

# INCREASING THE SUPPLY OF TRANSPLANT ORGANS BY WAY OF FINANCIAL INCENTIVES

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*This article begins by exploring the shortage of organs available for transplant and its possible causes, and submits that the ever-expanding gap between supply and demand could be alleviated by offering financial inducements. The numerous arguments against paid organ donation are deconstructed in an effort to show that such arguments are not strong enough to justify the failure to seriously consider a market system. Particular attention is given to the concept of 'no property' in the human body and the extent to which unquestioning adherence to this principle does more harm than good. The question of whether society is prepared to accept paid organ donation is considered before moving on to examine the practical considerations involved with the commerce of organs and the question of regulation. The article concludes that a market in body parts, which is limited to transactions in cadaveric donations, and which is closely regulated by the state, represents the best solution to the organ shortage.*

## I INTRODUCTION

Developments in medical science over the last century have revolutionised the provision of medical treatment. Operations that were once perceived as dangerous or even impossible are now carried out regularly and with increased certainty of minimal risk. Controversy surrounded early attempts to transplant kidneys in the Soviet Union and the United States.<sup>1</sup> By 1936, doctors in the Soviet Union had reported success in transplanting a kidney procured from a cadaver to a live patient. It was American doctors who took this process one step further and used a living donor to achieve the same result.<sup>2</sup> Since then, transplants have been performed using other types of non-regenerative human tissue including hearts, livers, lungs, intestines, corneas, pancreases, islet cells, adrenal glands, peripheral nerves, brain tissue, skin, bone, bone cartilage, and bone marrow.<sup>3</sup> The survival rates of the patients who receive the organs have increased markedly over the last few decades, largely because of the discovery of immunosuppressive drugs, such as cyclosporine, which allows doctors to control the body's rejection of donated organs.<sup>4</sup> The scale on which organ transplants are

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<sup>1</sup> Russell Scott, *The Body as Property* (1981) 20.

<sup>2</sup> Ibid. See also David E Jefferies, 'The Body as Commodity: The Use of Markets to Cure the Organ Deficit' (1998) 5 *Indiana Journal of Global Legal Studies* 621, 623.

<sup>3</sup> Scott, above n 1, 19-25.

<sup>4</sup> Lisa E Douglass, 'Organ Donation, Procurement and Transplantation: The Process, the Problems, the Law' (1996) 65 *University of Missouri at Kansas City Law Review* 200, 201; Julia D Mahoney, 'The Market for Human Tissue' (2000) 86 *Virginia Law Review* 164, 176.

performed<sup>5</sup> and the overall success of these procedures, evidenced by long-term survival rates and restoration of quality of life,<sup>6</sup> make it clear that organ transplantation is no longer a 'new experimental science'.<sup>7</sup> While a great number of lives have been saved over the years through the process of organ transplantation, the demand for organs significantly exceeds the available supply. There is a growing shortage of cadaveric human organs made available for transplantation and as other efforts to increase the organ supply have proved inadequate, the question of whether financial incentives should be given to donors has been regularly debated in recent years. The debate is marked by a fundamental divide between those who argue that price should be used for creating a market in transplantable organs<sup>8</sup> and those who reject outright, the sale of something so integral to the human body, the most sacred of all things.<sup>9</sup> Although legislation dealing with the procurement and use of human tissue varies from country to country, throughout most of the world, laws specifically prohibit the sale of organs. This article argues that such laws should be repealed and that legislation that recognises the right of individuals to buy, sell and otherwise trade their body parts, be implemented. At the very least, a pilot program where organs can be bought and sold should be tried, rather than simply rejecting the proposal for financial incentives altogether.

Parts II and III of this paper will consider what the causes of the organ shortage are and whether it is possible, and indeed viable, to increase the supply of transplant organs by way of offering payment to donors.<sup>10</sup> Objections and barriers to paid organ donation will be considered in parts IV and V. The primary objective here will be to expose weaknesses and inconsistencies in traditional arguments against organ commerce and show that such arguments are not strong enough to justify the failure to seriously consider a market system. Particular attention will be given to the concept of 'no property' in the human body and the extent to which unquestioning adherence to this principle does more harm than good. The question of whether society is prepared to accept paid organ donation, or can grow used to the idea, will be addressed in part VI. Once it has been shown that a market solution to the organ shortage is desirable and likely to receive popular support, the question then becomes one of how. Part VII will concentrate

<sup>5</sup> In 1998, nearly 21,000 solid organ transplantation procedures were performed, including 12,000 kidney transplants and 4,500 liver transplants. In addition, transplant programs in the United States performed approximately 2,300 heart transplants, 965 kidney-pancreas transplants, 850 lung transplants, 250 pancreas transplants, 70 intestine transplants, and 45 heart-lung transplants: see United Network for Organ Sharing, *US Facts About Transplantation* (1999) <[http://www.unos.org/Newsroom/crit\\_data\\_main](http://www.unos.org/Newsroom/crit_data_main)> at 8 March 2004 ('UNOS (1999)').

<sup>6</sup> Douglass, above n 4, 201.

<sup>7</sup> Walter Block et al, 'Human Organ Transplantation: Economic & Legal Issues' (2000) 3 *Quinnipiac Health Law Journal* 87, 96.

<sup>8</sup> See, eg, Jefferies, above n 2, 637; Andrew H Barnett, Roger D Blair and David L Kaserman, 'Improving Organ Donation: Compensation Versus Markets' (1992) 29 *Inquiry* 372; Dwayne L Barney and R Larry Reynolds 'An Economic Analysis of Transplant Organs' (1989) 17 *Atlantic Economic Journal* 12.

<sup>9</sup> See, eg, Margaret Jane Radin, 'Market-Inalienability' (1987) 100 *Harvard Law Review* 1849, 1881; Robert A Sells, 'The Case Against Buying Organs and a Futures Market in Transplants' (1992) 24 *Transplantation Proceedings* 2198.

<sup>10</sup> Strictly speaking, the correct terminology may be organ 'vendors' rather than donors, given that such people are no longer 'donating' once financial incentives are in operation.

on the practical considerations involved in increasing the organ supply by way of financial incentives and give particular attention to the question of regulation. Part VIII will conclude the article.

## II THE ORGAN SHORTAGE

There is a reported organ shortage at present. In the US, the number of patients on waiting lists has risen 313 per cent since 1988, while the number of cadaveric donors has risen only 42 per cent.<sup>11</sup> At present, approximately 95,000 Americans are awaiting a transplant,<sup>12</sup> with a name added to that list every sixteen minutes.<sup>13</sup> Given the expanding gap between supply and demand, it is foreseeable that many of those people will die before surgery is available. In 1999, it was estimated that around 4,000 Americans die each year while waiting for organs.<sup>14</sup> That figure is now closer to 6,000.<sup>15</sup> While the organ shortage is said to be worse felt in the US, comparable situations exist all over the world. In Australia, for instance, between 20 and 30 per cent of people awaiting heart and liver transplants die while waiting.<sup>16</sup> Clearly, there is not merely a scarcity of transplant organs, but rather, an acute and calamitous shortage.

Although the term 'organ shortage' implies that there is a fundamental shortage of organs, this is actually something of a misnomer. There is an abundance of organs that might be used in transplant operations, only they are not. People are dying while the resources that could be utilised to save their lives are not being used efficiently.<sup>17</sup> Every person who is buried or cremated without having his or her organs procured is a potential source of transplant organs. Not everyone is a suitable donor of course; age and lifestyle choices render the procuring of some individual's organs useless. Nevertheless, hundreds of thousands of healthy organs are disposed of every year, with barely any thought given to the wasted potential.<sup>18</sup> Thus the term 'organ shortage' is essentially a synonym for the supply problem.

The organ shortage has been attributed to any number of factors. In a White

<sup>11</sup> UNOS (1999), above n 5.

<sup>12</sup> United Network for Organ Sharing, *Latest Data* <<http://www.optn.org/latestData/rptData.asp>> at 7 February 2005 ('UNOS, *Latest Data*')

<sup>13</sup> Curtis E Harris and Stephen P Alcorn, 'To Solve a Deadly Shortage: Economic Incentives for Human Organ Donation' (2001) 16 *Issues in Law & Medicine* 212, 213.

<sup>14</sup> UNOS (1999), above n 5.

<sup>15</sup> UNOS, *Latest Data*, above n 12.

<sup>16</sup> National Health & Medical Research Council, *Ethical Issues Raised by Allocation of Transplant Resources. Ethical Issues in Organ Donation*, Discussion Paper No 3 (1997) as cited by Peter Saul, Ian Kerridge and John McPhee, 'Organ Donation and Transplantation in Australia' in Ian Freckelton and Kerry Patersen (eds), *Controversies in Health Law* (1999) 316, 318.

<sup>17</sup> Block et al, above n 7, 109.

<sup>18</sup> An estimated 20,000 usable cadavers are buried each year in the US alone without having had any of their organs harvested. These cadavers could provide 40,000 kidneys and 20,000 hearts, livers, and lung pairs. See Gregory S Crespi, 'Overcoming the Legal Obstacles to the Creation of a Futures Market in Bodily Organs' (1994) 55 *Ohio State Law Journal* 10; Theodore Silver, 'The Case for a Post-Mortem Organ Draft and a Proposed Model Organ Draft Act' (1988) *Boston University Law Review* 687 as cited in Jefferies, above n 2, 625.

Paper on Bioethics released by the United Network for Organ Sharing (UNOS) titled 'Financial Incentives for Organ Donation', the low rate of organ donation was said to be a result of 'deficiencies of knowledge and interest in the medical profession, public distrust, fear and ignorance of a system which is poorly understood, or, to a certain degree, inefficiencies in organ procurement organisations'.<sup>19</sup> On a practical level, there are a number of problems with current organ procurement processes. Many surgeons seek the approval of the next of kin before they go about removing any organs from the deceased, even when the deceased carried an organ donor card or driving license, which unmistakably gave prior consent.<sup>20</sup> Because organs need to be removed quickly, doctors frequently inform the family of their loved one's imminent death and seek permission to harvest their organs 'in almost the same breath'.<sup>21</sup> The result, not surprisingly, is that many such requests are denied. The last thing a family wants to think about at this point is their loved one being cut open to retrieve organs,<sup>22</sup> particularly if there is a fear that the doctor will hasten death in order to procure the organs.<sup>23</sup> This problem occurs most frequently in countries that have systems based on voluntary donation, such as Australia and America. Nevertheless, even in countries where consent is presumed, and the deceased has not 'opted out' (see below), doctors may still ask for familial consent. In fact, the laws in Finland, Greece, Italy, Norway, Spain and Sweden require that physicians consult with the deceased's relatives before taking any organs.<sup>24</sup> Ultimately, this points to problems with the laws that govern organ donation.

The idea of the organ shortage being a result of inappropriate laws has been debated for some time. For a number of scholars, it is axiomatic that 'the legal system itself is the cause of the organ shortage and of all the ensuing and unnecessary deaths'.<sup>25</sup> Given that legislation sets the limits on what is acceptable practice in organ procurement and transplantation, it cannot be denied that the law plays a major role in determining donation rates. In the US, the *Uniform Anatomical Gift Act 1987* ('UAGA') and the *National Organ Transplantation Act 1984* ('NOTA') recognise the right to transfer rights in the body, but they do not permit the transferring of those rights for valuable consideration.<sup>26</sup> Australian

<sup>19</sup> United Network for Organ Sharing, *Financial Incentives for Organ Donation: A Report of the UNOS Ethics Committee, Payment Subcommittee* (1993) <[http://www.unos.org/Resources/bioethics\\_whitepapers\\_finance.html](http://www.unos.org/Resources/bioethics_whitepapers_finance.html)> at 1 April 2004 ('UNOS (1993)').

<sup>20</sup> Mahoney, above n 4, 177.

<sup>21</sup> Block et al, above n 7, 97.

<sup>22</sup> Ibid.

<sup>23</sup> Sean R Fitzgibbons, 'Cadaveric Organ Donation and Consent: A Comparative Analysis of the United States, Japan, Singapore, and China' (1999) 6 *ILSA Journal of International & Comparative Law* 74, 105.

<sup>24</sup> David Lamb, *Organ Transplants and Ethics* (1990) 141, as cited by Christian Williams, 'Combating the Problems of Human Rights Abuses and Inadequate Organ Supply Through Presumed Donative Consent' (1994) 26 *Case Western Reserve Journal of International Law* 315, 341.

<sup>25</sup> Block et al, above n 7, 106.

<sup>26</sup> The *Uniform Anatomical Gift Act 1987* s 10(a) makes it illegal for a 'person to knowingly, for valuable consideration, purchase or sell a body part for transplantation.' The UAGA of 1987 superseded the UAGA of 1968. The *National Organ Transplantation Act 1984* s 301 states that it is illegal to 'knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation'.

laws regulating organ procurement and transplantation are much the same. For instance, the *Human Tissue Act 1983* (NSW) explicitly forbids the creation of any contract or arrangement for the 'sale' of any tissue.<sup>27</sup> Although such laws were no doubt passed with good intentions, the ban on receiving any valuable consideration for the donation of organs effectively precludes a host of innovative approaches aimed at increasing the supply of organs. Proposals include income tax deductions for donors,<sup>28</sup> health insurance reductions,<sup>29</sup> payment of expenses related to donation such as travel costs, lost wages, and coverage of other existing medical bills,<sup>30</sup> a 'futures market', in which people could contract for the sale of their organs for delivery after their death,<sup>31</sup> and payment of funeral expenses.<sup>32</sup> Whereas all of these schemes offer some sort of financial benefit to the donor or his or her estate, the system based on altruistic donation offers nothing in the way of financial gain.

A number of countries have adopted systems of organ donation based on presumed consent. Under such a system, the presumption is made by the state that citizens wish to donate their organs, unless they recorded their objections to such a harvest, during their lifetime. A decision to do this is sometimes referred to as a decision to 'opt out'. Many European countries, including, Austria, Belgium, Denmark, Finland, France, Greece, Italy, Norway, Spain and Sweden have adopted the presumed consent model.<sup>33</sup> Outside of Europe, systems based on presumed consent are in place in Argentina, Brazil, Singapore, and Chile.<sup>34</sup> Laws aimed at increasing the supply of organs via presumed consent have had mixed results. Presumed consent has increased the supply of donors in some countries, notably Austria, where the rate of kidney retrieval is twice as high as that of America and most European countries.<sup>35</sup> Nevertheless, even in Austria, only 60 cadaveric kidneys are retrieved for every one million persons.<sup>36</sup> Thus presumed consent is not the solution to the organ shortage. Neither voluntary donation nor presumed consent has succeeded in solving the organ deficit. There is still a wide gap between supply and demand in countries all around the world.

<sup>27</sup> *Human Tissue Act 1983* (NSW) s 32.

<sup>28</sup> See Lindsey Gruson, 'Signs of Traffic in Cadavers Seen, Raising Ethical Issues', *New York Times* (New York), 25 September 1986, A14.

<sup>29</sup> See Henry Hansmann, 'The Economics and Ethics of Markets for Human Organs' (1989) 14 *Journal of Health, Politics, Policy & Law* 57, 63-5.

<sup>30</sup> Harris and Alcorn, above n 13, 223.

<sup>31</sup> See Lloyd R Cohen, 'Increasing the Supply of Transplant Organs: The Virtues of a Futures Market' (1989) 58 *George Washington Law Review* 1, 32-6; and Crespi, above n 18, 34-6.

<sup>32</sup> Such a proposal was enacted in the state of Pennsylvania (*Pennsylvania Act 1994-102* (SB 1662)) and has since been codified as amended in 20 Pa Cons Stat 8601 et seq). The state of Pennsylvania pays up to \$3000 in hospital and other medical expenses, funeral expenses and incidental expenses incurred by the donor or the donor's family in connection with making a vital organ donation: see Robert M Veatch, 'Why Liberals Should Accept Financial Incentives for Organ Procurement' (2003) 13 *Kennedy Institute of Ethics Journal* 19, 22.

<sup>33</sup> Monique C Gorsline and Rachelle L Johnson, 'The United States System of Organ Donation, The International Solution, and the Cadaveric Organ Donor Act: "And the Winner is ..."' (1995) 20 *Journal of Corporate Law* 5, 21-3 as cited in Jefferies, above n 2, 625.

<sup>34</sup> *Ibid.*

<sup>35</sup> 'Changes Needed to Get More Kidneys', *Straits Times* (Singapore), 27 May 1992, 2, as cited by Williams, above n 24, 340.

<sup>36</sup> *Ibid.*

### III WHAT IS TO BE DONE?

An increase in organ procurement is desperately needed to meet the needs of the terminally ill. It is clear that present systems of organ donation have failed to retrieve enough organs. Given that there are enough organs in existence to significantly reduce, if not entirely eliminate, the organ deficit, the time is nigh to consider more creative methods for increasing the supply organs. The main problem with present systems of organ donation is that people have very little incentive to donate their organs. It is worth considering whether a scheme that offers financial incentives to donors is viable. This author is of the view that people would be more likely to bequeath their organs to those in need if they were reimbursed for their efforts. Governments around the world should respond to the organ shortage by abolishing the current ban on organ sales and enacting legislation that recognises the right of individuals to sell their organs for delivery after death.<sup>37</sup> The option to sell will become 'more plausible and sometimes compelling' once the legal barriers to sales are removed, and this will lead to an overall increase in the number of transplant organs.<sup>38</sup> The major benefit that would come from increasing the organ supply is that there would be a significant reduction in the number of people suffering and dying in hospitals.<sup>39</sup> Moreover, not only would the recipients of transplant organs be living normal and healthy lives, they would also be expending fewer hospital resources.<sup>40</sup> Nevertheless, there are a number of barriers that stand in the way of a market solution to the organ shortage. Principally, the laws all over the world strictly forbid the sale of human organs. At first glance there seems to be something of an anomaly in laws that permit the purchase and sale of nearly everything, except for the one thing that could save the lives of thousands of people every year.<sup>41</sup> However, organ transplantation and donation are delicate issues and prone to arousing controversy. The idea of organ commerce has sparked fierce debate and has been condemned on a number of grounds. The various objections to organ commerce will be examined and deconstructed in an effort to show that such arguments are not strong enough to justify the failure to seriously consider financial incentives for organ donation.

37 Cohen, above n 31, 1.

38 Michael H Shapiro, 'Symposium on Bioethics: Thinking About Biomedical Advances: The Role of Ethics & Law: On the Possibility of "Progress" in Managing Biomedical Technologies: Markets, Lotteries, and Rational Moral Standards in Organ Transplantation' (2003) 31 *Capital University Law Review* 12, 63.

39 Williams, above n 24, 316.

40 In the US, 60 per cent of transplants are kidneys. Each patient taken off of the kidney waiting list saves between \$200,000 and \$400,000 (US) for the payers, be they Medicare (60 per cent) or private insurance companies. Thus, a donor who provides two kidneys, for example, would save insurance companies or Medicare between \$400,000 and \$800,000: Richard M Devos, 'How to Fix the Organ Donation Crisis' (2003) <<http://www.mackinac.org/article.asp?ID=5040>> at 10 February 2005. See also Thomas G Peters, 'Life or Death: The Issue of Payment in Cadaveric Organ Donation' (1991) 265 *Journal of the American Medical Association* 1302, 1302; Cohen, above n 31, 39.

41 Block et al, above n 7, 106.

## IV TRADITIONAL ARGUMENTS AGAINST PAID ORGAN DONATION

### A *Sending the Wrong Message*

It is arguable that the law should not be changed to allow the commercial sale of body parts, because to do so would be to send out the wrong message to society. It might encourage individuals to live more recklessly for instance. People are more likely to use and abuse their bodies without fear of consequence and lead less healthy lives in general if they believe that organs are readily available for transplantation at any time. The foundation of this line of reasoning is sound. However, as an idea it is far too abstract. Too many practical considerations are left out of account in its formulation. Moreover, the argument does not work as a justification for the current ban on the sale of organs. This is because people are already encouraged to donate their organs and so the 'message' that transplantable organs are available for the sick and needy, or that they should be at least, is already being fostered by society. Were paid organ donation to succeed in increasing the supply of organs there is a danger of course, that the 'message' will be promoted further still. Such an outcome is part-and-parcel of organ commerce and should be tolerated by society, given the fundamental interest in increasing the supply of transplant organs.

### B *Concern That All Voluntary Donations Will Cease*

An argument that is frequently made against paid organ donation is that donation rates will actually decrease under such a system due to a backlash and losses from the current donor pool based on pure altruistic giving.<sup>42</sup> This view reflects the importance of maintaining the gift ethic in contemporary society. It is in this spirit that Warren Wilentz CJ ruled in the *Baby M* case,<sup>43</sup> in which the question of surrogacy was at issue, 'there are in a civilised society some things that money cannot buy'.<sup>44</sup> The Nuffield Council on Bioethics has condemned the procurement and commercial sale of body parts and recommended that the altruistic motivation of donors should ultimately be 'respected and encouraged'.<sup>45</sup> Although altruism is an admirable characteristic to encourage in society, concern over the possibility that voluntary donations will cease if paid organ donation is tried does not justify outlawing organ sales, especially when it is more apparent than ever that reliance on altruism alone 'condemns the sick'.<sup>46</sup> Indeed, the idea

<sup>42</sup> UNOS (1993), above n 19; Randy W Marusyk and Margaret S Swain, 'A Question of Property Rights in the Human Body' (1989) 21 *Ottawa Law Review* 351, 373.

<sup>43</sup> *In re Baby M*, 537 A 2d 1227, 1235 (NJ, 1988).

<sup>44</sup> Cited in 'Papua New Guinea Patents, the Human Genome Diversity Project' (November 1995) <<http://nativenet.uthscsa.edu/archive/nl/9511/0282.html>> at 1 November 2003.

<sup>45</sup> Nuffield Council on Bioethics, 'Human Tissue: Ethical and Legal Issues' <<http://www.nuffieldbioethics.org/>> at 7 February 2005 ('Nuffield Council on Bioethics'). See also Thomas Murray, 'Organ Vendors, Families, and the Gift of Life' in Stuart J Youngner (ed), *Organ Transplantation: Meanings and Realities* (1996) 101, 120.

<sup>46</sup> Neil Duxbury, 'Do Markets Degrade?' (1996) 59 *Modern Law Review* 331, 338. See also Troy R Jensen, 'Organ Procurement: Various Legal Systems and Their Effectiveness' (2000) 22 *Houston Journal of International Law* 556, 580.

of paid organ donation is only being entertained because altruism has failed to supply a sufficient quantity of organs. Moreover, payment can be understood as simply providing an incentive to those who have altruistic motives to donate, but refrain from doing so, there been no additional incentive. The decision to become a paid organ donor can still be construed as a charitable act. The fact that a person is paid does not mean that his or her act is not, also, a charitable one.<sup>47</sup> Furthermore, even if laws legitimising organ commerce were passed, citizens would still be free to donate their organs without receiving any remuneration.

### **C Objections Based on Increased Costs**

It has been said that a market in human organs would increase the cost of transplant operations and research. According to Roger Evans, irrespective of whom the recipients of the organs are, ‘financial incentives add to total transplantation expenditures’.<sup>48</sup> Stephen Munzer has reached a similar conclusion, maintaining that schemes to pay organ sources would cause the total costs of transplants to rise.<sup>49</sup> Regarding research costs, there is a fear that research will be fettered if people are free to buy, sell and otherwise trade in their bodily material.<sup>50</sup> Currently, scientific research in the area of medicine relies on the free exchange of experimental tissue. Should organ commerce be legitimised, patients could potentially interfere with the scholarly pursuit of knowledge.<sup>51</sup> They might, for instance, try and sell their tissue to the highest bidder, with the result that non-profit research organisations would be excluded from the process. These arguments cannot be maintained. They reflect the mistaken belief that organ transfers are unaffected by the laws of supply and demand. Were organ commerce to succeed in bringing more organs to the market, this would allow for more research, which would inevitably lead to lower costs. As the supply of organs increases, the market price for organs will fall accordingly.<sup>52</sup> Concern over increased costs is overstated and does not justify the current ban on organ sales.

### **D Rich Versus Poor Arguments**

Most objections to organ commerce reflect, in one way or another, a belief that some things should not be the subjects of commerce and that undesirable consequences will flow from extending the market to everything. Further, the ‘rich man’s purchase’ is seen as a category of transaction that can render a market morally unacceptable to either potential participants or third parties.<sup>53</sup> There is a widespread belief that basic necessities of life and health, such as housing, food

<sup>47</sup> Block et al, above n 7, 98.

<sup>48</sup> Roger W Evans, ‘Organ Procurement Expenditures and the Role of Financial Incentives’ (1993) 269 *Journal of the American Medical Association* 3113, 3117.

<sup>49</sup> Stephen R Munzer, ‘An Uneasy Case Against Property Rights in Body Parts’, in Ellen Frankel Paul (ed), *Property Rights* (1994) 259, 259-60. See also Marusyk and Swain, above n 42, 579.

<sup>50</sup> See Loane Skene, ‘Arguments Against People Legally “Owning” Their Own Bodies, Body Parts and Tissue’ (2002) 2 *Macquarie Law Journal* 165, 171.

<sup>51</sup> See Roy Hardiman, ‘Toward the Right of Commerciality: Recognising Property Rights in the Commercial Value of Human Tissue’ (1986) 34 *UCLA Law Review* 207, 240-1.

<sup>52</sup> Jensen, above n 46, 579.

<sup>53</sup> Cohen, above n 31, 12.



and medical care, should be available to all individuals, regardless of ability and willingness to pay. It is in this context that some people are loath to allow rich people to purchase kidneys or other vital organs that poor people cannot afford.<sup>54</sup> A market solution to the organ shortage is wrong, it is claimed, because it discriminates against people based on their ability, or inability, to pay.<sup>55</sup> Consequently, poorer patients would be priced out of the organ market, and this is deemed to be unethical and unacceptable.<sup>56</sup> The view that it is unfair for the rich to have privileges not available to the poor cannot be sustained as a valid objection to a market in body parts. If organ selling is wrong for this reason, 'so are all the benefits available to the rich, including all private medicine'.<sup>57</sup> Most financial transactions would seem to have effects that differentiate based on income level.<sup>58</sup> Moreover, the market could be regulated to reduce the impact of discrimination based on wealth. Transplantable organs could be allocated on the basis of need and urgency to prevent rich patients from outbidding people with limited resources and the latter might be able to rely on public assistance programs (such as Medicare) to obtain their organs just as they do other medical benefits.<sup>59</sup>

Another potential problem with organ commerce is that it could lead to an exploitation of the poor, as those selling organs are more likely to be economically disenfranchised.<sup>60</sup> The danger is that the impoverished members of society might see the sale of their organs as the only solution to their economic hardship<sup>61</sup> and this may result in 'poor people and the third World ... being used as organ farms for the wealthy'.<sup>62</sup> Because the financially disadvantaged may also be less educated and less able to understand the risks associated with live organ donation, their consent should not be seen as genuine, especially when they are coerced by their economic conditions. This is the view taken by Robert Sells in his efforts to justify the current ban on organ sales.<sup>63</sup> It is submitted that the concerns raised by Sells are valid to the extent that it would never be possible to rule out coercion behind any financially rewarded organ donation, especially in this materialistic age.<sup>64</sup> However, this does not work as a justification for prohibition. The likelihood that there will be a net flow of organs from the poor to the rich is not a good argument against paid organ donation, when the

<sup>54</sup> Sells, above, n 9, 2198-202; Radin, above n 9, 1849-937.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> Janet Radcliffe-Richards et al, 'The Case For Allowing Kidney Sales' (1998) 351 *The Lancet* 1950, 1951 ('The International Forum for Transplant Ethics').

<sup>58</sup> Veatch, above n 32, 25

<sup>59</sup> Jensen, above n 46, 579, 591

<sup>60</sup> Sells, above n 9, 2198-202; Hansmann, above n 29, 72-4.

<sup>61</sup> Harris and Alcorn, above, n 13, 231.

<sup>62</sup> 'Body Organ Sales Discussed as a Way to Increase Supply', *Los Angeles Times* (Los Angeles), 24 September 1991, A4, as cited by Danielle M Wagner, 'Property Rights in the Human Body: The Commercialisation of Organ Transplantation and Biotechnology' (1995) 33 *Duquesne Law Review* 931, 945. See also Jensen, above, n 46, 556; Williams, above, n 24, 316.

<sup>63</sup> Sells, above n 9, 2198-202.

<sup>64</sup> John Harris and Charles Erin, 'An Ethically Defensible Market in Organs' (2002) 324 *British Medical Journal* 114, 115.

consequences would be a net flow of cash from the later to the former.<sup>65</sup> It has been suggested, moreover, that the sale of a kidney by a poor vendor allows both the seller and buyer a better chance of leading a more humane life<sup>66</sup> and is therefore ‘worth whatever risk there is’.<sup>67</sup> On another level, the rich are free to engage in dangerous sports or dangerous jobs for high pay,<sup>68</sup> why therefore, should the poor who take the risk of selling a kidney for great reward ‘be thought so misguided as to need saving from themselves?’<sup>69</sup> If it is immoral to buy organs from someone who is desperate, it is arguably even more immoral to continue under these circumstances to withhold the right of the desperate to market the one valuable commodity they possess.<sup>70</sup> There is another way out of the dilemma posed by the coercion argument. It assumes that there will be no restrictions on what can be sold and by whom. This need not be the case. A market in body parts could be structured and regulated in such a way as to alleviate the possibility of the rich preying on the poor. One way of doing this would be to ban the harvesting of organs from living people, and only permit market transactions in cadaveric donations. This would ensure that there would be no question of the poor selling their organs while they were still alive.

### **E The Human Body Should Not Be Commodified**

The prospect of commercialisation of body parts has aroused widespread condemnation. It is often claimed that a market in body parts would offend the Kantian dictum that a person should never be treated as a means, but only as an end.<sup>71</sup> Andrew Kimbrell has contended that the sale of human tissue poses a threat to human dignity, individuality and integrity.<sup>72</sup> Stephen Munzer has gone one step further, suggesting that people might come to think of themselves as ‘repositories of organs, tissues, and other bodily substances’ if a market in body parts flourished.<sup>73</sup> The moral aversion to treating the human body and its parts as commodities that can be traded just like any other form of property reflects a belief that there are limits on what can be sold. Attempts to draw a principled line between what can and cannot be sold form part of the commodification debate. Margaret Radin has championed the view that undesirable consequences will flow from extending the market to everything. Radin demonstrates her concern

65 Jeremy P Wight, ‘Commerce and Kidneys’ (1991) 303 *British Medical Journal*, 110 as cited by Harris and Erin, above n 64; Charles T Carlstrom and Christy D Rollow, ‘The Rationing of Transplantable Organs: A Troubled Line-up’ (1997) 17 *The Cato Journal* 2, 8.

66 Radin, above n 9, 1917.

67 The International Forum for Transplant Ethics, above n 57, 1950.

68 Unpleasant, degrading, and dangerous, but legal activities that people engage in because of remuneration include boxing, coal mining, lumbering, cleaning toilets, or collecting garbage: Cohen, above n 31, 13.

69 The International Forum for Transplant Ethics, above n 57, 1951

70 Veatch, above n 32, 30

71 Kant contended that ‘man ... exists as an end in himself, not merely as a means of arbitrary use by this or that will’, Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Paton translation, 1948) 90.

72 Andrew Kimbrell, *The Human Body Shop: The Engineering and Marketing of Life* (2<sup>nd</sup> revised ed, 1998) 86-8.

73 Stephen R Munzer, ‘Human Dignity and Property Rights in Human Body Parts’ in James W Harris (ed), *Property Problems: From Genes to Pension Funds* (1997) 25, 29.

about the hyper-revolutionising capacity of markets via the notion of 'personhood'. The personhood thesis defines self-ownership as an inherent characteristic of personhood.<sup>74</sup> Radin draws on the theories of the German scholar George Wilhelm Friedrich Hegel, who, in recognising property as a medium through which individuals find freedom and develop their personalities, stressed that people should never be able to alienate their personalities, bodies and talents to the permanent service of another.<sup>75</sup> Radin herself argues that market discourse can be antagonistic to the interests of personhood: 'to speak of personal attributes as fungible objects – alienable "goods" – is intuitively wrong'. 'Bodily integrity', she says, 'is an attribute and not an object' and should therefore not be treated as the subject of commerce.<sup>76</sup> Although Radin provides a powerful argument against universal commodification, the view that the market is theoretically all encompassing,<sup>77</sup> her dissertation suffers from at least one fatal flaw.

The case against the commercialisation of body parts is infused with notions of what is ethical and morally acceptable. What apologists of the current laws fail to grasp is that the primary reason for allowing sales in organs is 'to alleviate man's suffering by ensuring an increased supply of organs for transplantation'<sup>78</sup> and therein lies a fundamental contradiction in arguments that are purportedly based on humanitarian grounds.<sup>79</sup> It seems 'decidedly contentious' to contend that such markets are damaging to personhood or inhumane, when they actually offer many people a chance of a better life.<sup>80</sup> Indeed, Radin appears to be aware of the limitations of the personhood thesis. She grapples with the possibility that commodification can actually serve to empower certain groups and that to deprive someone of a chance to sell an organ is therefore depriving one of an opportunity 'to buy adequate food, shelter and health care in the market'.<sup>81</sup> Moreover, market degradation is not an inevitable consequence of expanding or even eliminating boundaries on market activity. The dangers of having a system where body parts can be owned, bought and sold are overstated by scholars such as Radin, who arguably focus on all the worst case scenarios associated with the market.<sup>82</sup> Those worried about justice should reconsider payment for organ donation and tolerate it as 'a lesser moral evil'.<sup>83</sup>

<sup>74</sup> Margaret Jane Radin, 'Property and Personhood' (1982) 34 *Stanford Law Review* 957, 962-3.

<sup>75</sup> George Wilhelm Friedrich Hegel, *Philosophy of Right* (Knox translation, 1952) 66-7, as cited by Michael G Slater, 'Hegel and the Social Dynamics of Property Law' in Harris, above n 73, 257, 262; see also Duxbury, above n 46, 332-3.

<sup>76</sup> Radin above n 9, 1879-81.

<sup>77</sup> Richard Posner is the primary exponent of this view. Together with Elisabeth Landes, Posner has argued that everything should be ownable and saleable, including babies: Elisabeth Landes and Richard Posner, 'The Economics of the Baby Shortage' (1978) 7 *Journal of Legal Studies* 323, 347 as cited by Radin, 'Market-Inalienability', above n 9, 1862.

<sup>78</sup> Duxbury, above n 46, 340. See also Shapiro, above n 38, 61.

<sup>79</sup> UNOS (1993), above 19, noted that the motives for prompting financial incentives for organ donation are ultimately ethical because they are based on concern for patients and saving lives.

<sup>80</sup> Duxbury, above n 46, 340.

<sup>81</sup> Radin refers to this dilemma of transition as the 'double bind': Radin, 'Market-Inalienability', above n 9, 1917.

<sup>82</sup> Duxbury, above n 46, 339.

<sup>83</sup> Veatch, above n 32, 19.

The issue of slavery often arises in discussions about paid organ donation. Recognition of the right of an individual to buy or sell a body part arguably treats the human body in the same manner as slavery, which was morally offensive because it permitted alienation of the human body.<sup>84</sup> The view that a market in organs would lead to the legitimising of slavery cannot be sustained as a valid objection to financial incentives for organ donors. While there may be an aversion to the notion of alienating the living body as a whole, participation in profits arising out of products derived from one's own body is not akin to slavery. Allowing an individual to sell his or her body parts establishes the property right of the individual in his or her own body; it does not give rights in the body of another.<sup>85</sup> A decision to sell one's organs is not the same as depriving oneself of autonomy altogether. On the contrary, it 'extends the range of individual choice and opportunity', which is synonymous with enhancing autonomy, not limiting it.<sup>86</sup> To put it another way, self-ownership allows scope for autonomous decision-making about one's own body, whereas ownership by another person does not.<sup>87</sup> In order to fully appreciate the notion of self-ownership as it stands in the debate on organ commerce, it is necessary to consider the concept of property and in particular the principle that there can be 'no property' in the human body.

## **V THE CONCEPT OF PROPERTY AS A BARRIER TO THE COMMERCE OF ORGANS**

### **A *The Concept of 'No Property' in the Human Body***

A significant problem confronting organ commerce is determining if the seller has any legally recognisable interest in the organ. As a general rule, people do not legally own their own bodies, body parts or tissues. With a few notable exceptions,<sup>88</sup> the courts have vigorously enforced the principle of 'no property' in

<sup>84</sup> In 1740, the South Carolina legislature pronounced slaves to be 'chattels personal, in the hands of their owners and possessors'. They could be bought, sold, taxed and inherited: as cited by James W Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (1992) 15. See also Leon Kass, 'Organs for Sale? Propriety, Property and the Price of Progress' (1992) 107 *Public Interest* 71, as cited by Duxbury, above n 46, 340

<sup>85</sup> Hardiman, above n 51, 224-5.

<sup>86</sup> Duxbury, above n 46, 339-40. See also Shapiro, above n 38, 63.

<sup>87</sup> Alexandra George, 'Property in the Human Body and Its Parts: Reflections on Self-Determination in Liberal Society' (Working Paper No 2001/8, European University Institute, 2001) 56.

<sup>88</sup> The common law has traditionally taken the view that 'a dead body is not the subject of property': *R v Price* (1884) 12 QBD 247, 252 (Stephen J); and *Williams v Williams* (1882) ChD 659. Nevertheless, courts have granted a person with the right of possession of a corpse for the limited purpose of burial: *R v Price* (1884) 12 QBD 247, 254 (Stephen J); and *R v Stewart* (1840) 113 ER 1007, 1009. Such a right has been referred to as a 'pseudo-property right' in Canada: *Waldman v Melville (City)* [1990] 2 WWR 54, 57, (Macleod J) and a 'quasi-property right' in the US: *Pierce v Proprietors of Swan Point Cemetery*, 10 RI 227 (1872); *Mensingher v O'Hara*, 189 Ill App 48 (1914). Outside the area of burial, property rights in the human body have been recognised in circumstances where 'a person has by their lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired attributes differentiating it from a mere corpse awaiting burial': *Doodeward v Spence* (1908) 6 CLR 406, 414 (Griffith CJ). More recently, the US Supreme Court found in *Diamond v Chakrabarty*, 447 US 303 (1980) that live human-made 'micro-organism plainly qualifies as patentable subject matter' under 35 USCA s 101 of the *Patent Act*.

the human body. The refusal of the California Supreme Court to find a property right in the human body in the case of *Moore v Regents of University of California*<sup>89</sup> is typical of the approach taken by modern courts. In that case, the plaintiff claimed an ownership interest in his cells, which had been removed from his body by a doctor for commercial gain.<sup>90</sup> The judges making up the majority were careful to recognise that Moore's rights could be protected by other doctrines without having to recognise that he had a proprietary interest in his spleen. Thus while the claim for conversion ultimately failed, Moore was still entitled to a half-share of the profits made by the doctor on the basis of a breach of fiduciary duty. This is but one example of the ways in which the autonomy of the individual can be protected at law, without having to resort to property law. Tort law has proven to be equally sufficient in other cases,<sup>91</sup> while the criminal law provides adequate means of guarding against the mistreatment of corpses.<sup>92</sup> It is in this spirit that Loane Skene has argued that people should not be able to legally own their own bodies. What is the need, she says, when the law affords people adequate protection already?<sup>93</sup>

### **B Debunking Objections to Recognising Property in the Human Body**

The argument that the law can protect people and their bodies without resorting to property law cannot be maintained. This is demonstrated by the decision in *Moore*. Although Moore was able to recover damages for the breach of fiduciary duty, it seems unjust that the defendants were able to keep the cells for themselves for their commercial gain given that they had obtained them by improper means.<sup>94</sup> Justice Mosk, in his dissenting opinion, recognised the irony in the fact that the majority effectively gave the defendants an ownership right over the tissue, which had been denied to Moore, and argued persuasively that it was not ethical for people to be profiting from the patient's body other than the patient.<sup>95</sup> The problem identified by Mosk J is particularly prevalent in organ donation, where there is evidence to suggest that some biomedical companies are making large profits from donated tissue.

The voluntary system of organ donation allows doctors, physicians, coordinators, social workers, hospitals and procurement organisations to make a financial gain, while the donor and the family are arguably the only participants that do not

<sup>89</sup> 51 Cal 3d 120 (1990) ('*Moore*').

<sup>90</sup> Doctors and researchers treating Moore developed and patented, without telling the patient, a T-cell line using cells from his spleen. The 'Mo cell line' went on to become a great commercial and medical success.

<sup>91</sup> *Carney v Knollwood Cemetery Assn*, 514 NE 2d 430, 435 (1986) (Jackson J); *State v Powell*, 497 So 2d 1188, 1192 (1986).

<sup>92</sup> See, eg, *Crimes Act 1900* (NSW) s 81C.

<sup>93</sup> Skene, above n 50, 167.

<sup>94</sup> Peter Ritter, '*Moore v Regents of the University of California*: The Splenic Debate Over Ownership of Human Tissue' (1992) 21 *Southwestern University Law Review* 1465, 1481, as cited by Amy S Pignatella Cain, 'Property Rights in Human Biological Materials: Studies in Species Reproduction and Biomedical Technology' (2000) 17 *Arizona Journal of International and Comparative Law* 449, 477.

<sup>95</sup> *Moore* 51 Cal 3d 120, 175 (1990).

directly benefit from the process.<sup>96</sup> Barnett and Kaserman have presented empirical evidence, which strongly suggests that transplant centres in the US are able to appropriate rents through the fees they charge for organ acquisition.<sup>97</sup> The NOTA prohibits the 'transfer of any organ for valuable consideration' but it allows Organ Procurement Organisations (OPOs) to collect 'reasonable payments associated with removal and transportation'.<sup>98</sup> This effectively leaves a loophole, which OPOs can take advantage of by exchanging organs for large sums of money on the premise that the transaction involves the collection of fees rather than an outright sale.<sup>99</sup> The moral and ethical reasons that have been offered as justifications for the current ban on financial incentives for organ donation are somewhat undermined when the laws that allow people to give their body parts away are the same laws that allow removed body parts to be used for commercial gain by almost anyone except the donor, possibly even without the donor's consent.<sup>100</sup>

The legislature should expand people's property rights in their bodies so that they may sell their organs. The protection of human autonomy need not be an objection to a finding of property in the human body and its parts. On the contrary, it seems reasonable to protect what is most precious, the human body, under the classification that affords it the most protection: property.<sup>101</sup> It is useful at this point to contrast the conflicting verdicts that were handed down in the aforementioned case of *Moore*. Justice Arabian, of the majority, stated that treating human tissues as a 'fungible article of commerce' would culminate in the defiling of the 'unique human persona'.<sup>102</sup> Implicit in his judgement is a fear that a black market trade in human body parts might arise if alienable property rights in the human body were to be legally recognised. Such concerns hardly justify maintaining the principle of 'no property' in the human body, especially when the illegal trade in organs has been known for years. 'Hot spots' where markets in organ trade are reportedly flourishing include India, Pakistan, the Philippines, Iran, Iraq, Egypt, Moldova, Romania, Turkey and South Africa.<sup>103</sup> Justice Arabian's view is indicative of the attitudes of those who are content to warn of the dangers of commodifying the human body without acknowledging the extent to which the human body has already become the subject of commerce. Genuine

<sup>96</sup> Peters, above n 40, 1302-5; Jensen, above n 46, 581.

<sup>97</sup> Andrew H Barnett and David L Kaserman, 'The "Rush to Transplant" and Organ Shortages' (1995) 33 *Economic Inquiry* 506, 506-15.

<sup>98</sup> NOTA, 42 USC 274e (1994).

<sup>99</sup> See Mahoney, above, n 4, 180.

<sup>100</sup> As was the case in *Moore*.

<sup>101</sup> James Churchill, 'Patenting Humanity: The Development of Property Rights in the Human Body and the Subsequent Evolution of Patentability of Living Things' (1994) 8 *Intellectual Property Journal* 249, 281.

<sup>102</sup> *Moore* 51 Cal 3d 120, 149 (1990).

<sup>103</sup> A S Daar, 'Paid Organ Donation and Organ Commerce: Continuing the Ethical Discourse' (2003) 35 *Transplantation Proceedings* 1207, 1207-9. On India, see M M Friedlaender, O Gorfit and A Eid, 'Unrelated Living Donor Kidney Transplantation' (1993) 342 *The Lancet* 1061, 1061-2; 'Kidneys for Sale' and 'Losers All' on the website of the Indian Multi Organ Harvesting Aid Network <[http://www.vish.com/html/body\\_mohan.html](http://www.vish.com/html/body_mohan.html)> at 1 November 2003. On Baghdad in Iraq, see Michael Friedlaender, 'Living Unrelated Renal Transplantation: Principle and Practice' in Vittorio E Andreucci and Leon G Fine (eds), *International Yearbook of Nephrology* (1996) 153-9.

non-commodification of human biological materials requires much more than merely maintaining the present ban on the sale of body parts.<sup>104</sup> It is for this reason that the dissenting judgements of Broussard and Mosk JJ, who were in favour of recognising a property right in the body, are preferable to those of the majority in *Moore*. Justice Mosk argued that it was not ethical for people to be profiting from the patient's body other than the patient<sup>105</sup> and that this scenario was more likely to result in the body being treated as a commodity than the solution proposed by the dissent. His Honour urged that 'recognising that every individual has a legally protected property interest in his own body and its products' only serves to protect the human body 'as the physical and temporal expression of the unique human persona'.<sup>106</sup> Despite fears that a market system will exploit the poor and increase violations of human rights, such a system may actually function to eliminate those problems.<sup>107</sup> There would be 'little incentive to seek organs illegally' were a market system to succeed in meeting the demand for human organs.<sup>108</sup> Just as the personhood argument cuts both ways, the same arguments that are made against people legally owning their bodies can be raised as reasons for recognising property interests in one's own body and its parts.

The importance that liberal philosophical tenets place on personal autonomy is not borne out by the law, which continues to deny individuals property in their own bodies and body parts.<sup>109</sup> 'Property' is said to be a central concept of liberal ideology,<sup>110</sup> conferring on an owner a 'bundle of rights', which they may enforce, as against the whole world.<sup>111</sup> At the same time, the concept of 'property' has been used as 'a tool', to justify laws that 'infringe personal liberties and self determination'.<sup>112</sup> Courts and legislators use the philosophy of liberalism to intervene in the sale of human body parts, yet 'pure' liberalism supports autonomy and self-ownership.<sup>113</sup> A legal fiction operates in 'liberal' societies where 'property' masks the 'illiberal traits' of laws affecting trade in human body parts.<sup>114</sup> The fact that 'property' is not a neutral term cannot be stressed enough. 'Property' is historically and culturally contingent. It is 'a cultural creation and a

<sup>104</sup> Mahoney, above n 4, 166-7.

<sup>105</sup> *Moore*, 51 Cal 3d 120, 175 (1990).

<sup>106</sup> *Ibid* 173.

<sup>107</sup> Jensen, above n 46, 578.

<sup>108</sup> Williams, above n 24, 316.

<sup>109</sup> George, above n 87, 60.

<sup>110</sup> Ely, above n 84, 1-5; Erh-Soon Tay and Kamenka argued that property ownership denotes an 'ultimate power and right to use, control, enjoy and exclude others': Alice Erh-Soon Tay and Eugene Kamenka, 'Introduction: Some Theses on Property' (1988) 11 *University of New South Wales Law Journal* 1, as cited in Adrian J Bradbrook, Susan V MacCallum and Anthony P Moore, *Australian Property Law: Cases and Materials* (2003) 30.

<sup>111</sup> *Milirrpum v Nabalco Pty Ltd and Commonwealth* (1971) 17 FLR 141; *Yanner v Eaton* (1999) 201 CLR 351.

<sup>112</sup> George, above n 87, 8.

<sup>113</sup> George has explained that intervention on the basis of a desire to protect the needy and discourage 'exchanges of desperation' is justified in liberal terms, such as 'protection of the autonomy of the needy', even though this is not truly 'liberal'. The courts appear to be protecting the autonomy of the individual by refusing to allow people to sell their body parts on the basis that this might affect their future quality of life, when in fact all the courts are doing is interfering with decision-making authority over the human body: *Ibid* 75-6.

<sup>114</sup> *Ibid* 8-9.

legal conclusion'.<sup>115</sup> In so far as the sale of body parts is concerned, 'property' is merely a legal structure that the legal system has adopted to protect and at the same time limit, decision making authority or autonomy over the human body and its parts.<sup>116</sup> Being no more than a synonym for 'legally enforceable decision-making authority about the use of human body parts', it is arguable that discussions about whether or not there can be 'property' in the human body are misleading and even irrelevant.<sup>117</sup> The question should not be whether the concept of 'property', or rather the lack of 'property' in the human body, stands in the way of a market in body parts (clearly it does, and it is up to the legislature to change this) but rather, whether or not people should be permitted to buy, sell or otherwise trade in their body parts. This question invites in turn, a discussion of whether society is prepared to accept organ commerce and the methods and means that would have to be employed to reach the goal of organ maximisation by way of financial incentives.

## **VI IS SOCIETY PREPARED TO TOLERATE FINANCIAL INCENTIVES FOR ORGAN DONATION?**

Society and the legal rules that operate within it are not static. Ideas of what is and is not appropriately commodifiable today may be different tomorrow.<sup>118</sup> For instance, there was initially widespread opposition to the notion of life insurance, which was considered sacrilegious in the early 19<sup>th</sup> century.<sup>119</sup> Increasing industrialisation, in conjunction with a rapidly expanding market economy, brought about a situation where 'economic valuations of death – and therefore life insurance – became more acceptable.'<sup>120</sup> By the same token, a future in which people have autonomy in selling their organs is not unimaginable, especially given that the law in some countries already allows for the sale of some body parts.

It is notable that compared with organ commerce, the sale of blood, sperm, hair and other body parts and substances arouses very little controversy and involvement from the law.<sup>121</sup> In an extensive investigation into the idea of the body as property, Russell Scott concluded that bodily parts such as hair and teeth have been objects of the open market for centuries in Europe.<sup>122</sup> Blood is another product that is now available on the market, at least in the US, where there are

<sup>115</sup> Edwin Baker, 'Property and its Relation to Constitutionally Protected Liberty' (1986) 134 *University of Pennsylvania Law Review* 741.

<sup>116</sup> George, above n 87, 63, 74.

<sup>117</sup> *Ibid* 76-7.

<sup>118</sup> Duxbury, above n 46, 336; Allan Watson, 'Legal Changes: Sources of Law and Legal Culture' in Allan Watson (ed), *Legal Origins and Legal Change* (1991) 73, 82-3, 93.

<sup>119</sup> Viviana Zelizer, 'Human Values and the Market: The Case of Life Insurance and Death in 19<sup>th</sup> Century America' (1978) 84 *American Journal of Sociology* 591, 597-602 as cited by Duxbury, above n 46, 336.

<sup>120</sup> Duxbury, above n 46, 336.

<sup>121</sup> William Boulier, 'Sperms, Spleens, and Other Valuables: The Need to Recognize Property Rights in Human Body Parts' (1995) 23 *Hofstra Law Review* 704, 712; Wagner, above n 62, 945.

<sup>122</sup> Scott, above n 1, 180.



more than 400 blood centres, which collect, buy and market blood products.<sup>123</sup> The commercialisation of blood was viewed as a logical response to increasing the supply of blood products at a time when voluntary donation fell short of demand.<sup>124</sup> As a result, a significant percentage of the US blood supply is retrieved from paid donors.<sup>125</sup> Sperm is also regarded as a saleable product in the US. It has been viewed as a marketable commodity since artificial insemination became an acceptable option for infertile couples.<sup>126</sup> At the legislative level, some State statutes prohibit the sale of all body parts other than sexual cells, while others explicitly permit donors of oocytes and sperm to be compensated for their 'time and inconvenience'.<sup>127</sup> The difference between major organs, such as hearts and kidneys, and blood, sperm and hair is, of course, that the former are non-regenerative body parts and their sale is arguably more likely to arise controversy than the sale of regenerative body parts. Nevertheless, legislative approval of the commercialisation of blood and reproductive tissue still met with opposition and even today, their sale in the US remains controversial. Controversy aside, the fact that American society (or a greater part of it) has come to accept the commercialisation of blood and sperm, suggests that societal norms can and do change. Perhaps it will only be a matter of time before policymakers consider changing the laws and legitimising organ commerce.

There are already signs of a change in public attitude towards commerce in organs. Take for instance, Friedlaender, who initially argued that organ trading was wrong and would lead to terrible crimes.<sup>128</sup> Friedlaender has since changed his mind and come out in support of a market solution.<sup>129</sup> Various organisations are in favour of offering financial incentives to organs donors meanwhile<sup>130</sup> and even the most avid opponents of organ commerce have conceded that it may be time to consider alternatives to the current system based on altruistic donation.<sup>131</sup> The point to bear in mind is that societal norms change and issues that used to be shocking, such as life insurance, 'women's equality, interracial marriage, children

<sup>123</sup> Andrew Kimbrell, *The Human Body Shop: The Engineering and Marketing of Life* (1993) 20, as cited by Wagner, above n 62, 945; Jefferies, above n 2, 656.

<sup>124</sup> Harris and Alcorn, above n 13, 216; Mahoney, above n 4, 171.

<sup>125</sup> Hardiman, above n 51, 219; Scott, above n 1, 191.

<sup>126</sup> The practice of artificial insemination became readily available to many couples after World War II: Scott, above n 1, 211; Mahoney, above n 4, 171.

<sup>127</sup> See Gloria J Banks, 'Legal and Ethical Safeguards: Protection of Society's Most Vulnerable Participants in a Commercialised Organ Transplantation System' (1995) 21 *American Journal of Law and Medicine* (1995) 45, 49-50 as cited by Harris and Alcorn, above n 13, 218.

<sup>128</sup> Friedlaender, Gorfit and Eid, above n 103, 1061-2.

<sup>129</sup> Friedlaender urges for legislation governing regulated kidney sales: Michael Friedlaender, 'The Right to Sell or Buy a Kidney: Are We Failing Our Patients?' (2002) 359 *The Lancet* 971, 971-3.

<sup>130</sup> UNOS (1993), above 19; The Council on Ethical and Judicial Affairs (CEJA) of the American Medical Association (AMA) produced a report on the use of financial incentives to enhance cadaveric donation in 1995, in which they concluded that 'there is enough evidence in favour of employing some sort of financial incentive to justify the implementation of a financial program': CEJA, 'Financial Incentives for Organ Procurement' (1995) 155 *Archives of Internal Medicine* 581, 581-9, cited by Margaret M Byrne and Peter Thompson 'A Positive Analysis of Financial Incentives for Cadaveric Organ Donation' (2001) 20 *Journal of Health Economics* 69, 69.

<sup>131</sup> The Transplantation Society is ultimately opposed to any commerce in organs. One of its representatives nevertheless, has said that greed on the part of middlemen and potential for criminalisation of clinical practice when attitudes encourage a black market, attest to the need for

born out of wedlock, necropsies and cadaver organ transplants are now accepted aspects of western society'.<sup>132</sup> The public will get used to the notion of organ commerce and come to accept it, particularly when a great number of people will be financially better off for it and the quality of life of thousands of suffering people will be improved immeasurably.

Polls and surveys reveal a high community acceptance of the concepts of organ donation and transplantation. 90 per cent of Australians<sup>133</sup> and 85 per cent of Americans<sup>134</sup> support donation and transplantation in principle. The problem is that the number of people who are actually willing to donate their organs is significantly lower. Some 44 per cent of Australians have indicated such a wish on their drivers' license,<sup>135</sup> while only 28 per cent of the American adults that were surveyed claimed to have filled out an organ donation card.<sup>136</sup> It is submitted that the reason for the discrepancy is that price is not used to bring more organs to the market. Altruism can be a powerful factor in motivating organ donation, but to increase supply it is necessary to provide additional incentives.<sup>137</sup> Whilst there will always be some people who are so opposed to organ donation and transplantation that nothing will sway them to change their minds, the people who support such practices in principle but have not yet consigned themselves to becoming donors may be attracted to the idea of remuneration. When people have been asked directly about whether they would approve of organ sales, the result has been positive. In an American survey, 56 per cent of those surveyed stated they would be willing to purchase an organ for a loved one if necessary.<sup>138</sup> Another poll found that 52 per cent favoured some sort of financial compensation for human organs, while only 22 per cent opposed any compensation.<sup>139</sup> There is growing evidence to suggest that society is prepared to accept organ commerce as a means of solving the organ shortage.

(footnote 131 cont'd) a more meaningful discourse on the possibilities of compensation for organ donation: Daar, above n 103, 1207. The New South Wales Department of Health stated that a re-examination of the scope of the prohibition against trading in human tissue and the circumstances in which exceptions to it may be made is warranted: *Review of the Human Tissue Act 1983: Organ and Tissue Donation and Use and Post Mortem Examination* (1999) 53. The report is available at <<http://www.health.nsw.gov.au/csd/llsb/legislationBloodReport.pdf>> ('NSW Department of Health'); Nuffield Council on Bioethics, above n 45; The International Forum for Transplant Ethics, above n 57, 1952.

<sup>132</sup> Friedlaender, 'The Right to Sell or Buy a Kidney: Are we Failing Our Patients?', above n 129, 973

<sup>133</sup> Figures published by Australian Centre for Cooperative Research and Development, *Organ Donation Attitudes Research Fact Sheet* (1995), as cited by NSW Department of Health, above n 131.

<sup>134</sup> According to a 1988 survey conducted in the US, 'more than 85 per cent of the public believes in and supports organ donation': see Lori Noyes, 'Organ Donor and Transplant Facts' *Organ Transplant Ring*, (November 1998), 2, as cited by Block et al above, n 7, 97.

<sup>135</sup> Frank Small and Associates, *Public Awareness and Attitudes towards Organ Donation* (1995) 4 as cited by NSW Department of Health, above n 131.

<sup>136</sup> Gallup Organisation, Inc, *Survey prepared for the Partnership for Organ Donation and Harvard School of Public Health* (1993) <[http://www.transwed.org/reference/articles/gallup\\_survey/gallup-index.html](http://www.transwed.org/reference/articles/gallup_survey/gallup-index.html)> as cited by Cohen, above n 31, 5.

<sup>137</sup> Carlstrom and Rollow, above n 65, 6-7; Duxbury, above n 46, 338.

<sup>138</sup> James Warren, 'A Literal Gift of Life; Organ Donations Are Saving Lives, But a Shrinking Donor Pool has Caused Many to Re-Evaluate the System for Transplants', *Los Angeles Times* (Los Angeles), 18 October 1992, 18, as cited by Williams, above n 24, 334.

<sup>139</sup> *Ibid.*

## VII PRACTICAL CONSIDERATIONS INVOLVED IN THE BUYING AND SELLING OF ORGANS

An economist such as Richard Posner would see the problem of valuable organs going to waste as an economic problem in need of a market solution. The market is a wonderfully efficient mechanism to induce the transfer of goods that are worth more to one person than another. A kidney or a heart will be worth infinitely more to the patient awaiting a transplant than the dead person who has no further use for his or her organs. It is in this realm that it is possible to envisage commerce in organs. Bearing in mind that the offering of financial incentives for organs should significantly increase the pool of transplantable organs (as above), it is submitted that the legislature should respond to the organ shortage by removing the traditional ban on organ sales. At the very least, a pilot program could be tried in one state or one country and if the results are positive then the process of drafting the necessary legislation could begin.

A number of innovative ideas to increase organ donation have been proposed<sup>140</sup> and in some instances tried.<sup>141</sup> Although an examination of all the proposals is beyond the scope of this paper,<sup>142</sup> it is worth making a general point about programmes that have been advocated as alternatives to direct payment. Consider for a moment, the concept of 'rewarded gifting', which has been proposed by Alexander<sup>143</sup> and Daar.<sup>144</sup> Organs cannot be sold under this scheme. Instead, something with a monetary value is given to the organ donor. To represent this as an alternative to direct payment is surely a 'blatant corruption of the language'. It is no more than a gimmick to avoid the reality that financial incentives are being paid for the organs provided.<sup>145</sup> A system whereby the funeral expenses of donors are paid up to the value of US\$3000 has been tried in Pennsylvania.<sup>146</sup> This is a step in the right direction, but once again, it is 'immorally deceptive' in the pretence that there is no payment, when, in effect, there is.<sup>147</sup> If compensation is to be provided to organ donors, or their estates, it should take the form of a direct payment.

In February 2005, the chief executive of Kidney Health Australia, Anne Wilson, called on the Federal Government to compensate live kidney donors for loss of

<sup>140</sup> For example, the American Society of Transplant Surgeons has sought to increase live organ donations by encouraging employers to allow employees who donate to be given paid leave: Daar, above n 103, 1208.

<sup>141</sup> A government-supported system operated through charity organisations operates in Iran. It brings, without participation of fixed-salaried transplantation teams, donors and recipients together and arranges fixed payments to donors: Daar, above n 103, 1208.

<sup>142</sup> Any number of schemes might be adopted in the hope of increasing the rate of organ donation. This discussion aims to demonstrate that it is feasible to increase the supply of organs via financial incentives, rather than simply outlining all the possible means of improving on the current system.

<sup>143</sup> J Wesley Alexander, 'Rewarded Gifting Should be Tried' (1992) 8 *Transplantation and Immunology Letter* 1, 4, 6, as cited by Veatch, above n 32, 20.

<sup>144</sup> A S Daar, 'Rewarded Gifting' (1992) 24 *Transplantation Proceedings* 2207, 2207-11, as cited by Veatch, above n 32.

<sup>145</sup> Veatch, above n 32, 21.

<sup>146</sup> *Pennsylvania Act 1994-102* (SB 1662) and has since been codified as amended in 20 Pa Cons Stat 8601 et seq: Veatch, above n 32, 22.

<sup>147</sup> Veatch, above n 32, 23.

earnings over an eight-week period, capped at \$3000. The Minister for Health, Tony Abbott, said the Government would consider the issue. The Australian Medical Association (AMA) accepted the proposal, although a spokesman for the AMA, Bill Glasson, stressed: 'We are not paying for organs here, we are talking about minimum payment in recognition for a loss of income.'<sup>148</sup> As with the Pennsylvanian scheme, this proposal is commendable as it is operating within the framework of organ commerce, even if its proponents deny that it involves payment. Unlike the Pennsylvanian scheme however, this plan involves live donors and is limited to procuring kidneys. While the majority of people on organ waiting lists are in need of a kidney, a significant number of people are waiting for other organs such as livers, pancreases, hearts, lungs and intestines.<sup>149</sup> Organ procurement schemes should be designed to procure as many organs as possible and not just one particular type.

People should be free to contract for the sale of their organs for delivery after their death. Opportunities to sign organ sales contracts could arise when people receive their driver's licenses, enrol at a university or college, buy insurance, apply for a job, or a community or sporting group. What is important is that the decedent makes a decision about the sale of his or her organs when he is in good health. This is because the best organs come from accident victims rather than those dying of old age and by the time people suffering traumatic head injuries and cerebral haemorrhage arrive at hospital they will usually be in a state of permanent unconsciousness and incapable of expressing a desire to donate.<sup>150</sup> Payment could take the form of a lump sum, payable to the decedent's estate or designee, only after the organs were harvested and provided the organs were fit. This would ensure that only good quality organs would be collected and paid for.<sup>151</sup> It is also crucial that market transactions in organs be limited to cadaveric donations. The advantage of a posthumous organ market is that it addresses a number of the concerns raised by opponents of a market solution. It involves no question of the poor being exploited, as there would be no acquisition of organs from live donors (as above). Such a system would essentially respect the autonomy of the individual, and avoid the difficulties involved in discussing donation at the time of one's death.<sup>152</sup>

A posthumous organ market also avoids the possibility of 'time-inconsistent choices' being made. Byrne and Thompson have described this phenomenon as the situation in which people will register as donor to receive payment, only to change their mind and prefer not to have their organs harvested after receiving the

<sup>148</sup> As cited by Ruth Pollard, 'Love – Not Money – Drives People to Donate Their Organs' *Health Reporter*, 5 February 2005 <[http://www.smh.com.au/news/National/Love\\_not\\_money--drives-people-to-donate-their-organs/2005/02/04/1107476802857.html](http://www.smh.com.au/news/National/Love_not_money--drives-people-to-donate-their-organs/2005/02/04/1107476802857.html)> at 7 February 2005.

<sup>149</sup> Of 94,307 Americans that were awaiting transplants on 10 February 2005, 65,008 were in need of kidneys, 17,637 livers, 11,699 pancreases, 3,239 hearts, 3,884 lungs and 186 intestines: UNOS, above n 12.

<sup>150</sup> Cohen, above n 31, 14.

<sup>151</sup> This precautionary measure addresses the concern raised by some commentators over the possibility of a market system resulting in the donation of lower quality organs. See, eg, Marusyk and Swain, above n 42, 373.

<sup>152</sup> Cohen, above n 31, 1.

reward.<sup>153</sup> There would be no question of 'time-inconsistent choices' or the related problem of a vendor making numerous contracts with various procurement organisations for the sale of the same organs, if consideration for the organ sales contract was payable posthumously.

Were legislation removing the traditional ban on the sale of body parts to be passed, one question that would arise is whether the buying and selling of organs should be left to market forces or whether the state should be at the forefront of the scheme. At the simplest level, hypothetically at least, organs could be treated as a production good capable of being adequately modelled with the standard tools of supply and demand curves. A number of scholars have advocated a system of 'market based procurement', where procurement firms recruit donors and act as organ brokers based simply on supply and demand.<sup>154</sup> Implicit in what is most appropriately described as a purely economic approach to organ commerce, is the hope, or trust, that the 'invisible hand'<sup>155</sup> of the market will create a greater supply of human materials and resolve the myriad of complex legal, social and ethical dilemmas that advances in medical science have brought us. The issue is not so simple however. For one thing, it is questionable whether organ commerce should be left to market forces.

The legal regulation of commerce is an issue that scholars have revisited time and time again. The liberal legal approach emphasises that the role of the state in regulating the economy should be minimal. It may act as an enforcer at times<sup>156</sup> but for the most part it simply sets out a general regulatory system that provides individuals with means of achieving their business objectives by way of property rights and contracts.<sup>157</sup> This system of economic organisation has been termed the 'market system' and it stands in stark contrast with the 'collectivist system', which stresses state regulation.<sup>158</sup> Underscoring this model is the belief that the state is not concerned simply with allocation but with ensuring that accumulation can take place. The New Deal period in American history is an example of the state taking the reins of the economy and playing a strong directive role in regulation.<sup>159</sup> For better or for worse, the state has actually entered into the productive realm where it plays a critical role in organising the economy.

<sup>153</sup> Byrne and Thompson, above n 130, 70.

<sup>154</sup> Robert D Blair and David L Kaserman, 'The Economics and Ethics of Alternative Cadaveric Organ Procurement Policies' (1991) 8 *Yale Journal on Regulation* 403, 403-5; Block et al, above n 7, 104-9; Barnett, Blair and Kaserman, 'Improving Organ Donation: Compensation Versus Markets', above n 8, 372-8; Barney and Reynolds, above n 8, 12-20.

<sup>155</sup> Adam Smith, in warning of the dangers society faced in the onset of the rise of joint stock companies, conceded that the invisible hand of the market would keep things in the balance to a certain degree: Adam Smith, *The Wealth of Nations* (1937) 1-9.

<sup>156</sup> Enforcing contracts in the courts for instance.

<sup>157</sup> Christopher Arup, *Innovation, Policy and Law: Australia and the International High Technology Economy* (1993) 34-5.

<sup>158</sup> Anthony Ogus, *Regulation: Legal Form and Economic Theory* (1994) 1-3.

<sup>159</sup> This was made possible through the establishment of agencies such as the Federal Communications Commission, the Securities and Exchange Commission, the Civil Aeronautics Board, and the National Labour Relations Board: Robert Horwitz, 'The Gateway of Commerce' in Robert Horwitz (ed), *The Irony of Regulation Reform: The Deregulation of American Telecommunications* (1989) 69-72.

It is hardly possible to envisage a market in body parts in which the state plays no part in regulating. Supposing laws recognising the right of individuals to buy, sell or otherwise trade in their body parts are passed, what next? Can the state be expected to pass the relevant legislation and then step back from the regulatory process altogether? A market in body parts will only succeed if the participants in such a market adhere to rules and standards of practice and it is suggested that the state should play a role in setting and enforcing these. Analysts of the desirable scope of government action, from John Locke to Frederick Hayek and Milton Friedman, have agreed that governments must set standards and enforce compliance with them in order to encourage action for public good and discourage actions for public harm.<sup>160</sup> Even Adam Smith, who argued against state regulation,<sup>161</sup> would agree on this point.<sup>162</sup> The need for a ‘collectivist system’ in which the state exercises its regulatory capacity can be illustrated by considering what might happen if the buying and selling of organs were left to a ‘market system’.

One problem is the danger of egregious price gouging arising by way of organ selling agencies withholding the supply and so driving the price up. It is in this context that the suggestion has been made that to operate efficiently the structure of the market would require a central organisation responsible for ‘fair distribution’.<sup>163</sup> One possibility is to confine the marketplace, perhaps to a particular nation state or a bloc of states.<sup>164</sup> Becker has contended that a market in body parts will only work if the authority to buy and sell organs is granted exclusively to the state.<sup>165</sup> Implicit in his proposal is a fear that a market in body parts will lead to corruption, in particular on the part of ‘too-eager doctors’ and unscrupulous organ harvesting agencies, unless the US federal government retains a firm grip on matters. Lloyd Cohen has argued that concern of price gouging is unrealistic and that the fact that a timely liver transplant may prove to save the life of a needy recipient does not mean that the price charged will be exorbitant. ‘As in the case of such necessities as food, clothing, and shelter, so too with livers’, so long as there is competition among the providers, market price will reflect the marginal cost to the provider rather than the reservation price of the purchaser.<sup>166</sup> It may be that price gouging will never arise as a problem.

<sup>160</sup> Robert A G Monks, *The Emperor’s Nightingale: Restoring the Integrity of the Corporation in the Age of Shareholder Activism* (1998) 158. Similar sentiments have been echoed by Ogus, above n 158, 2.

<sup>161</sup> It has been argued by Luntz that Smith’s argument, although justifiable in his day, when the economy was still embedded in society, cannot be maintained in today’s world where the economy is essentially based on mobile capital and transactions are taking place on a multi-national level: M A Luntz, *Economics for the Common Good: Two Centuries of Social Economic Thought in the Humanistic Tradition* (1999) 196-7, 206-8.

<sup>162</sup> See Monks, above n 160, 158.

<sup>163</sup> The International Forum for Transplant Ethics, above n 57, 1952; Carlstrom and Rollow, above n 65, 6.

<sup>164</sup> Harris and Erin, above n 64, 114-115.

<sup>165</sup> As cited by Carlstrom and Rollow, above n 65, 6-7.

<sup>166</sup> According to Cohen, price gouging will only arise as a serious problem in the event that a single vendor owns the only tissue suitable for a particular individual. Even this is unlikely however, because most organs such as kidneys, hearts, and livers elicit an immune reaction, while the development and refinement of immuno-suppressant drugs (such as cyclosporin-A and prednisone) has made it possible for a given recipient to make use of organs from a variety of individuals: Cohen, above n 31, 22

However, in order to ensure that it does not, pricing matters should be administered by a state agency, which would be responsible for setting and enforcing the fees payable to the vendor's estate and the maximum price that the recipient could be charged.<sup>167</sup>

Although the market solution being proposed here speaks to the need for state regulation, it does not deny the possibility of co-regulation. Large firms are playing increasingly important roles in the regulatory processes that take place in the advanced economies of capitalist societies. The study that Mark Nadel undertook in the 1970s into the role that corporations play in making public policy provided compelling evidence for the proposition that large firms are in fact like private governments.<sup>168</sup> They are, as another scholar put it, 'governing institutions' themselves.<sup>169</sup> The decisions made by firms with regards to employment, investment and output have, to quote Leigh Hancher and Michael Moran, 'important allocational and distributional implications which resonate in the public sphere'.<sup>170</sup> In this sense, it may be artificial to see a division between public and private spheres of regulation, as the 'regulatory space' is occupied by powerful organisations, both state and non-state, who are 'linked in a network to the numerous points of decision in the other organisations populating regulatory space'.<sup>171</sup> Consider for a moment, the hospitals and procurement agencies in the US, who are already heavily involved in the organ transplantation process.<sup>172</sup> Such organisations are not regulated directly by the state, many of them being 'private' institutions, but neither are they free of state control and influence either. Hospitals, whether private or public, are bound to follow the same legislative regimes, and doctors who are privately employed owe their patients the same fiduciary duties as those doctors who are employed by the state. Some of the rules in current practice could be extended to the model of organ procurement that is being proposed here. By doing so, a system could be created in which the state and the organisations already involved in the transplantation process could play a role in regulating.

<sup>167</sup> Cohen has suggested that payment in the range of US\$5000 for each major organ such as liver, kidney, or heart, and substantially lesser amounts for other tissue such as corneas, bone marrow, and pituitary glands would not be inappropriate: Cohen, above n 31, 16. The question of how the state could afford such payments has been considered by UNOS, which suggested that the potential savings to the medical system would be enormous if as few as 1000 additional organs were gained every year: UNOS (1993), above 19. This is principally because having a greater number of organs available for transplantation would reduce the waiting period and so alleviate a considerable portion of the expenses incurred by the state in keeping people alive on life support: Cohen, above n 31, 3. See also Peters, above n 40, 1302-5.

<sup>168</sup> Mark Nadel, 'The Hidden Dimension of Public Policy: Private Governments and the Policy-Making Process' (1975) 37 *Journal of Politics* 2, 5-8.

<sup>169</sup> Keith Middlemas, 'Politics in Industrial Society' (1979) as cited in Leigh Hancher and Michael Moran (eds), *Capitalism, Culture and Economic Regulation* (1989) 275.

<sup>170</sup> Hancher and Morann, above n 169, 275 (they rely on the work of Charles Lindblom, *Politics and Markets* (1977)).

<sup>171</sup> Hancher and Morann, above n 169, 295.

<sup>172</sup> In spite of the organ shortage, the number of hospitals performing transplant operations rose from 12 in 1983 to 148 in 1989: Ron Winslow 'Hospitals Rush to Transplant Organs' *Wall Street Journal* (New York), 29 August 1989, B1, as cited by Barnett and Kaserman, 'The 'Rush to Transplant' and Organ Shortages', above n 97, 506.

A closely monitored market in body parts might eventually become deregulated. Deregulation describes the process where less interventionist methods and forms of control are exercised over the industry in question.<sup>173</sup> It essentially involves the state withdrawing some of its influence over a particular industry or area of the economy. An analogy might be offered by way of the telecommunications industry. Telecom, once an arm of the federal government in Australia, began a process of deregulation in late 1980s.<sup>174</sup> It took on a new name, Telstra, and eventually ended up becoming one of a number of companies competing in the telecommunications industry.<sup>175</sup> By the same token, it is possible to envisage a market in body parts where the state plays a less important role than is being advocated at present.

## VIII CONCLUSION

Current legal approaches towards solving the organ shortage have failed. People will continue dying until stronger incentives to encourage organ donation are provided. Society must move beyond voluntarism and presumed consent and adopt new measures for overcoming the scarcity of available transplant organs. No one disputes that organs are valuable. Nevertheless, the ban on organ sales means that the price of body parts is artificially held at zero and this prevents supply from meeting demand.<sup>176</sup> The supply of organs would increase dramatically if individuals could sell their organs. With this goal in mind, the legislature should pass laws that recognise the right of individuals to sell their organs. Traditional arguments against paid organ donation do not justify the current ban on sales, especially given the likelihood that the use of organ sales markets would actually increase the supply of organs. The case against the commercialisation of body parts is, for the most part, an uneasy one, fraught with emotion and highly subjective notions of justice and morality. Although emotion will inevitably be involved in any debate relating to the sale of body parts, emotion must not be the governing principle, rather, analysis of the best method for increasing the number of organs procured must be the controlling factor.<sup>177</sup> Only by taking the first step of commercialisation can it be hoped that the organ deficit will be reduced, and eventually eliminated.<sup>178</sup>

A market in body parts, which is limited to transactions in cadaveric donations and closely regulated by the state, represents the best solution to the organ shortage, not least because it would afford protection to the participants and avoid some of the ethical concerns that underscore arguments against paid organ

<sup>173</sup> Ogus, above n 158, 8.

<sup>174</sup> Starting in 1989, when a 'liberalisation policy' was introduced and a new regulator, Austel, was established: Colin Scott, 'The Proceduralisation of Telecommunications Law: Adapting to Convergence' 1997 (3) *Journal of Information, Law & Technology* <[http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1997\\_3/scott1/](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1997_3/scott1/)> at 7 February 2005.

<sup>175</sup> On European deregulation of the Telecommunications industry see John Braithwaite and Peter Drahos, *Global Business Regulation* (2000) 322-59.

<sup>176</sup> Block et al, above, n 7, 107.

<sup>177</sup> Williams, above n 24, 331.

<sup>178</sup> Jefferies, above n 2, 658.



donation. Because a market is essentially a human exercise, the potential for market failure and the possibility that unscrupulous individuals will abuse the rights of other individuals can never be eliminated entirely. No system of organ procurement will be perfect. Legislation recognising the right of individuals to buy, sell and otherwise trade their body parts should be passed nevertheless. The thrust of this discussion has been to deconstruct some of the barriers to organ commerce and sidestep others, by making a qualified case for a market in body parts, a first step only; but one that could provide the outline for a new strategy of assault in the future.