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Michele Goodwin

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PRECIOUS COMMODITIES: AN INTRODUCTION

*Michele Goodwin**

*The market in human body parts is a problem
in search of a legal theory.¹*

The year 2005 might well be remembered as the year of tissues, implants, and transplants. The year was marked by revelations of body parts being stolen from cadavers, body parts being sold by New York funeral homes to tissue banks, the desecration of dead bodies, body parts being stolen from victims of the powerful earthquake in Pakistan, and the infamous face transplant from a suicide victim to a chain smoker in France. The nation and the world were stunned by these revelations. The events brought to light, in the most stunning manner, the surreptitious scheming of modern-day body snatchers. Yet it also highlighted a significant human tragedy. The current demand for body parts is far greater than at any other time in human history, and this tremendous need outstrips our ability to supply precious human tissues, organs, and other biological materials.

There exist both the public and private negotiation processes for body part transactions. Both systems operate at crisis levels and are characterized by incoherence and ambiguity. Our altruistic system of procurement is sadly predictable and quite conventional; today we know thousands will die without the hope of ever receiving an organ. Furthermore, the waitlist will expand far beyond the capacity of organ donors to ever meet the demand. You might consider what this all means after a “gift of life” public service announcement airs on your local television station. Within the span of your favorite one hour television show, a candidate on our organ transplant waitlist will likely die. Commentators are divided as to how this issue should be addressed. According to Peggy Radin, changing the system by introduc-

* © Associate Professor of Law; Wicklander Fellow, DePaul University College of Law. LL.M., University of Wisconsin Law School; J.D., Boston College Law School. It was a pleasure to work with Jason Greis, former symposium editor of the Law Review, to bring this symposium to fruition. Christine Matott’s leadership in the editorial process of these articles is most appreciated by the authors and conference organizers. We are most indebted to the outstanding contributions of colleagues who participated in this symposium as well as to Jenner & Block L.L.P. for allowing us to use its facilities to host the meeting.

1. Professor Linda S. Greene, Remarks at round table discussion of DePaul Health Law Institute (Mar. 12, 2004).

ing market alternatives would ultimately lead to placing values on products from the body, thereby interfering with our notions of personhood.² On the other hand, acquiescence to an altruistic system of procurement would also seem to mean that we accept its failure to generate an adequate supply of organs and the deaths that result.³

In either case, the law has yet to catch up with these new, malleable, biotechnological regimes, which operate both within the public sphere and also underground. The public process is best characterized by our current organ procurement and allocation systems, which are regulated at the federal level by Congress through the National Organ Transplantation Act, and at the state level through the Uniform Anatomical Gift Act. Those systems, however, relying upon pure altruistic transfers, are underserved and over-subscribed—demand for precious body parts far outpaces altruistic supply. The private, underground systems involve individuals taking their chances on buying organs through the black market and companies buying and selling human body parts and tissues from university hospitals, funeral homes, crematoriums, and organ procurement organizations.

Authors in this Symposium edition scrutinize the law's role in demarcating the boundaries of commodification and the human body. By no means are their articles uniform; indeed, the diversity of opinion is quite refreshing within the context of a critical inquiry on the supply and demand of body parts. The scholars examine the commodification debate within three distinct spheres: law and religion, organ markets, and tissue sales. The participants challenge the notion that markets necessarily violate personhood, while also debating the role of religion, socioeconomics, race, and gender in these contexts. Their articles are perceptive, constructive commentaries about body part supply and demand in a global economy.

Lloyd Cohen, T. Randolph Beard, and David Kaserman challenge the presumption that a market in cadaveric body parts violates personhood, but they also seem doubtful that a market in body parts will ever materialize.⁴ Cohen's arguments are provocative and almost contrarian. He characterizes the arguments in opposition to markets in body parts as "muddled, weak, and fatuous."⁵ Yet Cohen astutely

2. MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1850 (1987).

3. See, e.g., Michele Goodwin, *Altruism's Limits: Law, Capacity and Organ Commodification*, 56 RUTGERS L. REV. 305 (2004).

4. Lloyd R. Cohen, *Directions for the Disposition of My Vital Organs*, 55 DEPAUL L. REV. 805 (2006); T. Randolph Beard & David L. Kaserman, *On the Ethics of Paying Organ Donors: An Economics Perspective*, 55 DEPAUL L. REV. 827 (2006).

5. Cohen, *supra* note 4, at 808.

points out that in the more than past fifteen years of his writing on the subject of an organ procurement system in crisis and meeting with members of Congress on this subject, "little progress toward increasing organ supplies" has been made.⁶ For him and other participants in the Symposium, the current procurement regime condemns people to death. This year thousands will die, never coming close to receiving the long-awaited organ. Over 90,000 patients registered on the wait-list will vie for the relatively few viable organs that will be recovered. Organs that are recovered will largely be credited to the fact that paid professional solicitors stationed at hospitals are trained to implore mourning families to donate body parts, often before the targets of their entreaties are dead. For some commentators, this process undermines the very notion that organ donation is a "gifting" process even within the altruistic context.

For example, Kaserman and Beard argue that using a cost-benefit analysis informs us that a commodification scheme in organ procurement would necessarily be better than the current altruistic system. Their approach illuminates very sound criticisms of the current transplant regime, but also reflects a thorough study of institutional efficiency in organ procurement. Like Cohen, Beard and Kaserman reject the pure altruistic regime in favor of an approach that provides compensation to donors.

Cohen deftly argues that the only way to test the notion that an organ market would save lives and end human suffering is, in fact, a market test. He suggests a trial market test to study the empirical question as to whether a market would actually increase the supply of body organs. There is, however, one problem with his proposal, which he acknowledges. Testing a market option in organs would be illegal and could result in potential fines up to \$50,000 and jail time. Cohen's challenge is that opponents of the market approach "must provide persuasive arguments why in *this market*, unlike virtually all others, permitting the price to rise above zero will not increase the quantity supplied."⁷

Cohen's passionate criticisms of the current altruistic procurement regime are controversial and sparked considerable debate at the Symposium, which is carried on in these pages. For example, professors William Stempsey and Steven Resnicoff examine the intersection of law, bioethics, and religion in their response to whether religious teachings give us guidance as to the buying and selling of body parts.

6. *Id.*

7. *Id.* at 811.

Professor Resnicoff provides a Jewish perspective on the buying and selling of body parts.⁸ He suggests that to answer whether Jewish law permits the buying of body parts involves two distinct questions. First, does Jewish law permit the transfer of body parts? Second, does Jewish law permit the transferor to be paid for those body parts? He notes that “[u]nlike common law, Jewish law imposes an affirmative duty to save a person’s life through one’s direct intervention or through the use of one’s resources.”⁹ The most sacred of Jewish laws requires the rescue of another. Resnicoff argues that “[t]he clearest biblical basis for this rule is the verse that states, ‘Do not stand idly by your fellow’s blood.’”¹⁰ This duty to rescue is not found in secular law; we eschew the duty to rescue. Yet within a Jewish law context, according to Resnicoff, in order to save or rescue a person, “one must violate every provision of Jewish law except for those relating to immoral sexual acts, idolatry, or murder.”¹¹ Where does this place the question of the precious commodity?

According to Resnicoff, the body is revered as sacred within Jewish religious teachings. Even the bodies of those convicted of the most heinous crimes are to be treated as sacred. For example, “[t]he body of a person who is executed for having committed a capital offense is thereafter briefly hung on a tree,” but his executioners are forbidden from leaving the body in a tree overnight, “requiring instead that it be buried on the same day as the execution.”¹² With such respect for the dignity of the human life, how might we reconcile the notion of an obligation to rescue the life of one through an act that might involve payment and the harvesting of organs? Resnicoff informs us that Jewish law prohibits one from utilizing a cadaver for personal profit. Yet a system that denies a life-saving treatment is unacceptable.

Stempsey uses what might be referred to as a strict constructionist approach to the question of whether organs can or should be commodifiable objects.¹³ He invokes scripture and Greek philosophy to argue that commodification denigrates the very notion of personhood and our humanity; even altruistic donations might reduce our bodies to a mere collection of limbs and appendages. His formalistic reading of biblical law and text demonstrates deference to the idea that the

8. Steven H. Resnicoff, *Supplying Human Body Parts: A Jewish Law Perspective*, 55 DEPAUL L. REV. 851 (2006).

9. *Id.* at 853.

10. *Id.*

11. *Id.*

12. *Id.* at 856.

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

body is to remain whole and not desecrated through the disembowelment of body parts. He suggests that if the body is to be reduced to the terms of commodification, it then follows that we have accepted the body as property. Here is where his philosophy challenges the thinking of some of our other conference participants.

According to Stempsey, and indeed Justice Armand Arabian,¹⁴ the body should not be treated as property. To whom, he questions, would the property belong. The brain? He argues that we cannot be simply be reduced to our psyches. Rather, “Christians conceived immortality as the restoration of the wholeness of the person, but to a person no longer enlivened only by *psyche*, the Aristotelian soul, but divinized by *pneuma*, or spirit.”¹⁵ In sum, he puts forth the conclusion that our brains are an insufficient means of categorizing who owns our bodies and that within us we cannot locate the sphere of the self without being of the self entirely. This existentialist view challenges the notion that the human body and experience can be compartmentalized or dissected. Stempsey argues that “the person” is incomplete without the body. It is not sufficient to suggest that what really matters is that the soul and its spirit remain intact despite the appendaging of parts. To Stempsey, the human body is more than an assemblage of parts. To reduce the body to parts and accessories is to objectify it and conflate it with so many other objects that lack life, spirit, meaning, and religious value.

To what extent, however, does such a position limit organ donation altogether? It would seem that all forms of donation, when considered within the context of this approach, necessarily violate Christian values Stempsey describes. Though an opponent to commodification (based on prior works grounded in both utilitarian and deontological thinking), Stempsey concedes that “there may be a reasonable way to give moral approbation to a few forms of commodification.”¹⁶ His criticisms of an organ market are grounded in a phenomenological approach to the question of whether organ markets should be permissible, meaning that we own our bodies not in the sense of owning a computer or a car, but rather we are of our bodies. Our bodies help us to situate ourselves in the world. The brain alone does not help us to do this, according to the author, but rather our limbs and flesh help us to actualize our human existence. In short, he argues, “[I]t is a

14. Justice Armand Arabian, Associate Justice, California Supreme Court (retired), Keynote Address at the DePaul University Law Review Symposium: Precious Commodities: The Supply & Demand of Body Parts (Mar. 4, 2005).

15. Stempsey, *supra* note 13, at 885.

16. *Id.* at 875.

mistake to think of the body as a machine," as did philosophers such as Descartes.¹⁷ For Stempsey, "the body is essentially what we are, and what enables our experience of the world."¹⁸

Women might easily find flaws in Stempsey's provocative commentary as it describes the body as fixed, thereby failing to account for the rather less than static experience of the woman's body. Some might argue that we are more than our bodies. Women's bodies release babies, milk, and blood. The regular shedding of flesh while remaining spiritually whole would seem to conflict with Stempsey's approach to the debate about property, commodification, and preserving religious values. At conflict would be the notion of what is whole. Professors Martha Ertman,¹⁹ June Carbone,²⁰ and others within the socioeconomics school might suggest that women are *more* than what their bodies produce or that they cannot be reduced to the immutable function of body parts.²¹

Yet, it is exactly the immutability of body parts and the lack of access to them that round out the discussion in this Symposium. Michelle Oberman, David Undis, Robert Katz, and Raymond Pollack demonstrate in their eloquent prose that whatever procurement scheme we design will be met by controversy and skepticism. Indeed, the tragic couplings of a censured, unlicensed dentist from New Jersey and New York City funeral homes should give us pause about creative schemes to procure body parts.

David Undis, the president of LifeSharers, the organization leading the way in a provocative "directed donation" model, argues that the entire paradigm of organ allocation must shift. According to Undis, "If we change how we allocate organs we will have more organs to allocate."²² Critics suggest that directed donation models violate utilitarian principles and promote injustice in the organ allocation process. Indeed, one might envision elements of affirmative action and quota systems in such a model; organs reserved exclusively for one group at the exclusion of others. Yet, for Undis, the case is simple: "Agreeing

17. *Id.*

18. *Id.*

19. See, e.g., Martha M. Ertman, *What's Wrong With a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1 (2003); Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.—C.L. L. REV. 79 (2001).

20. June Carbone, *What Do Women Really Want? Feminism, Justice and the Market for Intimate Relationships*, in FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW & SOCIETY 405 (Martha Albertson Fineman & Terence Dougherty eds., 2005).

21. Michele Goodwin, *Assisted Reproductive Technology and The Double Bind: The Choice of Motherhood*, 9 IOWA J. JUST. RACE & GENDER 1 (2005).

22. See David J. Undis, *Changing Organ Allocation Will Increase Organ Supply*, 55 DEPAUL L. REV. 889, 889 (2006).

to donate your organs after you die is a small price to pay for a better chance to get an organ if you ever need one to live.”²³ Undis suggests that “[a]lmost everyone would decide to pay that price,”²⁴ thereby increasing the supply of organs and saving the lives of thousands each year.

Undis ultimately urges a behavior change; he wants Americans to buy into the system of donating. But he concedes by the very work that he is doing and the article that illuminates it that the current organ procurement system itself is lacking. Faith, confidence, and trust are not values commonly associated with the current organ procurement system, particularly for those individuals and their families who suffer through protracted illnesses treatable by transplants that will never materialize because of the severe organ shortage. LifeSharers, however, opens the door for alternative schemes to be pursued, a few of which may be more controversial than others. For example, given the dramatic shortage of organs suitable for transplantation in African Americans (according to UNOS), what if African Americans were to create their own organ procurement scheme that served their communities? This could be organized through churches and fraternal organizations. The organization would be very similar to LifeSharers, and certainly the motivating principles would be the same—to save the lives of persons in need of organ transplantation. It is likely that such a system would be challenged based on the fact that it excludes all non-African Americans. Of course there are clever ways to avoid such problems. For example, if a directed donation program happened to be organized by churches that so happen to serve majority African American populations, it would arguably not be a system based on exclusion, but the demographics of location.

Dr. Raymond Pollack, however, seems unpersuaded by directed donation systems such as LifeSharers. He suggests that there is enormous potential for chaos with such systems and policing fairness and equity is difficult.²⁵ Moreover, he finds that the more immediate solutions to our procurement problems rest with the dead. For him, cadaveric donations provide the best source for organ donations, and it is within this context that potential solutions must be explored. He suggests that more advertising campaigns and public awareness addresses will encourage greater donations. His optimism, however, is unmatched by the current realities of organ procurement. Donna

23. *Id.*

24. *Id.*

25. Raymond Pollak, *Cadaver Donors Are the Best Solution to the Organ Shortage*, 55 DEPAUL L. REV. 897 (2006).

Shalala, former Secretary of Health and Human Services, spearheaded public service campaigns to directly address the organ procurement crises, particularly in underserved communities. Yet, what we have begrudgingly come to learn is that Americans are not as altruistic when it comes to surrendering their organs as we might have liked to believe. In part, the reluctance among some to donate has much to do with the lack of confidence in the current procurement process. In this way, if education campaigns were aimed at explaining why so many people die while waiting for organs (beyond the simple supply and demand equations), perhaps the public might be more willing to surrender their organs. But many are unconvinced, and it is because of the sometimes clandestine practices associated with body part procurement that millions refuse to be organ donors.

Professors Michelle Oberman and Robert Katz provide two nuanced views of the market in tissues, an industry that exists in the shadows of organ transplantation. Unlike the organ procurement regime, there exists a robust tissue industry that operates in public view of law enforcement, but for reasons of unknown, happen to be largely overlooked. That the tissue banking industry publicly circumvents federal and state laws by purchasing body parts from hospitals, universities, and even organ procurement organizations and resells the tissues to hospitals and doctors seemingly goes unnoticed. In this private domain of tissue banking, hundreds of millions of dollars are generated each year. Profits are expected to top one billion dollars in this fiscal year.²⁶ Many of these companies trade on the global stock exchanges, demonstrating all the more that altruism is not a part of their business plan.

In her illuminating article, *When the Truth Is Not Enough: Tissue Donation, Altruism, and the Market*, Professor Michelle Oberman examines the reach and limits of the marketplace in body parts, especially tissues.²⁷ Noting that more than 800,000 allograft surgeries involving tissues occur each year, she explores the contours of how this robust industry affects our lives and whether we should be troubled by the industry's failure to compensate the unwitting donor. Oberman pierces the opaque veil around tissue bank retrieval of human body parts and how the tissues ultimately come to be used. Tissue banks do not directly solicit individuals to procure body parts. Rather, they work through middlemen who negotiate for body parts that were altruistically donated to hospitals and other organizations.

26. Michelle Oberman, *When the Truth Is Not Enough: Tissue Donation, Altruism, and the Market*, 55 DEPAUL L. REV. 903, 911 (2006).

27. *Id.*

Unsuspecting donors believe their body parts will be used exclusively for altruistic purposes (such as implantation into another person) or for scientific research seeking to cure diseases. Yet, Oberman notes, "There are myriad uses for tissue retrieved from human cadavers. Skin grafts can be used to treat burns or can be processed into products that are useful for cosmetic purposes such as enhancing lip size, reducing wrinkles, or enlarging penises."²⁸ The features of the tissue banking industry are far from ideal; they involve uninformed participants who donate at the most vulnerable stages of their lives (after the death of a loved one)—a generous act that enables a market transaction. Though individuals cannot be compensated for donating tissue, every other aspect of the industry involves financial compensation and market competition. To pretend that this does not exist is to fall prey to our own veil of willing ignorance and, in such cases, ignorance is not bliss. Oberman contends that recent efforts by the federal government to eliminate solicitor fraud (i.e., requiring disclosure that an organ, body, or body part might be transferred to a "tissue processor") is an inadequate response. Through her lens, the truth is not enough; our goal should be to balance legal tissue donations, because they are important, while not creating aversions to the donation process altogether.

Katz builds on this point in his article, *The Re-Gift of Life: Can Charity Law Prevent For-Profit Firms From Exploiting Donated Tissue and Nonprofit Tissue Banks?*²⁹ Katz is less optimistic as to whether we, as a society, are "ready" to allow individuals to capture the profit in their tissues. Katz argues for the veil that separates us as members of a society to be lifted from the gruesome task of pricing tissues. For this reason, though willing to scrutinize and criticize the current tissue procurement regime, Katz's ultimate conclusion is that the system is not so bad. For example, he argues that there are some advantages to the current arrangement that must be considered before making any changes. According to Katz, by encouraging tissue processors to capture the economic value of donated tissue, they have "more incentive and resources to develop" new therapeutic uses for donated tissue.³⁰ Thus, while Oberman argues for greater transparency, Katz reminds us of what he considers the benefits of "concealing" market exchanges from public view. Katz does concede,

28. *Id.* at 910.

29. Robert A. Katz, *The Re-Gift of Life: Can Charity Law Prevent For-Profit Firms From Exploiting Donated Tissue and Nonprofit Tissue Banks?*, 55 DEPAUL L. REV. 943 (2006).

30. *Id.* at 1014.

however, that a conscious policy of concealing commodification from donors may itself raise ethical problems.

Our final papers of the Symposium, written by Professors Elisa Gordon and Kieren Healy, remind us that at the center of these discourses should be the discussion of equity, access, and the furtherance of antidiscrimination in the retrieval and disposition of organs and tissues. In his article, *Do Presumed-Consent Laws Raise Organ Procurement Rates?*, Professor Healy examines whether presumed-consent laws might offer a solution to our procurement challenges.³¹ Presumed-consent laws are conscription measures that assume consent in place of an expressed agreement with the state.³² Healy extrapolates from the European models, specifically those of Spain and Italy, that a more efficient way to generate an adequate organ supply might be to require an opt out rather than an opt in system. Such models, emblematic of the social contract concept, and grounded philosophically in the works of Locke, Rousseau, and Rawls, place the onus of procurement upon the state and are assumed at the individual level. These utilitarian concepts take into account some problems that are not individual in nature, but rather are “community concerns” and the best mode of addressing such problems, according to this theory, is that we as a community sacrifice to make such goals, whatever they may be, come to fruition.

Anita Allen is among the more critical observers of social contract theory.³³ According to Allen, the social contract can be used according to a majoritarian purpose, exacting greater costs on the vulnerable than the elite. The benefits of the derivatives will often inure to those who sacrifice the least. Healy uses empirical data to develop his thesis that compelled donation increases the supply of organs and yet preserves next-of-kin autonomy. To support his thesis, he argues that “[p]resumed-consent countries do in fact perform a little better on average than informed-consent countries.”³⁴ Healy attributes this “success” not to any “direct effect of the law on individual choices,” but rather, “countries with presumed-consent laws are more likely to have paid close attention to the social organization of their transplant systems.” To Healy, the Spanish and Italian systems are successful because the framers were mindful of the economic and social pitfalls of

31. Kieran Healy, *Do Presumed-Consent Laws Raise Organ Procurement Rates?*, 55 DEPAUL L. REV. 1017 (2006).

32. *Id.*; see also Michele Goodwin, *Deconstructing Legislative Consent Law: Organ Taking, Racial Profiling & Distributive Justice*, 6 VA. J.L. & TECH. 2 (2001).

33. See, e.g., Anita L. Allen, *The Social Contract Theory in American Case Law*, 51 FLA. L. REV. 1 (1999).

34. Healy, *supra* note 31, at 1042.

the social contract model, and had effectively developed the “logistics” of the transplant system, including paying attention to staffing. The debate about whether a presumed consent system would be viable in the United States raises a different set of questions, however, that are most appropriately considered in the context of race and class.³⁵ The unique history of extended human bondage in the United States, which was exclusively race-based, provides a context in contrast to that of European nations—that might well and did engage in race-based slavery outside of their hemisphere, and bondage, which included whites in their own states. These unique differences largely contribute to the ways in which racial identities are realized and manipulated for purposes of discrimination and exploitation.

Indeed, examining organ procurement and allocation through the lenses tinted by race or muddied by poverty renders an entirely different discussion and policy outcomes. The uncomfortable realities of race discrimination and class subordination in the United States remind us that organ transplantation does not escape the legacy of discrimination or disparities. Professor Gordon thus asks, What are we missing in the transplantation market debate?³⁶ Her proposals are not radical, and probably speak the least to the question of body part commodification. Her paper instead offers a proposal for government subsidized insurance, which provides the only access for the poor to benefit from high-tech medical options such as organ transplants.

Perhaps for Gordon the question of markets is a luxury debate. She reminds us that the nation’s poorest are the most vulnerable. They lack truly viable access to organ transplantation. Current healthcare policies limit the level of economic support for postoperative treatments. Government subsidies do not follow the life of an organ, but rather provide an equal opportunity to receive one—but not necessarily to keep it. Gordon’s paper is provocative: she asks what are the limits of biotechnology and healthcare. When and where can we draw the lines? Ultimately, limited government support for postoperative transplant care affects patient and physician decisionmaking. If a patient cannot afford immunological treatments to prevent rejection, is he or she truly a viable candidate? Thus, when we discuss markets and costs of transplantation, doing so without earnest sensitivity to class and creativity as to how the poor will be equitable participants is less than ideal. Indeed, it is unacceptable. Public policy, according to

35. See, e.g., MICHELE GOODWIN, *BLACK MARKETS: THE SUPPLY AND DEMAND OF BODY PARTS* (2006).

36. Elisa J. Gordon, *The Ethics of Medicare Policy: Increasing Transplant Access and Survival*, 55 DEPAUL L. REV. 1045 (2006).

Gordon, must “shift in concert with the needs of the kidney recipient population”³⁷ Expanding coverage to subsidize the life of the kidney, according to Gordon, is the equitable way to proceed.

In the end, we are confronted with the law’s limits to give us what we want. Current public policy, as it relates to organ procurement, leaves a broad spectrum of scholars desirous of a more equitable, just, and efficient system. Their efforts to parse out how such systems can be developed and what they might look like are published in this special Symposium edition. I am grateful for their efforts and honesty.

37. *Id.* at 1065.