufficient.[80] While this case may provide support for Micheline's conversion claim, insofar as it relies on "quasi-property rights" vested in the next of kin, it offers Moore little consolation. Indeed, the New York Court of Appeals, in response to a certified question from the Second Circuit,[81] disposed of

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[74] *See infra* Part II.A.1.

[75] *See infra* Part II.A.2.

[76] *See* RESTATEMENT (SECOND) OF TORTS § 222A(1) (1965).

[77] An action for conversion, unlike most torts, has no requirement of culpability. GOLDBERG, ET AL., TORT LAW: RESPONSIBILITIES AND REDRESS 777 (2004). Conversion thus avoids the burden of proof problems posed by a breach of fiduciary duty and many other intentional and negligent tort actions. *Id*. Importantly, reasonable mistake is not a defense under the common law and defendant's mistaken belief of entitlement is irrelevant. *See* Ranson v. Kitner, 31 Ill. App. 241, 241 (1888) (defendant's reasonable mistake that he had lawfully killed a wild animal was not a defense).

[78] *See supra* Part I.A.

[79] Colavito v. N.Y. Organ Donor Network, Inc. (*Colavito III*), 860 N.E.2d 713, 719-22 (N.Y. 2006); Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 488-89 (Cal. 1990); Hasselbach v. Mt. Sinai Hosp. 159 N.Y.S. 376, 379 (App. Div. 1916). *But see* Cornelio v. Stamford Hosp. 717 A.2d 140, 143-44 (Conn. 1998) (assuming, but not deciding, property rights existed in a pap smear.) While this Note generally avoids the more fundamental and complicated question of what is a property interest, if one takes the "bundle of rights" approach to property law seriously, then any right may be considered property. *Moore*, 793 P.2d at 509-10 (Mosk, J., dissenting); *see also infra* notes 95, 182, and Part II.C.2 (discussing "new property" under the Due Process clause versus traditional property protected by the Takings Clause); *see also infra* note 90 (discussing types and characteristics of certain forms of property).

[80] 675 So. 2d 383 (Ala. 1996).

[81] In *Colavito II*, the Second Circuit certified to the New York Court of Appeals the following questions:

> (1) Do the applicable provisions of the New York Public Health Law vest the intended recipient of a directed organ donation with rights that can be vindicated in a private party's lawsuit sounding in the common law tort of conversion or through a private right of action inferred from the New York Public Health Law? (2) Does New York Public Health Law immunize either negligent or grossly negligent misconduct? (3) If a donee can bring a private action to enforce rights referred to in question 1, may the plaintiff recover nominal or punitive damages without demonstrating pecuniary loss or other actual injury?

the issue of conversion in the *Colavito* case, with facts substantially similar to Moore's situation with the exception of compatibility, wholly on grounds of incompatibility.[82] In *Colavito*, the decedent's kidney was medically incompatible with the donee, who brought the conversion action against the NYODN, and since Colavito could not "use" the organ, no property interest vested in Colavito.[83]

While Moore may lack the common law support of a legally fictitious, quasi-property interest, an argument may be made that any interest Micheline held was legally devised to Moore under the UAGA,[84] a statutory scheme which adds multiple layers of complication to the analysis.[85] While the UAGA is generally restrictive with respect to possessory interests in organs,[86] the UAGA does, although in very general terms, grant rights to donees *as well as* next of kin.[87] The UAGA also establishes a hierarchy of rights among family members with the decedent's spouse at the top of the list.[88] This "right" is not expressly defined as a property interest, but rather as an authorization for a person who, absent a known objection by the decedent, "may make a gift" of the

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Colavito v. N.Y. Organ Donor Network, Inc. (*Colavito II*), 438 F.3d 214, 233 (2d Cir. 2006), *certifying questions to* 860 N.E.2d 713 (N.Y. 2006). Upon answering question (1) in the negative, the court declined to answer questions (2) and (3). *Colavito III*, 860 N.E.2d at 722. The issue of immunizing negligent conduct, mentioned in Question (2), is analyzed *infra* Part II.A.2.b and Question (3) is analyzed *infra* Part II.A.3.

82 *See Colavito III*, 860 N.E.2d at 719 ("[P]laintiff, as a specified donee of an incompatible kidney, has no common-law right to the organ.").

83 *See id.*

84 *See supra* Part I.B.

85 *See infra* Part II.A.2.

86 *See* UNIF. ANATOMICAL GIFT ACT § 10 (1987), 8A U.L.A. 62 (2003) (prohibiting sale of organs).

87 *See id.*§§ 8(a), 3(a) , 8A U.L.A. 33-34, 57-58.

88 UAGA § 3(a) states:

> Any member of the following classes of persons, in the order of priority listed, may make an anatomical gift of all or a part of the decedent's body for an authorized purpose . . . :
>
> 1. the spouse of the decedent;
> 2. an adult son or daughter of the decedent;
> 3. either parent of the decedent;
> 4. an adult brother or sister of the decedent;
> 5. a grandparent of the decedent; and
> 6. a guardian of the person of the decedent at the time of death.

Id.§ 3(a), 8A U.L.A. 33-34.

The 2006 UAGA proposes an expansion of the list to include persons acting as agents at the deceased's death, adult grandchildren, and even close friends. REVISED UNIF. ANATOMICAL GIFT ACT § 9 (amended 2007), *available at* http://anatomicalgiftact.org/DesktopDefault.aspx?tabindex=1&tabid=63.

decedent's organs.[89] Whether such a right rises to the level of property is subject to debate.[90]

Moore's case for property rights created under the UAGA lies with rights granted to the donee.[91] The UAGA expressly states that the "[r]ights of a donee created by an anatomical gift are superior to the rights of others."[92] Whether a donation under the UAGA would create a property interest sufficient to sustain a claim for conversion remains an open question.[93] Additionally, even assuming that Moore or Micheline can stake a legal claim to property rights in Connery's organs for purposes of establishing a conversion claim, the UAGA further complicates recovery by granting good faith immunities to nearly everyone involved in the organ procurement process.[94] Notwithstanding these immunities, a major advantage of a conversion claim over dignitary torts of negligence is that conversion is considered a strict liability tort, with no defense for good faith mistake.[95] The UAGA's good faith immunities thus negate this advantage by forcing plaintiffs to show intentional wrongdoing or bad faith in order for their claims to proceed, a difficult proposition for plaintiffs like Moore and Micheline.[96]

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[89] UNIF. ANATOMICAL GIFT ACT § 8(a), 8A U.L.A. 57-58.

[90] The Supreme Court in at least one case found that government regulation that extinguished the limited right to devise property upon death constituted a taking of property under the Constitution. *See* Hodel v. Irving, 481 U.S. 704, 717-18 (1987). Justice Mosk's dissent in *Moore* refutes the holding of the majority, which states that "the statute eliminates so many of the rights ordinarily attached to property that one cannot simply assume that what is left amounts to 'property' or 'ownership' for purposes of conversion law." Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 492 (Cal. 1990). Mosk argues that under the "bundle of rights" conception of property, it is well recognized that "some types of personal property may be sold but not given away, while others may be given away but not sold, and still others may neither be given away nor sold." *Id.* at 510 (footnotes omitted). Organs may properly be conceptualized as a "market inalienable" form of property, one that can be given away but not sold. DUKEMINIER, *supra* note 25, at 81 n.41. For a detailed discussion of alienability of property, see Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931 (1985).

[91] UNIF. ANATOMICAL GIFT ACT § 8(a), 8A U.L.A. 57-58.

[92] *Id.*

[93] The Second Circuit Court of Appeals in *Colavito II* analyzed the UAGA language as enacted by the state legislature of New York in N.Y. Public Health Law § 4301(5). Colavito v. N.Y. Organ Donor Network, Inc. (*Colavito II*), 438 F.3d 214, 225-26 (2d Cir. 2006), *certifying questions to* 860 N.E.2d 713 (N.Y. 2006). The court analyzed the language referring to the "rights of the donee" as an issue of an implied right of action and did not address the issue directly of whether such language implies a property right sufficient to sustain an action for conversion. *Id.* at 230-31; *see infra* Part II.A.2.a (fully discussing the second circuit's treatment of Colavito's claim for an implied right of action).

[94] UAGA § 11(c) provides:

> A hospital, physician, surgeon, [coroner], [medical examiner], [local public health officer], enucleator, technician, or other person, who acts in accordance with this [Act] or with the applicable anatomical gift law of another state [or a foreign country] or attempts in good faith to do so is not liable for that act in a civil action or criminal proceeding.

UNIF. ANATOMICAL GIFT ACT § 11(c), 8A U.L.A. 64.

[95] *See supra* note 77. Reasonable mistake is not a defense under the common law and defendant's mistaken belief of entitlement is irrelevant. Ranson v. Kitner, 31 Ill. App. 241 (App. Ct. 1888).

[96] For a full discussion of the immunity issue under the UAGA, see *infra* Part II.A.2.a.

2. The Legislature Giveth, and It Taketh Away

a. Implied Right of Action Under the UAGA

Given the difficulties for Micheline and Moore in maintaining a cause of action for conversion due to the lack of property protections for post-mortem organ gifts under the common law, a more effective route for plaintiffs may be to pursue a statutory cause of action,[97] which does not necessarily rely on legal property in the body.[98] However, the UAGA and NOTA do not expressly provide for any civil remedies.[99] In fact, the only remedies mentioned within either statute refer to statutory penalties for the sale or purchase of body parts.[100] The federal standard for implied rights of action is very strict, essentially requiring an express right of action in the statute itself,[101] thus foreclosing the possibility of an implied right of action under NOTA.[102] In contrast, state law with respect to implied rights of action, while varying from state to state, is generally more liberal than the federal standard.[103] For example, implied rights of action under New York law turn on: "(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme."[104]

Moore's claim to an implied right of action under state law is based on the proposition that under the UAGA, the "[r]ights of a donee

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[97] While due process claims brought under 42 U.S.C. § 1983 are technically brought under a statute and may be considered a statutory cause of action for some purposes, such claims are constitutional in nature and are analyzed in this Note together with claims brought under the Takings Clause. *See infra* Part II.C.2.

[98] *See also infra* Part II.B (discussing contract claims which similarly do not depend on a violation of a property right).

[99] *See generally* UNIF. ANATOMICAL GIFT ACT, 8A U.L.A. 17; 42 U.S.C. §§ 273-274 (1988).

[100] UNIF. ANATOMICAL GIFT ACT § 10, 8A U.L.A. 62. *But see* REVISED UNIF. ANATOMICAL GIFT ACT (amended 2007), Summary of Changes in the Revised Act, *available at* http://anatomicalgiftact.org/DesktopDefault.aspx?tabindex=1&tabid=63 ("[O]ther laws of the state and federal governments may provide for further including those under regulatory rules, licensing requirements, Unfair and Deceptive Practices acts, and the common law.").

[101] *See* Alexander v. Sandoval, 532 U.S. 275, 286-88 (2001); Touche Ross & Co. v. Reddington, 422 U.S. 560, 578 (1979) ("The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law.").

[102] In *Colavito II*, the second circuit stated that, under federal law standards for implied rights of action, "we would likely conclude that they do not imply a private right of action." Colavito v. N.Y. Organ Donor Network, Inc. (*Colavito II*), 438 F.3d 214, 230 (2d Cir. 2006), *certifying questions to* 860 N.E.2d 713 (N.Y. 2006). Were such an action possible however, NOTA could have the effect of abrogating certain state law immunities. *See infra* Part II.A.2.b, note 174.

[103] *See* Dorwart v. Caraway, 58 P.3d 128, 133 (Mont. 2002) (surveying state court decisions, noting that about half have recognized implied rights of action in their respective state constitutions).

[104] *Colavito II*, 438 F.3d at 214, 231.

created by an anatomical gift are superior to the rights of others."[105] Moore's argument also likely ends here[106] because the UAGA's only mention of "civil suits" refers to good faith immunities for defendants in civil suits for actions taken pursuant to the UAGA.[107] While that may leave open the possibility of civil liability for bad faith violations, as discussed previously, such violations do not appear to be present in Moore's case.[108] Even assuming Moore could make a showing of bad faith, in the comments to the 2006 UAGA, the NCCUSL states that "remedies and sanctions" come from "other laws" rather than the UAGA,[109] suggesting that a cause of action under the statute would be inconsistent with the legislative scheme. Perhaps the strongest argument against Moore's individual claim comes from the prefatory note to the UAGA, which identifies the purposes of the UAGA and makes no reference to the protection of donees such as Moore, but rather to the "need of *society* for . . . organs for . . . transplantation."[110] Taken together, these provisions strongly suggest that the protection of individual rights was not contemplated by the enacting legislature.

Micheline's claim for recovery under an implied right of action faces similar obstacles as those facing Moore. Micheline, however, may rely on the prefatory statement to the UAGA which expressly states that two of its principal interests are "(1) the wishes of the deceased during his lifetime concerning the disposition of his body [and] (2) the desires of the surviving spouse or next of kin."[111] While the UAGA's interests would arguably be furthered by providing a cause of action on behalf of Micheline, her entitlement to rights under the statute are not expressly "superior to the rights of others"[112] and are not possessory. Instead, her rights are statutorily limited to the right of giving a gift of the decedent's body parts.[113] Providing a cause of action to protect such limited rights makes Micheline's argument to qualify as a member of the protected class a difficult one. Like Moore, Micheline is unlikely to succeed, as a

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[105] UNIF. ANATOMICAL GIFT ACT § 8(a), 8A U.L.A. 57-58.

[106] *But see* Daniel Jardine, *Liability Issues Arising out of Hospitals' and Organ Procurement Organizations' Rejection of Valid Anatomical Gifts: The Truth and Consequences*, 1990 WIS. L. REV. 1655 (1990). Jardine proposes an interesting alternative theory of liability under the UAGA, arguing that rejection of valid donations by decedents in favor of consent from next of kin by health care officials and organ procurement organizations is in contravention of the UAGA and creates liability for such organizations. *Id.* at 1659. The cause of action vests in the potential donee and could take a number of forms, including an action in negligence, tortuous interference, or invasion of privacy. *Id.* at 1659-60.

[107] UNIF. ANATOMICAL GIFT ACT § 11(c), 8A U.L.A. 64.

[108] *See infra* Part II.A.2.b.

[109] *See* REVISED UNIF. ANATOMICAL GIFT ACT (amended 2007), *available at* http://anatomicalgiftact.org/DesktopDefault.aspx?tabindex=1&tabid=63.

[110] Colavito v. N.Y. Organ Donor Network, Inc. (*Colavito III*), 860 N.E.2d 713, 720 (N.Y. 2006) (emphasis added) (citing UNIF. ANATOMICAL GIFT ACT (1968), 8 U.L.A. 100 (1993)).

[111] *Id.*

[112] UNIF. ANATOMICAL GIFT ACT § 8(a), 8A U.L.A. 57-58 (referring to rights of a donee).

[113] *Id.* § 3(a), 8A U.L.A. 33-34.

cause of action for either is inconsistent with and does not promote the legislative purpose.[114]

b. Impaired Right of Action Under the UAGA

Even if Moore and Micheline overcame the substantial burden of establishing a prima facie case, the UAGA still complicates matters by extending significant immunities to anyone remotely involved in the organ donation process as long as their actions are taken in "good faith."[115] The Wisconsin Supreme Court in *Williams v. Hoffman*,[116] defining the scope of immunities under the UAGA, held that such immunities extend to "(a) the mechanics of giving and receiving anatomical gifts, (b) the determination of the time of death, and (c) procedures following death."[117] The court also stated that such immunities are a valid "limitation on liability . . . justified by the legitimate public purpose of encouraging doctors to participate in the removal of organs following death, and therefore increase their supply."[118]

Similarly in *Nicoletta v. Eye & Human Parts Bank Inc.*, a New York court found no liability for defendants who, in good faith, accepted a donation that was later discovered to be invalid under the UAGA.[119] Thus, the only limit to the liability for those acting within the scope of

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[114] *See* Colavito v. N.Y. Organ Donor Network, Inc. (*Colavito II*), 438 F.3d 214, 231 (2d Cir. 2006), *certifying questions to* 860 N.E.2d 713 (N.Y. 2006).

[115] UNIF. ANATOMICAL GIFT ACT § 11(c), 8A U.L.A. 64.

[116] 223 N.W.2d 844 (Wis. 1974). In *Williams*, a plaintiff widower sought damages for wrongful removal of his deceased wife's kidneys as well as an action for abuses while she was still alive against her doctor and the hospital. *Id.* at 845-46. The court found that an affirmative defense of immunity under the UAGA was applicable where the doctor and the hospital had relied "in good faith" on a signed consent form. *Id.* However, the immunity did not apply to wrongful conduct against the wife prior to the allegedly wrongful removal of organs. *Id.* at 847.

[117] *Id.* at 846.

[118] *Id.* at 848-49. Of course, even assuming that these immunities have real world effects on behavior, it is debatable whether the benefits of such a regime outweigh the costs. Indeed, the legislature's incentives appear to be misguided. *See generally* RICHARD A. EPSTEIN, MORTAL PERIL: OUR INALIENABLE RIGHT TO HEALTH CARE? (1997) (arguing against government intervention in health care generally in favor of private ordering). As stated previously, the purpose of the immunities is to increase participation by health care organizations in the organ donation process. However, the problem is not health care participation but donor participation. *Id*. at 249-61 (discussing the supply side of organ donation). Shifting incentives to encourage donor participation would seem the more prudent course. *See Colavito II*, 438 F.3d at 229 ("[G]eneralized goals of increasing organ donations could plausibly be furthered either by shielding organ procurement organizations from liability or by giving donors and donees enforceable rights to remedy and deter misconduct."); *see also* MO. REV. STAT. § 194.270(3) (1996); FLA. STAT. ANN. § 765.517(5) (West 2002) (both statutes immunizing only "non-negligent" good faith conduct, presumably to protect donees rights rather than those involved in the organ procurement business).

[119] 519 N.Y.S.2d 928, 929 (Sup. Ct. 1987). In *Nicoletta*, decedent's organs were donated pursuant to UAGA § 3(a) by a woman who had lived with the decedent for 10 years and claimed to be his wife. *Id.* at 930. Subsequently it was discovered that the woman had no legal relation to the decedent and that the donation was invalid under the UAGA. *Id.*

the UAGA is that they act in "good faith,"[120] generally understood as not acting with fraud, malice, or dishonesty.[121] In Moore and Micheline's cases, showing fraud, malice, or dishonesty imposes a difficult burden.[122] However, if Dr. No had stolen the other kidney or the NYODN sold it on the black market, certainly there would be a variety of valid claims available.[123]

In recognizing the limits of these claims, it is important to remember that the UAGA has not been adopted uniformly among the states, and that there are substantial differences—even conflicts—in laws governing health and organ procurement practices within and between the states.[124] Some states have even expressly amended the UAGA to immunize only those who act "in good faith and *without negligence*."[125] While the effects of the good faith immunity vary greatly from jurisdiction to jurisdiction, and the dearth of caselaw provides few concrete examples, in the end, these immunities undoubtedly work to diminish or extinguish Moore and Micheline's respective interests in Connery's organs.[126]

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[120] *But see* Jardine, *supra* note 106, at 1659-60. Jardine argues that action taken in contravention of the purpose of the UAGA to "facilitat[e] the need for human organs" would not create entitlement to any immunities under the act. *Id.* at 1664. Jardine applies the argument to liability arising out of the rejection of valid organ donations. *Id.* at 1659-60. In Rogers and Micheline's case, it may be argued that damaging a kidney cannot be seen as an action "facilitating the need for human organs," and thus the immunities should not apply. It is doubtful that an already strained argument would stretch so far, and indeed, such an interpretation taken to its extreme would essentially do away with any meaningful protection provided by the UAGA immunities, which may be desirable policy but contravenes legislative intent. UNIF. ANATOMICAL GIFT ACT § 11(c), 8A U.L.A. 64.

[121] *See Nicoletta*, 519 N.Y.S.2d at 930 (citing BLACK'S LAW DICTIONARY (5th ed. 1979)).

[122] In *Colavito II*, on substantially similar facts, the court dismissed allegations of fraud. Colavito v. N.Y. Organ Donor Network, Inc. (*Colavito II*), 438 F.3d 214, 216, 222 (2d Cir. 2006), *certifying questions to* 860 N.E.2d 713 (N.Y. 2006).

[123] *See* REVISED UNIF. ANATOMICAL GIFT ACT (amended 2007), Summary of Changes in the Revised Act, *available at* http://anatomicalgiftact.org/DesktopDefault.aspx?tabindex=1&tabid=63 (suggesting remedies under the "common law").

[124] For example, New York does include the "good faith" immunity under UAGA, but under N.Y. PUB. HEALTH LAW § 4351(7) (McKinney 2007), "any person or organization acting pursuant to [the UAGA] shall be legally responsible for any negligent or intentional act or omission committed by such entity or its employees or agents." *Id.* The second circuit certified a question on this issue to the New York Court of Appeals, which the court of appeals did not reach, disposing of the case wholly on a factual finding of incompatibility. Colavito v. N.Y. Organ Donor Network, Inc. (*Colavito III*), 860 N.E.2d 713, 722 (N.Y. 2006). The discrepancies between state regulations raise interesting issues of conflict of laws for transfers between states, as well as the extent to which such regulation may impermissibly affect interstate commerce.

[125] FLA. STAT. ANN. § 765.517(5) (West 2002) (emphasis added).

[126] Also note that permitting actions for negligence certainly does not negate immunities for good faith, especially for causes of action explored in this Note which do not generally rely on negligence. *See generally* Part II. Concepts of good faith and negligence operate independently. *See, e.g.*, Berrios v. Our Lady of Mercy Med. Ctr., 799 N.Y.S.2d 452, 454 (App. Div. 2005) ("Although defendants . . . could be found to be negligent . . . all evidence points to the conclusion that defendants were acting in good faith."); People v. Lunney, 378 N.Y.S.2d 559, 563-64 (Sup. Ct. 1975) (grand jury minutes lost by a prosecutor considered "a 'good faith' negligent loss"); *see also* notes 124-125 (statutes waiving immunity for good faith negligence).

3. Kidneys for Cash? Tort-like Damages and Valuation[127]

In the unlikely event that Moore and Micheline were to successfully assert a prima facie case and somehow overcome the UAGA's statutory immunities, collecting meaningful damages on such a claim adds yet another layer of complication. Micheline and Moore's respective predicaments relating to damages are very different. Their situations are distinguished by the nature of the harm suffered by Micheline as next of kin and that suffered by Moore as a plaintiff in dire need of a kidney transplant.

Traditionally, damages available to next of kin in cases of corporeal mutilation provided compensation for "mental suffering and anguish . . . from the realization that disrespect and indignities have been heaped upon the body of one who was close to him in life."[128] This compensable quantum of mental suffering sustained by Micheline could be determined by a jury based on evidence presented at trial.[129] However, as is evident in Moore and Micheline's case, where wrongful appropriation of organs is at issue, any showing of mental pain and suffering is likely to be nominal.[130] Nevertheless, in extreme cases of reckless corporeal mutilation or cases of intentional theft of body parts, punitive damages would certainly be appropriate.[131]

Moore on the other hand, is asserting "a practical use for the organ, not a sentimental one,"[132] and as such, Moore has a much stronger argument for meaningful recovery. Moore may claim entitlement to a market price remedy,[133] although several courts have refused to entertain the concept of valuating organs as it is against public policy.[134] But the

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[127] The discussion of damages, while focused on tort damages, also has significant bearing on damages for breach of contract and constitutional claims. *See infra* Part II.B-C. Unique damages issues raised in those contexts will be addressed separately. *See infra* Part II.B-C.

[128] Harry R. Bigelow, Jr., Note, *Damages: Pleading: Property: Who May Recover for Wrongful Disturbance of a Dead Body*, 19 CORNELL L.Q. 108, 110 (1933).

[129] *See* Kenton v. Hyatt Hotels Corp., 693 S.W.2d 83, 89 (Mo. 1985) (discussing both mental and physical suffering as elements of damages properly presented to the jury).

[130] *See supra* Part II.A.1 (discussing the difficulty of establishing negligence in a tort action as a primary advantage of actions for conversion).

[131] Punitive damages are available to plaintiffs wronged by negligence where defendant's conduct demonstrates "reckless indifference to the rights of others." RESTATEMENT (SECOND) OF TORTS § 908(2) (1979). Nominal damages could provide appropriate relief where such damages could support an award for punitives. *See* Jacque v. Steenburg Homes Inc., 563 N.W.2d 154, 157, 161 (Wis. 1997) (upholding an award for $1 in nominal damages and $100K in punitives). *But see* Action House Inc. v. Koolik, 54 F.3d 1009, 1013-15 (2d Cir. 1995) (vacating an entirely punitive judgment). The Supreme Court has also held that excessive punitives out of balance with compensatory damages may implicate the Due Process Clause of the U.S. Constitution. BMW of North America, Inc. v. Gore, 517 U.S. 559, 580-83 (1996); Phillip Morris v. Williams, 549 U.S. 346 (2007); Exxon Shipping Co. v. Baker 128 S. Ct. 2605.

[132] Colavito v. N.Y. Organ Donor Network, Inc. (*Colavito II*), 438 F.3d 214, 225 (2d Cir. 2006), *certifying questions to* 860 N.E.2d 713 (N.Y. 2006).

[133] *See id.* at 221 n.9 (noting that Colavito submitted substantial evidence, in the form of a CNN article reporting an e-bay auction, of the value of a kidney).

[134] Colavito v. N.Y. Organ Donor Network, Inc. (*Colavito I*), 356 F. Supp. 2d 237, 244 (E.D.N.Y. 2005), *aff'd*, 486 F.3d 78 (2d Cir. 2007); Bauer v. N. Fulton Med. Ctr. Inc., 527 S.E.2d

courts need not restrict themselves to a market price remedy, as other options may be available.[135] Similar to the pain and suffering associated with the loss suffered by the next of kin in wrongful donation cases, Moore may be compensated for the loss of his *enjoyment* of a kidney.[136] Such a remedy might include the future health care costs associated with dialysis or other treatments incident to the loss of the limb.[137] Indeed, the courts' fears of violating public policy seem somewhat unjustified where juries and even government agencies, under programs such as the worker's compensation fund, regularly determine the value of human life and body parts with striking specificity.[138] Despite these potential remedies, Moore will likely find it difficult to collect adequate damages[139] due to a lack of precedent and the novel nature of his claim to damages.[140] The complete lack of recovery further underscores the futility of pursuing a tort law remedy.

B. Broken Hearts and Contracts

An analysis of Moore and Micheline's rights and remedies under contract law brings into focus a variety of problems, somewhat unique to organ donation law, that have attracted surprisingly little attention from

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240, 244 (Ga. Ct. App. 1999). The courts' notion of public policy in these cases seems somewhat unjustified in light of State Worker's Compensation Statute, which provides values for compensation for the loss of limbs and other body parts. *See. e.g.*, NEB. REV. STAT. § 48-121(3) (2007) (setting forth compensation as a percentage of wages for a thumb, finger, hand, and nose). Indeed, valuating organs is in many ways a much easier proposition than that of valuing pain and suffering associated with emotional distress or loss of future profits, and yet courts are more comfortable engaging in such less gruesome, highly speculative analysis. *See* GOLDBERG, ET AL., TORT LAW: RESPONSIBILITIES AND REDRESS 461 n.1 (2004).

[135] *See* Standard Oil Co. of N.J. v. S. Pac. Co., 268 U.S. 146, 155-56 (1925) ("Where there is no market value . . . [the value is measured by] the sum that in all probability would result from fair negotiations between an owner willing to sell and a purchaser desiring to buy."); Rhoades, Inc. v. United Air Lines, Inc., 224 F. Supp. 341, 344 (W.D. Pa. 1963) ("Where there is the destruction of personal property without a market value . . . damages . . . [are] based upon its special value to the plaintiff."); Szekely v. Eagle Lion Films, Inc., 140 F. Supp. 843, 849 (S.D.N.Y. 1956) ("Even if there were no other market . . . plaintiff . . . is entitled to damages 'based upon its special value to him.'") (quoting RESTATEMENT OF TORTS § 927(c)).

[136] *Colavito II*, 438 F.3d at 225 (noting that Colavito is suing in reality for the "loss of a functioning organ").

[137] *Id.*

[138] *See supra* note 134 (identifying statutory value placed on body parts).

[139] In *Colavito II*, the Second Circuit proceeded under the assumption that the amount in controversy requirement for diversity jurisdiction could be satisfied by nominal damages with the possibility of punitives. 438 F.3d at 221-22; *see supra* note 131 (discussing potential for punitive damages).

[140] Obviously, common forms of equitable relief available to plaintiffs asserting conversion claims would be unavailable to Roger. *See infra* note 165 (discussing unavailability of specific performance under contract theory). Specifically, the idea of replevin in the context of organ donation would not be taken seriously as removing transplanted kidneys would raise serious ethical concerns. Further, injunctive relief against the organ donor network, in the form of providing him with another kidney, may also be precluded on policy grounds because such an action would presumably deprive another donor on a waiting list of an organ. *See Colavito II*, 438 F.3d at 223 n.11.

courts and commentators.[141] Micheline signed a document authorizing a donation of her husband's kidneys to Moore, thereby presumably creating some sort of legal relationship between her, the health care service provider, and Moore.[142] Recovery under contract is not burdened by muddled doctrines of property rights in the body, but turns instead on whether the legal relationship that has been created constitutes a contract or something else.[143] Whether such a relationship or contract can be legally enforced is of central importance to the integrity of the organ donation system, established in part by the UAGA.[144]

1. A Problem that Merits "Consideration"

The black letter law of contract formation requires an offer, an acceptance, and some form of consideration.[145] Consideration is usually something of value offered in exchange for the promise to perform an obligation.[146] The UAGA expressly prevents someone from giving "valuable consideration" in exchange for organs.[147] Of course, the unavailability of valuable consideration does not act as an absolute bar to the formation of a contract. It is well established that a "contract" may be enforced without consideration, specifically when reliance by a party triggers promissory estoppel.[148] However, an argument can be made that the UAGA's bar against "valuable consideration" is intended to imply a bar against any enforceable contract. Indeed, the act is entitled the Uniform Anatomical *Gift* Act, and provides procedures by which donors

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[141] Nevertheless, the idea of contracting for body parts is at least as old as Shakespeare. *See* WILLIAM SHAKESPEARE, MERCHANT OF VENICE act 4, sc. 1. In Shakespeare's play the antagonist, Shylock, guarantees a debt with a contract containing a provision that in the event of default on the loan, he shall be entitled to a "pound of flesh" from the debtor. *Id.*

[142] *Colavito II*, 438 F.3d at 217-18.

[143] *See infra* Part II.B.1.

[144] *See infra* Part III.A.

[145] RESTATEMENT (SECOND) OF CONTRACTS §§ 22, 71 (1979).

[146] *Id.* § 71 (consideration may be given through "(a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification, or destruction of a legal relation").

[147] UNIF. ANATOMICAL GIFT ACT § 10(a) (1987), 8A U.L.A. 62 (2003). It is important to note that the UAGA only defines "valuable consideration" insofar as it excludes "reasonable payment for the removal, processing, disposal, preservation, quality control, storage, transportation, or implantation of a part," thereby allowing state courts and legislatures to interpret the limits of valuable consideration. *Id.* § 10(b), 8A U.L.A. 62. Indeed, there is present and proposed legislation that seems to test the limits of "valuable consideration." *See* Sarah Elizabeth Statz, Note, *Finding the Winning Combination: How Blending Organ Procurement Systems Used Internationally Can Reduce the Organ Shortage*, 39 VAND. J. TRANSNAT'L L. 1677, 1700-03 (identifying a number of legislative attempts to incentivize donation, including: tax credits, discounted fees for driver's licenses, and funeral expenses). South Carolina has also explored the possibility of letting prisoners out early in exchange for organs. CBS News, Wanna Cut Your Jail Time? Donate A Kidney! S.C. Legislation Would Reduce Prison Terms For Inmates Who Donate Organs, Bone Marrow, Mar. 8, 2007,http://www.cbsnews.com/stories/2007/03/08/national/main2548860.shtml.

[148] *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979). Contracts may also be formed in certain instances through nominal consideration. U.C.C. §§ 2-205, 2-209 (2001).

may make an "anatomical gift."[149] One may reasonably infer that the UAGA provides the means and form to execute a legal gift-promise, which is revocable at will and conceptually distinct from a contract, which requires consideration and is binding.[150] Yet, some courts have held that under the policies of the UAGA and NOTA, private parties have no authority to enter into a binding contract for disposition of organs, displacing common law promissory estoppel.[151]

Not all cases take such a restrictive view. Specifically, the Second Circuit in *Colavito* explicitly recognized the possibility of the formation of a contract based on principles of reliance on identical facts to Moore's case.[152] Moore's reliance on Micheline's promise in going to the hospital and being fully prepped for surgery could be sufficient reliance to form a binding contract,[153] although such reliance is not necessary where he is the beneficiary of the contract between Micheline and the NYODN.[154] In such a case, Moore's right to recovery depends upon the existence of the underlying contract between Micheline and the NYODN. Thus, although the Second Circuit's decision in *Colavito*

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[149] UNIF. ANATOMICAL GIFT ACT § 1, 8A U.L.A. 18. (defining "anatomical gift" as "a *donation* of all or part of a human body to take effect upon or after death") (emphasis added).

[150] *See generally* GRANT GILLMORE, THE DEATH OF A CONTRACT (1974) (arguing that consideration is a dead formality and that reliance has effectively displaced consideration as the *sine qua non* of contract law). Importantly, it is a legal certainty that promises to make inter vivos gifts are unenforceable and revocable at will. UNIF. ANATOMICAL GIFT ACT § 2(f), 8A U.L.A. 24 (donations revocable at will by donor prior to death). Revocable agreements may merely by considered illusory or gift promises. However, the policy concerns against coercion are not relevant upon death, and indeed the UAGA states that "[a]n anatomical gift that is not revoked by the donor before death is irrevocable and does not require the consent or concurrence of any person after the donor's death." UNIF. ANATOMICAL GIFT ACT § 2(h), 8A U.L.A.25.

[151] Perry v. Saint Francis Hosp. & Medical Ctr., 886 F. Supp. 1551, 1563 (D. Kan. 1995) ("[A] contract approach to organ and tissue donation is not reconcilable with societal beliefs and values on this subject. UAGA embodies a commitment to the belief that organs should be given as a gift, either to a specific individual or to society at large.") (footnotes omitted). Foreclosing formation through promissory estoppel makes some sense, especially where one considers the potential situation where Connery promises to make an inter vivos transfer of a kidney to Moore. It is unthinkable that any amount of reliance on the part of Moore, even if he were prepped for surgery and on the operating table, would prevent Connery from changing his mind and refusing to donate.

[152] *Colavito II*, 438 F.3d at 228 n.14.

[153] *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979) ("A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.").

[154] *Colavito II*, 438 F.3d at 228 n.14. The second circuit did not find the fact that Micheline was the party who entered into the original contract to be problematic for Moore seeking recovery on the contract, noting that

> New York follows the nearly universal rule that a third person may, in his own right and name, enforce a promise made for his benefit even though he is a stranger both to the contract and to the consideration. . . . [T]here is need for neither consideration from, nor privity with, nor obligation to, the third person.

Colavito II, 438 F.3d at 228 n.14 (citation omitted).

indicates that it would accept the validity of the underlying contract, again, other courts may disagree with such an approach.[155]

2. "Special" Damages?

Forming a contract does not help plaintiffs like Moore and Micheline unless the contract provides a legal means of meaningful recovery.[156] For example, in *Bauer v. N. Fulton Med. Ctr.*, a plaintiff widow brought an action for contract damages, among other claims, for removal of her deceased husband's eye tissue without her consent.[157] Although the court held that selling eye tissue is illegal, and therefore contract recovery was not available for the value of the eye tissue,[158] the court proceeded to apply a contract damages remedy.[159] Specifically, the court found the proper remedy to be any extra cost paid to the mortuary due to the removal of the corpse's corneas.[160] These damages, while perhaps insignificant in Mrs. Bauer's case, are in fact consequential damages on the contract.[161] Consequential damages are foreseeable damages resulting indirectly from the breach of contract, such as extra expenses incurred as a result of the breach, lost revenues, and repair costs.[162]

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[155] *Id. But see Perry*, 886 F. Supp. at 1563 ("The consent form simply memorializes their consent to donate. It does not purport to set forth any particular rights and duties of the parties like a written contract would be expected to do. . . . The court rejects the plaintiffs' attempts to construct an enforceable contract from these facts.").

[156] *See* LLEWELLYN, *supra* note 11.

[157] 527 S.E.2d 240, 242 (Ga. Ct. App. 1999).

[158] Courts often cite public policy as an excuse for not allowing contract remedies or for not enforcing contracts for the sale of organs. *See* Colavito v. N.Y. Organ Donor Network, Inc. (*Colavito I*), 356 F. Supp. 2d 237, 244 (E.D.N.Y. 2005), *aff'd*, 486 F.3d 78 (2d Cir. 2007). However, if one takes the UAGA seriously, public policy does allow transactions for organs every day between families of the deceased and donation organizations or hospitals. *See* UNIF. ANATOMICAL GIFT ACT § 6, 8A U.L.A. 53-54. Whether these transactions are contracts or not is inconsequential in the vast majority of donations where no serious complications arise. However, the distinction becomes much more than mere semantics where a dispute arises and a legal enforcement is sought. Indeed, one would hope that compliance with a donor's wishes would be more than voluntary. *But see* Epstein, *supra* note 118 at 258 ("No ongoing market could operate if the performance of each contract depended solely on its legal enforcement.").

[159] *Bauer*, 527 S.E.2d at 245 (denying damages for pain and suffering "[b]ecause Bauer's claims for mental pain and suffering are not pecuniary damages, they cannot be recovered pursuant to her contract claims"); *see also* Hawkins v. McGee, 146 A. 641, 644 (N.H. 1929) (denying recovery for pain and suffering). Potential inability of recovery for pain and suffering is another deterrent for plaintiffs seeking contract recovery, especially plaintiffs like Micheline who have suffered no pecuniary harm.

[160] *Bauer*, 527 S.E.2d at 245 ("In this case, therefore, Bauer might recover damages relating to any extra cost paid to the mortuary which flows directly from the removal of Mr. Bauer's eyes. Such damages might, for example, include any additional charge to prepare a corpse with its eyes removed for burial, or costs related to any delay in funeral proceedings resulting from such additional preparation, or other such limited damages.").

[161] *Id.*; *see also* Hadley v. Baxendale, 156 Eng. Rep. 145, 151 (1854).

[162] *See Hadley*, 156 Eng. Rep. at 151 ("Now we think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may

Moore, in seeking recovery under a contract theory may be entitled to more than consequential damages.[163] Despite cases like *Bauer* insisting otherwise, *Colavito* did rule out completely a market price remedy, or at least the value of a kidney to Moore.[164] However, as most courts addressing the issue express discomfort with kidney valuation, squeamishness over specific performance is certainly even more acute, and pragmatic considerations simply rule out performance as a viable option.[165]

In sum, potential contract claims may appear to have advantages over tort theories by circumventing many legal concerns of property in the body.[166] Any advantage, however, is offset by problems of contract formation generally sufficient to prevent recovery, not to mention a host of concurrent problems shared by statutory[167] and tort[168] causes of action. Specifically, contract law does little to resolve issues of damages[169] and immunities under the UAGA.[170] On balance, advantages under theories of contract, while making for interesting discussion,[171] provide no tangible

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fairly and reasonably be considered [] arising naturally . . .,from such breach of contract itself . . ."); *Bauer*, 527 S.E.2d at 245.

[163] *Colavito II*, 438 F.3d 214, 225 (2d Cir. 2006) ("Plaintiffs such as Colavito . . . have . . . a practical use for the organ, not a sentimental one."); *see supra* Part II.A.3 (discussing damages).

[164] *See supra* Part II.A.1; *Colavito II*, 438 F.3d at 220, 225.

[165] Courts generally disfavor specific performance. RESTATEMENT (SECOND) OF CONTRACTS § 367(1) & cmt. a (1981); Fitzpatrick v. Michael, 9 A.2d 639, 641 (Md. 1939). Courts would especially disfavor specific performance where such performance would come at the cost of others receiving organs.

[166] For one thing, recovery under contract does not turn on whether a property interest has been formed in the organ but on the enforcement of rights granted pursuant to a statute. *See* UNIF. ANATOMICAL GIFT ACT (1987), 8A U.L.A. 17 (2003). *Colavito II*, 438 F.3d at 228 n.14 (recognizing a contract). *But see infra* Part II.C.1 (discussing Due Process conception of property including statutory rights).

[167] *See supra* Part II.A.2.a.

[168] *See supra* Part II.A.1.

[169] *See supra* Part II.A.3. Also, importantly, punitive damages are not collectible under an action for breach of contract. Timothy J. Sullivan, *Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change*, 61 MINN. L. REV. 207, 218-19 (1977).

[170] Immunities under UAGA are especially prohibitive to claims in the area of contracts, given that breach of contract, unlike most torts (conversion being an exception), does not necessarily entail negligence. *See supra* Part II.A.1-2 (noting the evidentiary advantage of conversion over torts of negligence and the scope of immunities for purposes of conversion). State statutory schemes providing liability for negligent action in the organ donation process under UAGA will not provide a way around the good faith immunity problem absent a showing that the breach of contract was taken in "bad faith." UNIF. ANATOMICAL GIFT ACT § 5, 8A U.L.A. 44; *see supra* notes 124, 125.

[171] A few cases have attempted to bring body parts within the U.C.C. as goods, primarily to invoke the implied warranty protections afforded by the U.C.C. *See* U.C.C. §§ 2-314, 2-315 (1990); Note, *The Sale of Human Body Parts*, 72 MICH. L. REV. 1182, 1254-55 n.487 (1974). While these attempts have been uniformly unsuccessful, several states have passed statutes which expressly state that blood, semen, and other body parts are "services" in order to avoid this problem. *Id.* at 1254; Michelle Bourianoff Bray, Note, *Personalizing Personality: Toward a Property Right in Human Bodies*, 69 TEX. L. REV. 209, 224-25 (1991). However, if states are passing statutes which expressly categorize such body parts and fluids as services, that suggests that there is some support for the argument that organs should be classified as "goods," thereby making the advantages of the U.C.C. available to donees. *See* GOLDBERG, ET AL., TORT LAW: RESPONSIBILITY AND REDRESS 825-26.

benefits to plaintiffs like Moore and Micheline over other theories of recovery.

C. Is There a Constitutional Right to Your Corneas?

While plaintiffs such as Moore and Micheline encounter significant difficulty due to the inadequacy of common law and statutory remedies, perhaps relief may be found through an appeal to a higher source. Specifically, the Constitution may provide relief either in the form of a property right under the Takings Clause[172] or as a right protected under the Due Process Clause.[173] Importantly, constitutional claims may be more likely to succeed, in that they are not subject to statutory immunities under the UAGA.[174] Other significant obstacles remain as both takings and due process claims, similar to conversion claims,[175] are based on the existence of a property right, although the precise contours of that property right under claims for conversion, takings, and due process violations all bear important differences from one another.

In addition to the loss of a recognized property interest, it is essential for both Takings and Due Process purposes that the proprietary deprivation be effectuated by the government.[176] The Constitution does not protect individuals from private actors, but rather from those acting "under color of [the law]."[177] In our beginning hypothetical, neither Dr. No nor the NYODN[178] are state actors. To simplify the constitutional analysis, now assume that Dr. No is a coroner, who is a state actor.[179]

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[172] U.S. CONST. amend. V ("[P]rivate property [shall not] be taken for public use, without just compensation. ").

[173] *Id.* ("No person shall . . . be deprived of life, liberty, or property, without due process of law.").

[174] Concerns of immunities under the UAGA may be eviscerated by Congress through action under statutes like NOTA, depending on complicated doctrines of federal abrogation of state sovereign immunity. *See* U.S. CONST. amend. XI; Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996). In the vast majority of circumstances coroners acting pursuant to statute will be agents of a city or county which do not enjoy the full protection of state sovereign immunity. Lincoln County v. Luning, 133 U.S. 529 (1890). Most importantly for purposes of takings and due process claims, where state actors engage in unconstitutional conduct, such action is not protected by state sovereign immunity, although available relief may be significantly restricted. *Ex parte* Young, 209 U.S. 123 (1908).

[175] *See supra* Part II.A.1.

[176] MICHAEL WELLS & THOMAS EATON, CONSTITUTIONAL REMEDIES: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 29 (2002).

[177] 42 U.S.C. § 1983 (2000).

[178] NYODN operates as a nonprofit corporation although they are a "federally designated [OPO]." New York Organ Donor Network, http://www.donatelifeny.org/about/about_what.html (last visited Sept. 28, 2008).

[179] State v. Powell, 497 So. 2d 1188 (Fla. 1986) (assuming the issue of state action but finding statute authorizing corneal tissue removal to be constitutional); Georgia Lions Eye Bank, Inc. v. Lavant, 335 S.E.2d 127 (Ga. 1985) (same); Grad v. Kaasa, 314 S.E.2d 755, 758 (N.C. Ct. App. 1984) (noting that "a medical examiner is a public official"). The state action requirement may also be satisfied where a coroner authorizes a third party to take action to remove organs pursuant to presumed consent laws. *See* OHIO REV. CODE ANN. § 2108.60 (West 2008) (presumed consent

Assume also that Connery promised Moore two functioning corneas to replace Moore's defective corneas. Assume further that Dr. No removed Connery's corneas acting pursuant to a state "presumed consent" statute,[180] without providing notice and while unaware of the decedent's wishes. Presumed consent laws assume, under certain circumstances, that decedents have consented to the taking of body parts, regardless of the potential property interests which may have vested in the next of kin or in an intended donee.[181] While it is unlikely that Micheline or Moore would be entitled to some form of constitutional relief, even if they were, the remedies available under the Due Process Clause and Takings Clause are clearly inadequate.

1. Due Process Claims

In order for Moore or Micheline to bring a successful due process claim, they must show that they have suffered (1) a deprivation of (2) property (3) under color of state law.[182] Assuming that the third element, state action, is satisfied by the actions of the coroner or his agent,[183] the central problem with their claim turns again on the familiar dilemma of whether property exists, here specifically for purposes of the Due Process Clause.[184] The determination of whether a property right exists for Due Process Clause purposes[185] requires substantially similar

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statute including a provision for a "deputy coroner," acting under direction of an official coroner to remove eyes or eye tissue); Lawyer v. Kernodle, 721 F.2d 632, 635 (8th Cir. 1983) (employee of company hired by coroner to conduct autopsy "was performing those duties under color of state law").

[180] State presumed consent laws generally allow for removal of corneas, eyes, or pituitary glands where no objection is known of by a coroner or medical examiner. *See* Jaffe, *supra* note 32, at 531 (surveying presumed consent laws, including: ARK. CODE ANN. § 12-12-320 (1987) (pituitary gland); CAL. GOV'T CODE §§ 27491.46-.47 (West 1988) (pituitary and corneas); COLO. REV. STAT. § 30-10-621 (1986) (pituitary); CONN. GEN. STAT. ANN. § 19a-281 (West 1986) (pituitary and corneas); DEL. CODE ANN. tit. 29, § 4712 (Supp. 1988) (corneas); FLA. STAT. ANN. § 732.9185 (West 1989) (corneas); GA. CODE ANN. § 31-23-6 (1985) (eyes and corneas); KY. REV. STAT. ANN. § 311.187 (LexisNexis 1988) (corneas); MD. CODE ANN., EST. & TRUSTS CODE § 4-509.1 (West 1989) (corneas); MICH. COMP. LAWS ANN. § 333.10202 (West 1989) (corneas); MO. ANN. STAT. § 58.770 (West 1989) (pituitary); N.C. GEN. STAT. § 130A-391 (1989) (corneas); OHIO REV. CODE ANN. § 2108.60 (West 1987) (corneas); OKLA. STAT. ANN. tit. 63, § 944.1 (West 1990) (pituitary); TENN. CODE ANN. § 68-30-204 (West 1989) (corneas) (repealed); TEX. HEALTH & SAFETY CODE ANN. § 693.012 (Vernon 1990) (corneas); W. VA. CODE § 16-19-3a (1985) (corneas) (repealed)).

[181] *But see infra* note 188.

[182] Brotherton v. Cleveland, 923 F.2d 477, 482 (6th Cir. 1991).

[183] *See supra* note 179.

[184] This inquiry under the Due Process Clause differs in some respects and is arguably less stringent than inquiries under the common law or the Takings Clause. *See* Jaffe, *supra* note 32, at 556-58 (discussing "new property," such as statutory entitlements, protected by due process as opposed to more traditional common-law property, protected by both Due Process and Takings Clauses).

[185] *But see Brotherton*, 923 F.2d at 481-82 (avoiding analysis of Ohio property law by noting that while "the existence of an interest may be a matter of state law, whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the [D]ue [P]rocess [C]lause is determined by federal law" (quoting Memphis Light, Gas and Water Div. v. Craft, 436 U.S. 1, 9 (1978))). *See* Jaffe, *supra* note 184, at 556-58 (discussing "new property" entitled to due process protection).

analysis as the determination of whether a property might exist in an organ in state law actions for conversion.[186] Expounding on due process property rights, the Supreme Court in *Board of Regents v. Roth* stated that "[p]roperty interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."[187]

The facts that must be shown to determine whether property rights in organs are sufficient to trigger Due Process protections vary by jurisdiction.[188] The Sixth and Ninth Circuits have suggested that state-law rights to prevent mutilation or removal of organs can constitute a property interest under the Due Process Clause.[189] In *Brotherton v. Cleveland*,[190] the court found that a widow's property interest in her deceased husband's corneas, which had been removed pursuant to a state presumed consent statute,[191] constituted a property interest entitled to due

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[186] *See* Parts I.A, II.A.1.

[187] 408 U.S. 564, 577 (1972). Federal law can also create property rights. *See* Mathews v. Eldridge, 424 U.S. 319, 332 (1976) (Federal social security disability benefits conferred by federal legislation is a property interest protected by the Due Process Clause.). *See* Jaffe, *supra* note 184, at 556-58.

[188] Whaley v. Tuscola, 58 F.3d 1111, 1117 (6th Cir. 1995) (due process claim sustained for unauthorized removal of eyes and corneas pursuant to a state presumed consent statute); *Brotherton*, 923 F.2d at 481-84 (same).

[189] *Accord Brotherton*, 923 F.2d 477; Newman v. Sathyavaglswaran, 287 F.3d 786, 796-97 (9th Cir. 2002) (holding that "parents had property interests in the corneas of their deceased children protected by the Due Process Clause of the Fourteenth Amendment"). The *Newman* court recognized that "common law rights, combined with the statutory right to control the disposition of the body recognized in each state's adoption of the UAGA" supported the conclusion that a protectable property interest existed. *Id.* at 796. While here there are certainly enough "sticks," or rights to constitute a "bundle of rights," for some purposes, existence of property for all purposes is not clear. *See supra* note 179. Further, to the extent that the court relies on common law rights of the "next of kin," such analysis, while applicable to Micheline's action for relief, may exclude Moore. *See supra* Part II.A.1. Finally, other courts have come to opposite conclusions. *See* cases *infra* note 193.

[190] 923 F.2d 477 (6th Cir. 1991).

[191] *E.g.*, OHIO REV. CODE ANN. § 2108.60(B)(3)-(4) (1999).

> (B) A county coroner who performs an autopsy . . . may remove one or both corneas of the decedent, or a coroner may authorize a deputy coroner . . . to enucleate eyes, or eye technician to remove one or both corneas of a decedent whose body is the subject of an autopsy . . . if all of the following apply:
>
> . . . .
>
> (3) The removal of the corneas and gift to the eye bank do not alter a gift made by the decedent or any other person authorized under this chapter to an agency or organization other than the eye bank;
>
> (4) The coroner, at the time he removes or authorizes the removal of the corneas, has no knowledge of an objection to the removal by any of the following:
>
>> (a) The decedent, as evidenced in a written document executed during his lifetime;
>>
>> (b) The decedent's spouse; . . . .

Id.

process protection.[192] Other courts have gone the opposite direction, however, as in the case of *Arnaud v. Odom*, concluding that "quasi-property" interests are not actionable under the Due Process Clause of the Constitution.[193]

Even assuming that courts are willing to recognize that either Moore or Micheline holds a property interest sufficient for due process purposes,[194] it is not guaranteed that the deprivation constitutes a violation of due process.[195] A three-part balancing test was developed by the Supreme Court in *Mathews v. Eldridge* to determine whether the process provided by the state accompanying a deprivation of property is sufficient.[196] In determining whether the process is sufficient, the court weighs: (1) the private interest; (2) the risk of erroneous deprivation by the current procedures and the value of additional procedural safeguards; and (3) the state's interest, including additional burdens that may be imposed by alternate or additional procedural requirements.[197]

The court in *Brotherton* found that the state pre-deprivation process was insufficient and that the state interest in organ procurement did not outweigh plaintiff's property interest in the deceased.[198] Alternatively, in a pre-*Eldridge* decision, the Florida Supreme Court, while ultimately resting the decision on the lack of property interests afforded to the decedents' next of kin, found that a substantially similar "presumed consent" statute[199] was constitutional because the statute promoted a permissible state objective under Florida law and affected a very limited private interest.[200]

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[192] *Brotherton*, 923 F.2d at 482. The court noted that although the property interest was extremely regulated, the rights granted under the UAGA create a substantial interest by plaintiff in the decedent's body. *Id.* Whether such interest is devisable to plaintiffs such as Moore under the UAGA remains an open question. *See* discussion of conversion *supra* Part II.A.1.

[193] 870 F.2d 304, 307 (5th Cir. 1989). In *Odom*, defendant coroner performed an "experiment" on the corpses of two babies who had died of sudden infant death syndrome. *Id.* at 307. He dropped the baby corpses on their heads to determine the extent of the damage resulting from the falls in order to clear his name in a previous lawsuit. *Id.* The court held that despite Louisiana's recognition of a "quasi-property" right in a corpse, such a right was not actionable under the Due Process Clause of the Constitution. *Id.* at 310; *see also Brotherton*, 923 F.2d at 484 (J. Joiner dissenting) ("[T]he court is wrong in its holding that the procedural requisites for dealing with non-property can rise to become property and be protected by the fourteenth amendment [sic] . . . . [T]he 'bundle of rights' in the plaintiff, in light of the common law history and the express purpose of the [UAGA and presumed consent] statutes, is virtually nonexistent."); State v. Powell, 497 So. 2d 1188, 1191 (Fla. 1986) (finding no protected property interest while also noting the minor intrusion of corneal removal).

[194] *See* Part II.A.1; *see also supra* notes 187-189, 193.

[195] Deprivations of liberty and property are effectuated on a daily basis without due process violations. For example, when taxes are raised, debts owed to the government are collected, fines are levied, land is zoned for particular uses, or prisoners are convicted and sentenced.

[196] 424 U.S. 319, 335 (1976).

[197] *Id*.

[198] 923 F.2d at 482.

[199] FLA. STAT. ANN. § 765.5185 (West 2002).

[200] *Powell*, 497 So. 2d at 1191-92 (weighing the significant benefits of the statutory scheme against the minor cost and intrusion upon the families of the deceased in concluding that the statute achieves a permissible purpose).

Micheline and Moore are faced with two difficult challenges. Even assuming the presence of state action, Moore and Micheline must prevail in the *Eldridge* balancing test. Moore appears to have a substantially stronger private interest than Micheline, as the corneas were left to him, although even a widow's rights may be enforced under the Due Process Clause.[201] The state also has a substantial interest in the welfare of its citizens, and pre-deprivation process defeats the purpose of the statute and will impose an additional burden on the state. Secondly, it is by no means clear that Moore and Micheline have established a property interest at all under the common law or otherwise.[202] A final barrier to recovery that goes beyond establishing a constitutional violation is what that recovery would look like. As in actions for conversion, the proper measure of recovery for organs and other body parts in a due process case presents thorny remedial issues.[203] In sum, the slight advantage of avoiding state law immunities[204] by bringing a claim under the Due Process Clause is effectively nullified by the legal and pragmatic limitations faced by plaintiffs like Micheline and Moore.

2. Takings Clause Claims

Moore and Micheline may argue that the taking of Connery's corneas constitutes a taking of private property by the government.[205] One modern justification for actions under the Takings Clause flows from the concept that burdens that are disproportionately placed on individuals by the government for the benefit of the public should be internalized by the government and borne by those who benefit, rather than the individual.[206] This conception of takings policy conflicts directly with the policy of presumed consent laws, where the government appropriates corporeal property for public use without any compensation.[207] Thus, the principal and familiar question facing

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[201] *Brotherton*, 923 F.2d at 482.

[202] *See supra* Part II.A.1.

[203] *See supra* Part II.A.1, 3.

[204] *See supra* note 174.

[205] U.S. CONST. amend. V. While the text of the Takings Clause is found in the Fifth Amendment and was originally intended as a restriction on the federal government, the application of the Takings Clause to the states has been upheld and repeatedly reaffirmed by the Supreme Court. *See* Chicago, Burlington & Quincy Ry. Co. v. Chicago, 166 U.S. 226 (1897).

[206] Serkin, *supra* note 11 at 703-29 (surveying a variety of competing theories of takings beginning with the traditional economic account of forcing internalization of costs to effectuate efficiency and thereby "prevent[ing] fiscal illusion").

[207] Kelo v. City of New London, 545 U.S. 469 (2005). The Supreme Court in *Kelo* found the Public Use requirement of the Takings Clause to be satisfied where a municipality condemned property for the purpose of conveying such property to a private developer in order to aid the local economy. *Id.* at 472. While the holding may be seen as a liberal interpretation of Public Use, the Supreme Court in *Kelo* makes clear that there are substantive limits to the clause, specifically noting that "it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation." *Id.* at 477. Once again, making the liberal assumption that Moore or Micheline holds a property interest in

potential organ litigants is whether property in a corpse exists and, if so, whose property is it? The Supreme Court, in the area of Takings Clause jurisprudence, has stated, "We have never held that a physical item is not 'property' simply because it lacks a positive or economic market value."[208] Although the Supreme Court's view of property for purposes of the Takings Clause may be more restrictive than under due process analysis,[209] excluding certain statutory entitlements, property interest in organs may be cognizable as one of the traditional forms of property entitled to Takings Clause protection.[210]

One of the narrowest instances of property found by the Supreme Court to merit Takings Clause protection is found in the case of *Hodel v. Irving*.[211] In *Hodel*, the statutory elimination of the right to devise property interests in Indian land was held to constitute a taking of property,[212] despite the fact that, viewing rights to the property as a whole, a restriction on its disposition may seem insignificant.[213] Viewing the taking as a complete taking of the right to devise one's property, however, leads to the conclusion that the government has completely taken that property right away.[214] One could argue that where the government prevents Connery and Micheline from enforcing their wishes

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Connery's organs, it would appear that taking such property is a clear violation of the Public Use doctrine, "conferring a private benefit on a particular private party." *Id.* at 479. However, viewed in the aggregate, as the Supreme Court viewed New London's action, the taking of Connery's organs may properly be viewed as serving the permissible public purpose of providing more organs to donees generally. *Id. But see id.* at 478 (noting that the "[c]ity's development plan was not adopted to benefit a particular class of identifiable individuals") (internal quotation marks omitted).

[208] Phillips v. Washington Legal Found., 524 U.S. 156, 169 (1998).

[209] *See* Jaffe, *supra* note 184 at 556-58. *But see* Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998) (noting that the right to exclude is the *sine qua non* of property rights).

[210] *See* Jaffe, *supra* note 184, at 556-58 (distinguishing statutory entitlements as "new property" under the Due Process Clause, not protected by the Takings Clause). Perhaps the traditional form of property protected by the Takings Clause is better understood as rights arising from the common law rather than statutory entitlements. *See supra* Part I.A; *see also* Andrus v. Allard, 444 U.S. 51 (1979) (no regulatory takings protection for effective destruction of market value through a prohibition on sale of chattel); Lucas v. S. Carolina Coastal Council, 505 U.S. 1003, 1027-28 (1992) (preserving the *Andrus* exception, and noting the important status of land under the Takings Clause).

[211] 481 U.S. 704 (1987).

[212] *Id.* at 718.

[213] Only undivided interests of less than two percent fell under the regulation. *Id.* at 709.

[214] This sleight of hand demonstrates the problem of conceptual severance in Takings Clause jurisprudence. *See Lucas*, 505 U.S. at 1016-17 n.7. Also referred to as the "denominator problem," conceptual severance merely embodies the idea that where the government takes 5% of a parcel of land for example, the loss is thought of as 100% loss of 5% of the property, as opposed to a 5% loss of the parcel as a whole. JESSE DUKEMINIER ET AL., PROPERTY 989 (6th ed. 2006). The Supreme Court has not established a firm standard to determine at what level of generality the taking of property should be examined, although the opinion in *Lucas* suggests that generally the inquiry is made "in light of total value of the takings claimant's other holdings in the vicinity." *Lucas*, 505 U.S. at 1017 n.7. Should the court view the literal severance and subsequent pilfering of Connery's kidney as a small loss to Micheline, who retains possession of the rest of his body, or as a complete loss to Moore, who held only an interest in Connery's kidney?

to direct a donation,[215] the government has taken that proprietary right away, and that compensation must be made.[216]

Interests in organs are not interests in land, however, and *Hodel* appears to be a somewhat *sui generis* approach to Takings that may not extend to organs.[217] In the case of *Andrus v. Allard*, the Supreme Court found that no taking had occurred where a government regulation preventing the sale of eagle feathers extinguished the economic value of plaintiff's beautiful collection of eagle feathers.[218] Importantly, the owner of the feathers still retained a possessory interest and merely lost the right to sell his property.[219] When the Supreme Court in *Lucas v. South Carolina Coastal Council* found a complete wipeout of the economic value of land to constitute a taking, it specifically exempted chattel from this protection, citing *Andrus*, thereby elevating the level of protection afforded to real property.[220] Organs are likely to be treated as chattel and thus subject to broad regulation without real danger of Takings Clause concerns.[221] However, unlike *Andrus*, where the plaintiff retained physical possession of his feathers and the right to bequeath his feathers upon his death, for Connery, Moore, and Micheline, the government has appropriated every twig in the bundle.[222]

Given the complete lack of property rights in organs retained by Moore and Micheline, and assuming that at one point such rights vested in Moore and Micheline,[223] the strongest argument for a valid Takings claim would be based on the fact that the government has effectuated a permanent physical occupation of private property.[224] Using a more traditional approach to Takings, the Supreme Court has adopted a *per se*

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[215] *See supra* note 41 (exploring issues of testamentary disposition generally as well as under the UAGA).

[216] *Hodel*, 481 U.S. at 718.

[217] Penn Central Transp. Co. v. New York, 438 U.S. 104, 137 (1978) (rejection of proposals to construct a high-rise held to not be a taking); *see also* note 214 (discussing conceptual severance).

[218] 444 U.S. 51, 67-68 (1979) (no regulatory takings protection for effective destruction of market value through a prohibition on sale of chattel).

[219] *See supra* note 214 (discussing conceptual severance of Connery's kidneys).

[220] Lucas v. S. Carolina Coastal Council, 505 U.S. 1003, 1027-28 (1992) (preserving the *Andrus* exception and noting the important status of land under the Takings Clause).

[221] *See* Everard's Breweries v. Day, 265 U.S. 545, 563 (1924) (statute prohibiting sale of liquors manufactured before passage of the statute is not a taking in violation of the Fifth Amendment); Jacob Ruppert, Inc. v. Caffey, 251 U.S. 264, 302-03 (1920) (A statutory ban on "non-intoxicating" alcoholic beverages "on hand at the time of the passage of the act" was similarly upheld against a takings challenge where "there was no appropriation of private property, but merely a lessening of value due to a permissible restriction imposed upon its use."); *see also Andrus*, 444 U.S. at 64-68; Mugler v. Kansas, 123 U.S. 623, 664 (1887).

[222] *Andrus*, 444 U.S. at 63-64. Here, Connery's corneas did not remain in the possession of Micheline and Moore, as the cornea(s) were implanted in another donee. Of course it is arguable that Micheline never had any right to maintain possession of Connery's corneas, except perhaps for the limited purpose of burial or donation, while Moore has a stronger claim that the government took his rights to permanent possession. *See supra* Parts I.A, II.A.1.

[223] *See supra* Parts I.A, II.A.1.

[224] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982).

rule that a permanent physical occupation of property requires compensation under the Constitution.[225] Therefore, when the government takes an organ or tissue from a corpse for implantation or other public use, the government has arguably effectuated a permanent occupation of that organ.[226]

It seems that a taking of property in this context is straightforward, despite the lack of precedent in the context of organs, and that the physical taking of Connery's organs goes beyond regulation of chattel.[227] Of course, the claim fundamentally depends upon the liberal assumption that property exists in organs to begin with.[228] Just as courts have avoided conversion and due process claims based on a failure to find property rights in organs, there is no reason to believe a takings claim would fare any better. Further, even if a court did seriously entertain the proposition of a takings claim, the constitutional remedy of "just compensation"[229] presents a host of complicated issues that would deter most courts from wading into that dismal swamp.[230]

In sum, Moore and Micheline's claims under the Takings and Due Process Clauses provide a very narrow opportunity for meaningful relief. Previous impediments to recovery due to a lack of property in the body, as well as remedial concerns, are further complicated by new impediments. These added barriers to recovery include a state action requirement, a balancing test for due process claims, and the unclear application of takings jurisprudence traditionally applied to real property as opposed to chattel. Moore and Micheline's constitutional claims, as

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[225] *Id.* at 434-36. The invasion in *Loretto* was merely the installation of hardware associated with cable television hook-ups. *Id.* at 421-22. Under the permanent physical occupation test, any invasion is compensable, thus resolving the persistent denominator problem. *Id.* at 435 (Where permanent physical occupation is present, "the government does not simply take a single strand from the bundle of property rights: it chops through the bundle, taking a slice of every strand." (internal quotation marks omitted)).

[226] Certainly the government has no plans to return the organ upon death of the recipient. However, the government may assert a variety of traditional Takings Clause defenses to avoid liability for the removal of body parts pursuant to a presumed consent statute. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 422 (1922) (where regulation results in a reciprocity of advantage, no taking has occurred); Hadacheck v. Sebastian, 239 U.S. 394, 411 (1915) (nuisance prevention is within the purview of state police power and not a taking). These and other defenses to takings seem inapplicable where it is difficult to characterize maintaining the ocular integrity of a corpse as a nuisance and any reciprocity of advantage, presumably premised on a theory that the next of kin may have more organs in the future, seems far too remote.

[227] *See supra* note 221 (citing cases regulating chattel).

[228] *See* Georgia Lions Eye Bank, Inc. v. Lavant, 335 S.E.2d 127, 128 (Ga. 1985); Tillman v. Detroit Receiving Hosp., 360 N.W.2d 275 (Mich. Ct. App. 1984); *see also supra* note 210.

[229] Jaffe, *supra* note 32, at 571-72 (discussing potential solutions to the takings compensation problem, including, but not limited to: (1) fair market value where such market exists; (2) intrinsic value of the tissue being removed; (3) compensation for emotional distress suffered by the next of kin; and (4) recourse to the law of conversion); *see also supra* Part II.A.3; Kirby Forest Indus. v. United States, 467 U.S. 1, 10 n.14 (1984) (suggesting alternative means of just compensation may be available under certain circumstances). At the very least, nominal damages may be awarded in Takings Clause claims. *See, e.g.*, *Loretto*, 458 U.S. at 424-25 (noting that the New York Court of Appeals affirmed compensation for the taking in question at $1).

[230] *See supra* Part II.A.3.

well as all other possible claims previously discussed, are inadequate. Moore and Micheline are ultimately left with no adequate remedy for their tragic situation, and therefore, despite their reasonable belief to the contrary, Moore and Micheline have no rights.

III. AN ORGAN RIGHTS CRISIS

The relevance of Micheline and Moore's unique situation to the broader issues of organ donation may not be immediately clear, and many would suggest that their claims are largely irrelevant to the organ donation crisis in the United States.[231] However, the broad lack of enforceable legal remedies for directed donations leads to inefficiencies and undermines the integrity of the organ donation system.[232] Providing meaningful remedies to donors, donees, and their families would be an effective approach to increasing the supply of willing donors and the availability of organs generally, particularly in the context of directed donations, a growing, and increasingly important source for much needed organs.[233] Accordingly, resolving Micheline and Moore's problem is increasingly important to those who now need organs or who may need them in the future.[234]

A. The Problem

Organ shortages have reached epidemic proportions with an average of seventeen people dying daily, waiting in vain for needed organs, while every day we bury enough organs to keep those people alive.[235] The regulatory approach in the United States relies almost completely on altruism, forbidding the sale or exchange of organs for "valuable consideration."[236] Despite the good intentions of American legislators, the gap between supply and demand increases daily.[237]

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[231] Dina Mishra, *'Tis Better to Receive: The Case for an Organ Donee's Cause of Action*, 25 YALE L. & POL'Y REV. 403, 405 (2007).

[232] *Colavito II*, 438 F.3d 214, 228 (2d. Cir. 2006) (noting Mrs. Colavito's statement that "if [she] would have known [she] couldn't give Colavito both kidneys, [she] would have buried the other one in the ground with [her] husband").

[233] *See infra* Part III.B.

[234] Mishra, *supra* note 231, at 410-11.

[235] Sean Arthurs, *No More Circumventing the Dead: The Least-Cost Model Congress Should Adopt to Address the Abject Failure of our National Organ Donation Regime*, 73 U. CIN. L. REV. 1101, 1101 (2005); *see also* National Kidney Foundation, *25 Facts About Organ Donation and Transplantation*, ¶ 2, http://www.kidney.org/news/newsroom/printfact.cfm?id=30 (last visited Sept. 13, 2008); McIntosh, *supra* note 9, at 185 ("Although the number of potential cadaveric donors each year is difficult to estimate, studies often find that number could provide enough transplant organs to meet or exceed the demand.").

[236] UNIF. ANATOMICAL GIFT ACT (1987) § 10, 8A U.L.A. 62 (2003).

[237] REVISED UNIF. ANATOMICAL GIFT ACT (amended 2007), Prefatory Note, *available at* http://anatomicalgiftact.org/DesktopDefault.aspx?tabindex=1&tabid=63 (last visited Mar. 8, 2009); *see also* United Network for Organ Sharing, www.unos.org (maintaining a running total of organ donor waiting list) (last visited Sept. 13, 2008).

Numerous governmental and non-profit organizations[238] have had varying but limited success in attempting to address the organ shortage through public awareness and emotive appeals to altruistic donors.[239] Ethical concerns over selling body parts and the rich harvesting organs from the poor prevent serious consideration of changes in the current altruistic approach to organ donation.[240] The debate at its core is one between ethics and efficiency.[241]

The marketplace both here and abroad has responded to the organ supply shortage through a domestic black market in organ sales[242] and the quasi-legal emergence of "transplant tourism," where those in desperate need of organs travel to foreign markets to purchase necessary organs.[243] A wide variety of alternative solutions have been explored and implemented with varying degrees of success in a variety of foreign jurisdictions.[244] Some of these approaches include broader presumed consent laws,[245] an opt-out rather than opt-in model,[246] harvesting organs from death row prisoners,[247] and even a regulated free-market system.[248] Despite the successes of these alternative methods, given the firm policy of altruism in the UAGA it is unlikely that there will be any significant shifts in the current legislative scheme.[249]

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[238] *See* United Network for Organ Sharing Links, http://www.unos.org/resources/links.asp (listing nonprofit organizations dedicated to organ donation).

[239] *See* Epstein, *supra* note 118, at 237 (criticizing the shortcomings of altruistic donations and proposing market-based solutions); *see also* Lindsey Tanner, *Organ-swap Program May Be on Horizon*, DESERET NEWS (SALT LAKE CITY), Mar. 4, 2005, *available at* http://findarticles.com/p/articles/mi_qn4188/is_20050304/ai_n11848502 (noting post procedural emotional problems arising from donations where donors are too far removed from recipients).

[240] *See infra* note 284 (articles debating the costs and benefits of commodification); *see* Epstein, *supra* note 118 at 228-36 (recognizing the moral issues bound up in organ donation, surrogacy, and baby-selling); REVISED UNIF. ANATOMICAL GIFT ACT (amended 2007), Prefatory Note, *available at* http://anatomicalgiftact.org/DesktopDefault.aspx?tabindex=1&tabid=63 (last visited Mar. 8, 2009) (acknowledging that at this time there is no consensus to alter the policy of altruism underlying the UAGA).

[241] *See generally* Epstein, *supra* note 118, at 237-38.

[242] A kidney on e-Bay reportedly received bids for over 5.7 million dollars in 1999 before it was removed from the website. Colavito v. N.Y. Organ Donor Network, Inc. (*Colavito II*), 438 F.3d 214, 221 n.9 (2d. Cir. 2006), *certifying questions to* 860 N.E.2d 713 (N.Y. 2006).

[243] K. A. Bramstedt, Jun Xu, *Checklist: Passport, Plane Ticket, Organ Transplant*, 7 AM. J. OF TRANSPLANTATION 1698, Aug. 27, 2007.

[244] Statz, *supra* note 147, at 1691-97.

[245] *Id*.

[246] *Id.* The "opt-out" proposal is currently being considered in Great Britain. Gordon Brown, *Organ Donations Help Us Make a Difference*, TELEGRAPH, Apr. 12, 2008, *available at* http://www.telegraph.co.uk/news/1575442/'Organ-donations-help-us-make-a-differenceandrsquo.html.

[247] Sunny Woan, Comment, *Buy Me a Pound of Flesh: China's Sale of Death Row Organs on the Black Market and What Americans Can Learn From It*, 47 SANTA CLARA L. REV. 413 (2007).

[248] *Your Part or Mine? Organ Transplants (A Regulated System of Compensation for Body Parts May Be Better than a Black Market)*, THE ECONOMIST (US), Nov. 18, 2006, at 60 (looking in detail at Iran's regulated market for organs).

[249] *See* REVISED UNIF. ANATOMICAL GIFT ACT (amended 2007), Summary of the Changes in the Revised Act, *available at* http://anatomicalgiftact.org/DesktopDefault.aspx?tabindex=1&tabid=63 (last visited Sept. 13, 2008) (suggesting minor changes in existing organ donation policy); *see also* Sean Arthurs, *No More Circumventing the Dead: The Least-Cost Model Congress*

Aside from fueling black markets and transplant tourism,[250] self-interest is generating new schemes that conform to current legislation to remedy the organ deficit.[251] Those in need of organs, or even those who are concerned that they may one day need an organ but are unsatisfied with the current system of allocation, may seek to avail themselves of the benefits of an alternative donation scheme.[252] Among these alternatives is the relatively recent development of paired organ exchanges,[253] where problems of incompatibility between a willing donor and donee are resolved by agreements between pairs of donors with similar compatibility problems.[254] These paired-exchanges are gaining traction and even endorsement from the Department of Health and Human Services.[255] Other non-profit organizations such as LifeSharers use directed donations under the UAGA to give preference to its members, who all agree to direct donations of their organs to donees within the organization's membership.[256]

Given the current growth rate of these institutions and the unlikelihood of drastic changes in organ donation law, directed donation will become an increasingly important element of organ distribution, and therefore, resolving situations like those presented to Moore and Micheline becomes increasingly important.[257] The potential advantages created by directed donations generate incentives for broadening innovative private ventures, ultimately resulting in an increased number of potential donors and mutually beneficial transactions.[258] However,

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Should Adopt to Address the Abject Failure of our National Organ Donation Regime, 73 U. CIN. L. REV. 1101 (2005) (surveying the reasons why the United States will not change its approach). *But see* Statz, *supra* note 147, at 1677, 1700-03 (surveying less altruistic alternatives that have been adopted in some states).

[250] *See generally* Bramstedt, *supra* note 243.

[251] *See infra* notes 253-255. Appealing to self-interest is also a powerful enforcement mechanism where rights are concerned. *See also* Mishra, *supra* note 231, at 408 (identifying that plaintiffs like Moore have a strong incentive to pursue their claims).

[252] *See infra* notes 253-255.

[253] In a paired exchange, willing but incompatible donors can be matched with a set of recipient-donor pairs in order to facilitate a mutually beneficial organ swap. *See* Organswap.com, www.organswap.com (last visited Feb. 2, 2009). Similar exchanges may be arranged for cadaveric donors. The potential for such arrangements could solve the central problem to Mr. Colavito's case, providing him with a means to exchange an incompatible kidney for a usable organ. Colavito v. N.Y. Organ Donor Network, Inc. (*Colavito I*), 356 F. Supp. 2d 237, 240 (E.D.N.Y. 2005), *aff'd*, 486 F.3d 78 (2d Cir. 2007).

[254] *See* Lindsey Tanner, *supra* note 239; *see also* Organswap.com, *supra* note 253(compatibility determined by a number of factors).

[255] C. Kevin Marshall, *Legality of Alternative Organ Donation Practices Under 42 U.S.C. § 274e*, Memorandum Opinion for the General Counsel, Department Of Health And Human Services (March 28, 2007), *available at* http://www.usdoj.gov/olc/2007/organtransplant.pdf.

[256] *See* LifeSharers.org, Welcome to LifeSharers, http://www.lifesharers.org (last visited Feb. 2, 2009); *see also* David J. Undis, *Changing Organ Allocation Will Increase Organ Supply*, 55 DEPAUL L. REV. 889, 893 (recommending that UNOS endorse LifeSharers).

[257] *See* www.lifesharers.org, *supra* note 256 (tracking membership on a growth chart, showing over 12,000 members as of January 31, 2009).

[258] *See* AP, *5 Receive Kidneys in First-ever Multiple Transplant*, USA TODAY, Nov. 21, 2006, *available at* http://www.usatoday.com/news/health/2006-11-21-quintuple-kidney-transplant_x.htm.

such beneficial activity is undermined by the current lack of clarity in the law on whether these organizations and procedures involve rights which may or may not be enforceable.[259] Current uncertainty surrounding rights associated with organs also has the potential to deter would-be donors from participating in alternative organ donation programs and undermines the very foundational assumptions upon which these organizations are established.[260] Indeed, any potential donor may be deterred from making a directed donation where there is no guarantee that a donor's wishes will be respected.[261]

B. The Solution

The shortage of organs in the United States is not due to a lack of supply, but rather to a tragically inefficient allocation of resources.[262] It is evident from the creative use of directed donations (and even from the morally questionable, international free-market systems) that there is substantial empirical evidence that increasing property rights in cadaveric organs leads to an increasingly efficient allocation of resources.[263] The benefits of alternative organ donation programs are the direct result of self-interested individuals efficiently allocating their limited property rights in their organs.[264] While it is clear to most that a balance between efficiency and ethics is the best course,[265] it is equally clear that the current approach is improperly calibrated towards the latter, at the expense of the former, and shifting the balance incrementally towards increased protection of property rights in the body could save many lives.

Currently, Moore and Micheline's remedies are simply inadequate, calling into question whether any rights to a properly

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259 *See supra* Part II (discussing inadequacy and unenforceability of remedies); *see* LLEWELLYN, *supra* note 11; *see also* Serkin, *supra* note 11, at 679-80.

260 Mishra, *supra* note 231, at 410-11.

261 *See supra* note 232.

262 McIntosh, *supra* note 9, at 185 ("Although the number of potential cadaveric donors each year is difficult to estimate, studies often find that the number could provide enough transplant organs to meet or exceed the demand.").

263 Property rights may be understood as a system whose goal is the efficient distribution of resources. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 10 (1973) ("[L]egal protection of property rights has an important economic function: to create incentives to use resources efficiently."); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. (PAPERS & PROC.) 347, 350 (1967) ("If the main allocative function of property rights is the internalization of beneficial and harmful effects, then the emergence of property rights can be understood best by their association with the emergence of new or different beneficial and harmful effects."). As the need for body parts increases, the rules governing the disposition of those body parts may be seen as the rules of property in the body. *See supra* Part I.A. However, if such rules are not enforceable, then there is no substance to those rights. *See* Llewellyn, *supra* note 11. Providing a means for individuals to enforce rights in organs will result in increased control over the disposition of corporeal property and arguably lead to increased efficiency. *See generally* Demsetz, *supra*.

264 *Id.*

265 *See infra* note 287 (articles debating the costs and benefits of commodification).

donated organ exist at all.[266] The solution, where the donation crisis is understood as an inefficient allocation of organs stemming from poorly defined rights in the body,[267] is to broaden the scope of those rights, which is achieved by broadening the protection afforded those rights through providing meaningful remedies for violations.[268] Rights to cadaveric organs in the form of remedies may be found either through legislative action or the courts under the common law.

The most effective, and difficult, solution to the uncertain nature of property interests in cadaveric organs lies with the legislature. Indeed, changing the law is always a seductive response to problems with the *status quo*, but making broad-sweeping changes to the altruistic model is not a realistic goal.[269] Less drastic changes are more likely to succeed, and commentators have suggested narrow legislative causes of action for donees and their families.[270] Indeed, several state legislatures have limited the immunities granted under the UAGA.[271] While this may seem to be a minor change, it nonetheless strengthens Moore's and Micheline's property rights with respect to Connery's organs and, additionally, it gives one reason to hope that the legislature can effectuate change in this area of law.[272] However, given the states' inaction with respect to the adoption of the 1987 UAGA[273] and the uncertain future of the largely inconsequential changes proposed by the 2006 UAGA, any real legislative changes in the rights to organs are certainly not imminent.[274]

A more plausible solution may lie within the the courts. Were courts simply to broaden current common law protections of property in the body generally and, more specifically, grant property in cadaveric organs, remedies under existing common law causes of action could be provided for Moore and Micheline.[275] Just as a court responded to the increased value of cadavers in the nineteenth century,[276] the common law

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[266] *See* LLEWELLYN, *supra* note 11.

[267] Statz, *supra* note 147.

[268] *See* LLEWELLYN, *supra* note 11.

[269] *See* Arthurs, *supra* note 235 at 1108. While legislative reform may be difficult, it is not impossible. *See supra* note 126 (noting that several jurisdictions have waived immunities for negligence under the UAGA, suggesting legislative reform is not impossible); Mishra, *supra* note 231, at 412-14 (suggesting legislative reform).

[270] Mishra, *supra* note 231, at 404; *see also infra* note 273.

[271] *See supra* note 126.

[272] *See, e.g.*, *supra* note 126 and Part II.A.2.b.

[273] *See supra* note 56 (noting that thirty-seven states have adopted the 2006 UAGA). Also note that both the 1987 UAGA and the 2006 UAGA purport to increase the rights of parties involved in organ donations, despite the lack of remedies available to enforce those rights. *See supra* Parts I.B, II.A.2.

[274] *See* Arthurs, *supra* note 235, at 1108 (discussing reasons for legislative inaction).

[275] Of course the legislative immunities under the UAGA are a formidable barrier to recovery, but such immunities do not bar all actions. *See supra* Part II.A.2.b. Further, the immunities are not preventing the vast majority of courts from taking action; rather, these decisions tend to dismiss claims based on the lack of common law property interests in the body. *See supra* Part I.A.

[276] *In re* Johnson's Estate, 7 N.Y.S.2d 81, 85-86 (Sur. Ct. 1938).

should be responsive to the demand and increased value of cadaveric organs,[277] even if such remedies are an extension of legal fictions created for plaintiffs to recover damages.[278] Unfortunately, neither the courts nor the legislature seem interested in taking steps to ensure the enforcement of the rights purportedly granted[279] under the UAGA[280] or the inherent rights to corporeal property.[281]

IV. CONCLUSION

The real world impact of increasing property interests in cadaveric organs cannot be guaranteed,[282] and fact patterns such as that of Moore and Micheline seem, admittedly and thankfully, very unlikely and abnormal.[283] What is certain, however, is that the current organ donation system in the United States is insufficient to meet the growing demand for organs.[284] Current public policy surrounding organ donation is intent on preserving altruistic intent of donations,[285] and many commentators have defended the scheme on those grounds.[286] Others recognize that

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[277] *See* 15 AM. JUR. 2D Common Law § 2 (2008) ("The common law has an inherent capacity for growth and change. Its development is informed by the application of reason and common sense to the changing conditions of society, or to the social needs of the community which it serves. It is constantly expanding and developing in keeping with advancing civilization and the new conditions and progress of society, and adapting itself to the gradual change of trade, commerce, arts, inventions, and the needs of the country."); Jaffe, *supra* note 32, at 555 ("As scientific advances lead to increased use of, and consequently demand for, human tissue, the body will continue to take on the functional characteristics of property.").

[278] If a quasi-property interest lying with the next of kin may have operated as a legal fiction, it did create enforceable rights and remedies, making such property more real than Moore or Micheline's unenforceable interest in Connery's kidneys. *See supra* Part II.A.

[279] Whether the UAGA grants rights or restricts them ultimately depends on whether common law rights are more or less protective that the UAGA. Some courts have interpreted the UAGA to merely provide process rather than substantive rights, which may be the predominant view considering that "'[no] court has [yet] held that an intended recipient has any right in a donated organ or tissue prior to the completion of the gift,' [or] 'actual transplantation into the recipient.'" Mishra, *supra* note 231, at 407 (quoting Brief of Am. Ass'n of Tissue Banks et al. as Amici Curiae Supporting Respondents at 15-16, Colavito v. N.Y. Organ Donor Network, Inc., 438 F.3d 214 (2d Cir. 2006) (No. 05-1305)).

[280] Any rights the legislature may have granted were cut back by heavy immunities, and the courts continue to be hesitant to declare property rights in the body.

[281] *See supra* note 3.

[282] Mishra, *supra* note 231, at 410 (concluding that a donee's cause of action "could . . . increase the organ supply").

[283] *See supra* note 3.

[284] REVISED UNIF. ANATOMICAL GIFT ACT (amended 2007), *available at* http://anatomicalgiftact.org/DesktopDefault.aspx?tabindex=1&tabid=63 (annual donor waitlist increases by 5,000 annually).

[285] REVISED UNIF. ANATOMICAL GIFT ACT (amended 2007), Prefatory Note, *available at* http://anatomicalgiftact.org/DesktopDefault.aspx?tabindex=1&tabid=63 (last visited Mar. 8, 2009).

[286] *See* Gilbert Meilaender, *"Strip-mining" the Dead: When Human Organs Are for Sale*, NATIONAL REVIEW, vol. 51 Oct. 11, 1999; Eric Cohen, *Organ Transplantation: Defining the Ethical and Policy Issues*, President's Council on Bioethics Staff Discussion Paper, *available at* http://www.bioethics.gov/background/staff_cohen.html (last visited Feb. 2, 2009) ("Our system of organ procurement is rooted in the belief that organ donation should be an act of altruism or gifting, motivated by the desire to do good for a needy patient or the desire to give added meaning to the

insistence on altruistic motives to produce effective results in an American, free-market culture is naïve and ineffective.[287] This Note proposes a compromise among competing views, suggesting that a simple and effective step towards resolving the organ crisis would be for the law to provide a means of enforcement to protect, and thereby expand, the minimal rights that have been granted under the current regulatory framework for organ donation.[288]

This source of protection may arise from the legislature, common law, or the Constitution; however, it is important to recognize that the technical logistics of extending and enforcing the rights of plaintiffs like Moore and Micheline is tangential to the recognition that increased rights in cadaveric organs will save lives. The current lack of remedies available to protect rights in cadaveric organs should be a pressing concern for the courts, legislatures, everyone who now needs an organ, and everyone who might need an organ in the future. Increased protection of rights in cadaveric organs will have a positive effect on organ donation as a whole and could save Sir Roger Moore's life.

Brian Morris[†]

donor's death, not the desire to profit from the sale of one's body or the sale of a family member's mortal remains.").

[287] *See* MARGARET JANE RADIN, CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS, AND OTHER THINGS (1996) (exploring "universal commodification" and its benefits and costs on society); *see also* Bryn Williams-Jones, *Concepts of Personhood and Commodification of the Body*, 7 HEALTH L. REV. 11, 12-13 (1999); EPSTEIN, *supra* note 118, at 234-37 (rejecting commodification for surrogacy and baby-selling but endorsing commodification for organs).

[288] EPSTEIN, *supra* note 118, at 249 (exploring market solutions to organ donation).

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