COMMENTS

MY BODY, HIS PROPERTY?: PRESCRIBING A FRAMEWORK TO DETERMINE OWNERSHIP INTERESTS IN DIRECTLY DONATED HUMAN ORGANS

I. INTRODUCTION

"Man Not Entitled to Kidney: The Appeals Court Ruled that a Florida Man Did Not Own a Kidney Promised to Him by the Widow of a Lifelong Friend"[1]

"Fertility Clinic Is Sued Over the Loss of Embryos"[2]

"Fertility Doctor Charged With Eggs Theft"[3]

"Lover Wins Custody of Dead Man's Sperm"[4]

"Woman Has Child After Receiving Twin's Ovarian Tissue"[5]

Although these statements resemble the storyline of a science fiction novel or a futuristic television program, they come directly from the headlines of today's major newspapers. Today we can donate an organ to a friend or family member at our death or during life. We can store our blood before surgery in a blood bank or place our embryos, sperm, and ova in clinical storage for future use. Modern medical science has made these possibilities today's realities. Thus, the legal system must keep pace with science in order to provide protection, regulation, and structure in the wake of continuing scientific advancement.

Commentators note that, as technological breakthroughs change the world, old legal theories may seem inadequate to address new legal problems.[6] Because modern technology enables organs and biological material to be separated from

1. Mark Johnson, *Man Not Entitled to Kidney: The Appeals Court Ruled that a Florida Man Did Not Own a Kidney Promised to Him by the Widow of a Lifelong Friend*, THE INTELLIGENCER (Doylestown, PA), Dec. 15, 2006, at A11.

2. *Fertility Clinic Is Sued over the Loss of Embryos*, N.Y. TIMES, Oct. 1, 1995, at 26.

3. Davan Maharaj, *Fertility Doctor Charged with Eggs Theft*, L.A. TIMES, Nov. 19, 1997, at A3.

4. Carla Hall, *Lover Wins Custody of Dead Man's Sperm: Woman Gets 12 Frozen Vials, Ending Legal Fight with His Children*, L.A. TIMES, Feb. 25, 1997, at A1.

5. Denise Grady, *Woman Has Child After Receiving Twin's Ovarian Tissue*, N.Y. TIMES, June 8, 2005, at A12.

6. *See, e.g.*, Melissa M. Perry, Comment, *Fragmented Bodies, Legal Privilege, and Commodification in Science and Medicine*, 51 ME. L. REV. 169, 172 (1999) (noting "gap in current legal discourse" regarding scientific and medical interests in face of rapid biotechnological advances); William Boulier, Note, *Sperm, Spleens, and Other Valuables: The Need to Recognize Property Rights in Human Body Parts*, 23 HOFSTRA L. REV. 693, 694-95 (1995) (arguing that law must evolve in light of present reality of biotechnologically advanced society).

the human body, courts must determine if this separated material constitutes property. They also must determine if a donor, a recipient, a storage facility, a research institute, or a family member can have an ownership interest in this material.

Legal practitioners and academics alike have extensively considered whether a property interest exists in the human body or its parts.[7] Recent cases indicate a great disparity in both the methods of analysis and outcomes of decisions involving property interests in the human body or its parts.[8] Traditionally, courts have rejected any suggestion that body parts may be property.[9] This reflects the common societal fear that recognizing the body as property would force people to become slaves in a market for body parts or compromise the societal regard for bodily integrity.[10] In light of science's rapid pace, these fears "undermine scholars' ability to credibly engage in policy debates" on the proper place of biotechnology and medical science within the law.[11] Courts' aversion to recognizing the body as property has resulted in "a sorely lacking and undeveloped nomenclature . . . and an expanding, conflicting common law" that have left many plaintiffs with no standing or recourse in the legal system.[12]

Colavito v. New York Organ Donor Network (*Colavito III*),[13] a recent case, introduced the novel issue of what type of ownership interest an intended recipient of a donated organ can exercise over that donated organ. The courts' reasoning in the *Colavito* cases exemplifies current concerns about the consequences of courts' failure to recognize that modern society requires the body to be treated as a form of property in certain situations.[14] The issue set forth by the *Colavito* case must be resolved to protect the autonomy and personhood of donors while providing donees with recourse in instances of misappropriation of organs.

This Comment proposes that courts should explicitly treat donated organs and bodily material as market-inalienable property, transferable by gift but not by sale. This Comment also argues that an intended recipient of a donated organ

7. *Compare, e.g.*, Lori B. Andrews, *My Body, My Property*, HASTINGS CTR. REP., Oct. 1986, at 28, 29-31 (advocating for recognition of property right in human body), *with, e.g.*, Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 428-43 (2000) (arguing against recognition of property rights in body).

8. *Compare, e.g.*, Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 492 (Cal. 1990) (finding that plaintiff had no ownership interest in excised cells because current state statute restricting how excised cells could be used eliminated property rights), *with, e.g.*, Colavito v. N.Y. Organ Donor Network, Inc. (*Colavito III*), 860 N.E.2d 713, 717-19 (N.Y. 2006) (discussing common-law property rights in human corpses to determine whether property interest exists in donated organ).

9. Andrews, *supra* note 7, at 29. *But see* Hecht v. Superior Court (*Hecht I*), 20 Cal. Rptr. 2d 275, 283 (Ct. App. 1993) (finding sperm to be "unique type of 'property'").

10. *Hecht I*, 20 Cal. Rptr. 2d at 281-83; Michele Goodwin, *Formalism and the Legal Status of Body Parts*, 2006 U. CHI. LEGAL F. 317, 321.

11. Goodwin, *supra* note 10, at 323.

12. *Id.* at 319.

13. 860 N.E.2d 713 (N.Y. 2006).

14. See *infra* Part II.B.3 for a complete discussion of *Colavito*.

has a recognizable, limited property right in the organ that originates in the right of the *donor* to control the disposition of his own body

Part II.A of this Comment discusses the historical background, beginning at common law, of recognition of property rights in the human body. This Part also discusses how the Supreme Court has recognized that the property rights that states afford to next of kin in the bodies of deceased relatives constitute a property interest entitled to due process protection. Part II.B explores recent cases dealing with issues stemming from advances in medical science. This Part presents both seminal cases that spurred original discussion in this area[15] and the *Colavito* case, which presents a new issue regarding property interests in the human body and its parts.[16] Part II.C reviews the current statutory framework for organ donation in the United States. Finally, Part II.D discusses the theoretical aspect of property, specifically Margaret Radin's personhood theory of property as applied to the human body and its parts.

Part III.A argues that courts should use Radin's theory to consider organs and human tissue as property separate from the human body. Part III.B proposes that the donor's right to control the use of his body parts requires that the intended recipient of an organ be granted a limited ownership interest in that organ once it is passed to him as a legal gift. This solution respects the autonomy and personhood of the donor and provides the donee with recourse for his loss of "property."

II. OVERVIEW

A. History of Property Rights in the Human Body—the Common Law and the Quasi-Property Right

1. English Common Law

Dating from the seventeenth century, English common law refused to recognize a property right in a human corpse or a human body or its parts.[17] This refusal was due largely to the fact that duties to ensure a dignified disposition of the body fell on the church and burials were "matters of ecclesiastical cognizance."[18] Courts abandoned this prohibition when the right of the dead to a dignified disposition, previously recognized only by ecclesiastical courts, was

15. *See* Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 492-95 (Cal. 1990) (holding plaintiff had no ownership interest in cell line created using his bodily material); *Hecht I*, 20 Cal. Rptr. 2d at 275 (finding girlfriend had ownership interest in sperm bequeathed by deceased boyfriend).

16. *See Colavito III*, 860 N.E.2d at 713 (holding that intended recipient of incompatible donated organ had no ownership interest in organ prior to transplantation).

17. Keyes v. Konkel, 78 N.W. 649, 649 (Mich. 1899); M.H. Klaiman, *Whose Brain Is It Anyway? The Comparative Law of Post-Mortem Organ Retention*, 26 J. LEGAL MED. 475, 479 (2005); Michelle Bourianoff Bray, Note, *Personalizing Personalty: Toward a Property Right in Human Bodies*, 69 TEX. L. REV. 209, 225 (1990) (citing Regina v. Sharpe, (1857) 169 Eng. Rep. 959 (Q.B.)).

18. Newman v. Sathyavaglswaran, 287 F.3d 786, 791 (9th Cir. 2002) (citing Pierce v. Proprietors of Swan Point Cemetery, 10 R.I. 227, 239 (1872)).

recognized at common law in 1840.[19] An exemplary early case is *Regina v. Price*[20] in which the court held that a father had a right to possession of his dead daughter's body and a duty to dispose of it in a legal manner.[21] Thus, as one commentator noted, the English system, while denying the existence of a property right in corpses and human bodies, may have in fact established the foundation of such a right.[22]

2. Development in American Case Law

Most early American courts adopted the English common law view that a dead body cannot be the subject of a property right,[23] but the end of the nineteenth century brought with it a rising "demand for human cadavers in medical science and use of cremation as an alterative to burial."[24] At this time, courts began to recognize an exclusive right of the next of kin to possess and control the disposition of the bodies of their dead relatives, the violation of which was actionable at law.[25] In the leading case of *Pierce v. Proprietors of Swan Point Cemetery*,[26] the court held that, while a dead body cannot be considered property as defined at common law, it is a quasi property, which entitles the relatives of the deceased to certain rights in the body that courts will protect.[27]

American courts continued to recognize the rights vested in the next of kin of the deceased for burial purposes until the acknowledgement of the quasi-property right gained widespread recognition.[28] The issue of the quasi-property right most often arose in cases in which relatives sought to recover damages for emotional distress suffered due to the mishandling of the dead body of their kin.[29] The quasi-property right was created to avoid requiring the deceased's

19. R v. Stewart, (1840) 113 Eng. Rep. 1007, 1009 (Q.B.) (imposing common law duty that required "the individual under whose roof a poor person dies" to provide pauper with proper Christian burial).

20. (1884) 12 App. Cas. 247 (Q.B.D.).

21. *Id.* at 254.

22. Bray, *supra* note 17, at 226-27.

23. *See* Bessemer Land & Improvement Co. v. Jenkins, 18 So. 565, 567 (Ala. 1895) (finding that dead body is not subject to property right, and noting that American courts have generally adopted this view from England).

24. Newman v. Sathyavaglswaran, 287 F.3d 786, 791-92 (9th Cir. 2002) (citing *In re* Johnson's Estate, 7 N.Y.S.2d 81, 85-86 (Sur. Ct. 1938)).

25. *Id.* at 791-92 (citing *In re Johnson's Estate*, 7 N.Y.S.2d at 85-86).

26. 10 R.I. 227 (1872).

27. *Pierce*, 10 R.I. at 238 (explaining that quasi-property right entails right to protection from violation and proper burial).

28. *See, e.g.*, Bogert v. City of Indianapolis, 13 Ind. 134, 138 (1859) (holding that "the bodies of the dead belong to the surviving relations . . . as property, and that they have the right to dispose of them as such, within restrictions analogous to those by which the disposition of other property may be regulated"); Herzl Congregation v. Robinson, 253 P. 654, 655 (Wash. 1927) (finding "quasi-property right in a dead human body inherent" in deceased's immediate relatives).

29. *See, e.g.*, Shults v. United States, 995 F. Supp. 1270, 1273-76 (D. Kan. 1998) (discussing parents' right to recovery when deceased son's organs were removed during autopsy and were not

next of kin to prove that emotional distress was accompanied by physical injury.[30] In recent cases, courts have recognized that plaintiffs' primary concern in seeking redress for harm done to dead bodies is not the injury to the body itself but the emotional harm suffered by surviving family members.[31] Thus, courts have moved away from vesting a quasi-property interest in dead bodies in next of kin and awarded damages through the tort actions of infliction of emotional distress or interference with a dead body.[32]

3. Due Process

Some surviving relatives have brought actions alleging that nonconsensual removal of bodily organs and tissues from the bodies of their next of kin amounted to an unconstitutional deprivation of property in violation of due process rights under the Fourteenth Amendment. At first, courts were reluctant to hold that next of kin had any constitutionally protected property interests in their relatives' bodies and to extend the quasi-property right past the right to proper burial or disposition of the body.[33] More recently, courts have held that state law provides the next of kin a constitutionally protected property interest in the body of a decedent.

In *Brotherton v. Cleveland*,[34] the Sixth Circuit held that the Due Process

returned but were incinerated); Culpepper v. Pearl St. Bldg., Inc., 877 P.2d 877, 880-82 (Colo. 1994) (discussing parents' right to recover for emotional distress when son's dead body was mistakenly cremated).

30. *Culpepper*, 877 P.2d at 880.

31. *Id.* (citing Scarpaci v. Milwaukee County, 292 N.W.2d 816, 821 (Wis. 1980)). The Second Restatement of the Law of Torts has proposed a cause of action for Interference with Dead Bodies under the quasi-property legal fiction theory. RESTATEMENT (SECOND) OF TORTS § 868 (1979). The comment to section 868 states that "[i]n practice the technical [quasi-property] right has served as a mere peg upon which to hang damages for the mental distress inflicted upon the survivor; and in reality the cause of action has been exclusively one for the mental distress." RESTATEMENT (SECOND) OF TORTS § 868 cmt. a (1979).

32. *See, e.g.*, *Shults*, 995 F. Supp. at 1275-76 (finding no cause of action for conversion, and holding that injury should be addressed through tort of interference with corpse); *Culpepper*, 877 P.2d at 882 (rejecting "fictional theory that a property right exists in a dead body" that would allow plaintiffs to bring cause of action for conversion, and holding that recovery would be more appropriate through tort action related to emotional distress); Bauer v. N. Fulton Med. Ctr., Inc., 527 S.E.2d 240, 244-45 (Ga. Ct. App. 1999) (rejecting cause of action for conversion for unauthorized removal of deceased husband's eye tissue and awarding damages through malpractice remedy); Bourgoin v. Stanley Med. Research Inst., No. CV-05-34, CV-05-82, CV-05-83, CV-05-121, CV-05-252, CV-05-186, CV-05-195, 2005 WL 3882080, at *2-3 (Me. Super. Nov. 23, 2005) (denying deceased's family members' cause of action for conversion, and opining that preferred cause of action for nonconsensual removal of deceased's organs is infliction of emotional distress). *But see* Spates v. Dameron Hosp. Ass'n, 7 Cal. Rptr. 3d 597, 608 (Ct. App. 2003) (holding that fact that quasi-property interest in deceased's body vested in next of kin did support cause of action for conversion).

33. *See, e.g.*, Fuller v. Marx, 724 F.2d 717, 719-20 (8th Cir. 1984) (recognizing only quasi-property interest in deceased son's organs, and holding that mother did not have constitutionally protected property right); Georgia Lions Eye Bank, Inc. v. Lavant, 335 S.E.2d 127, 128 (Ga. 1985) (dismissing due process claim, and holding that mother had no property interest in child's body outside of quasi-property right to bury deceased).

34. 923 F.2d 477 (6th Cir. 1991).

Clause gave a widow a legitimate property interest in her husband's body, including his removed corneas.[35] The court held that the state's recognition of a quasi-property right of the next of kin to possess a body for burial, combined with Deborah Brotherton's right to control the disposition of her husband's body under the Ohio law interpreting the Uniform Anatomical Gift Act, amounted to an "aggregate of rights" sufficient to be protected by the Due Process Clause of the Fourteenth Amendment.[36] In *Whaley v. County of Tuscola*,[37] and, more recently, *Newman v. Sathyavaglswaran*,[38] the courts followed the *Brotherton* court's reasoning and held that the property rights that states afford to next of kin in bodies of deceased relatives constitute an adequate property interest entitled to due process protection.[39]

B. Significant Recent Decisions Regarding the Recognition of a Property Right in the Human Body or Its Parts

In recent years, courts have faced novel issues regarding property interests in human bodies that extend beyond property interests in dead bodies vested in next of kin for proper burial and disposition of a body.

1. Ownership Interests in Excised Tissues and Cells—*Moore v. Regents of the University of California*

Moore v. Regents of the University of California[40] brought the issue of ownership interests in human cells and tissue to the forefront of both the legal and medical communities.[41] In *Moore*, the California state courts confronted a novel issue when a patient brought a cause of action for conversion against his physician and other defendants alleging that they used a cell line taken from his body in potentially lucrative medical research without his permission.[42] This case presented the California courts with one of the "more profound questions of the time: whether people own their body parts when the parts are in, or attached to, their bodies, and whether people continue to own them once the parts are

35. *Brotherton*, 923 F.2d at 482.

36. *Id. See generally* Kathryn E. Peterson, Note, *My Father's Eyes and My Mother's Heart: The Due Process Rights of the Next of Kin in Organ Donation*, 40 VAL. U. L. REV. 169, 185-220 (2005) (discussing statutory and common law rights of next of kin in organ donation and whether these rights create constitutionally protected due process property right).

37. 58 F.3d 1111 (6th Cir. 1995).

38. 287 F.3d 786 (9th Cir. 2002).

39. *See Newman*, 287 F.3d at 795-99 (holding that California recognizes parents' constitutionally protected interest in their deceased children's bodies); *Whaley*, 58 F.3d at 1116 (holding that next of kin had constitutionally protected property interest in bodies of deceased relatives that was violated when defendants removed corneas and eyeballs of deceased relatives without consent).

40. 793 P.2d 479 (Cal. 1990).

41. *See* Michelle J. Burke & Victoria M. Schmidt, *Old Remedies in the Biotechnology Age:* Moore v. Regents, 3 RISK: ISSUES IN HEALTH & SAFETY 219, 220 (1992) (noting that *Moore* attracted widespread attention and raised novel policy issues discussed at congressional hearings and in professional literature).

42. *Moore*, 793 P.2d at 480.

removed from their bodies."[43]

The plaintiff, John Moore, underwent extensive treatment for hairy-cell leukemia at UCLA Medical Center.[44] Moore consented to a splenectomy in order to retard the progression of his disease. Following the surgery, his physicians required Moore to return to the UCLA Medical Center for further testing and treatment.[45] During these visits, they withdrew additional samples of Moore's bodily tissue and, without Moore's knowledge, continued to perform research on the tissue samples and removed portions of his spleen until they ultimately developed a valuable cell line from his bodily materials.[46] The physicians obtained a patent for the cell line and negotiated various commercial agreements for development of the cell line and products to be derived from it.[47]

Moore based his claim of conversion on the theory that he retained ownership rights in his cells after they were removed from his body, that these rights allowed for him to direct the use of his cells, and that he never consented to their use in medical research.[48] The California Second District Court of Appeal held that Moore's allegation of a property right in his own tissue was sufficient to sustain a cause of action for conversion.[49] The court held that an individual's right of dominion over his own body, including the rights of use, control, and disposition, constituted a property interest.[50] Surveying existing case law, the court found that an individual's property interest in his own body was recognized in cases discussing requirements of informed consent, laws regarding disposition of dead bodies, and statutes protecting medical experimentation on human subjects.[51] The court of appeals emphasized that there was no existing public policy or statutory authority that would bar finding a property interest in one's own body.[52] It also noted that because the defendants had already commercialized the Moore cell line, there was no need for them to discuss the commonly articulated danger of body parts being subjected to a "free market"

43. Charles M. Jordan, Jr. & Casey J. Price, *First* Moore*, Then* Hecht*: Isn't It Time We Recognize a Property Interest in Tissues, Cells, and Gametes?*, 37 REAL PROP. PROB. & TR. J. 151, 160-61 (2002).

44. *Moore*, 793 P.2d at 480-81. At this time, it was common knowledge to all Moore's physicians that blood products and components of patients with hairy-cell leukemia were valuable and would provide significant commercial and scientific advantages in the field. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 481-82.

48. *Moore*, 793 P.2d at 487. At the time of the trial, the potential market for the types of proteins produced by cell lines like the one at issue in *Moore* had an estimated value of three billion dollars. *Id.* at 516.

49. Moore v. Regents of the Univ. of Cal., 249 Cal. Rptr. 494, 503-04 (Ct. App. 1988), *aff'd in part, rev'd in part*, 793 P.2d 479 (Cal. 1990).

50. *Id.* at 504-05; *see also* Andrew Wancata, Note, *No Value for a Pound of Flesh: Extending Market-Inalienability of the Human Body*, 18 J.L. & HEALTH 199, 210 (2003-2004) (noting that allowing Moore to recover on conversion theory would have effected recognition of complete property right in human body).

51. *Moore*, 249 Cal. Rptr. at 505-07.

52. *Id.* at 504.

trading system.[53]

The California Supreme Court reversed the court of appeals' decision and held that Moore had no cause of action for conversion under existing law because the existing California statutes limited a patient's control over excised cells.[54] The court reasoned that statutes restricting the use of excised cells eliminated many of the rights ordinarily attached to property and that the remaining rights could not amount to property or ownership.[55] The majority found that courts should look to these specialized statutes and not to the law of conversion in making determinations about the disposition of human biological materials.[56] It also found that the patented cell line was distinct, both factually and legally, from Moore's excised cells.[57] Furthermore, the court refused to extend the tort of conversion to cover Moore's claim.[58] It based its conclusion largely on the policy consideration that extension of the law would greatly hinder researchers by increasing their liability and limiting their access to raw materials.[59]

In his concurring opinion in *Moore*, Justice Arabian voiced concern about the commodification of the human body, arguing that any recognition of a property interest in the human body or its parts poses the danger of a "marketplace in human body parts" resulting in degradation of the "human vessel—the single most venerated and protected subject in any civilized society."[60] The *Moore* case evoked and continues to evoke much discussion and commentary,[61] and several courts have followed the California Supreme Court's reasoning in *Moore* when faced with decisions regarding property interests in excised cells.[62]

53. *Id.* (internal quotation marks omitted).

54. Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 489-90 (Cal. 1990) (citing CAL. GOV'T CODE § 27491.46-47 (West 1979); CAL. HEALTH & SAFETY CODE § 7054.3-4 (West 1972)).

55. *Id.* at 492.

56. *Id.* at 489.

57. *Id.* at 492. The court reasoned that the cell line was a product of invention because "[f]ederal law permits the patenting of organisms that represent the product of 'human ingenuity,' but not naturally occurring organisms." *Id.*

58. *Moore*, 793 P.2d at 493.

59. *Id.* at 494. The *Moore* court explained that recognizing a property interest in cell samples would result in a compromise of free and efficient access to and exchange of scientific materials for research purposes. *Id.* at 495. It ultimately concluded that upholding Moore's claims for breach of fiduciary duty and lack of informed consent offered him adequate compensation and protection. *Id.* at 496-97.

60. *Id.* at 497-98 (Arabian, J., concurring).

61. *See, e.g.*, Gina M. Grandolfo, Comment, *The Human Property Gap*, 32 SANTA CLARA L. REV. 957, 981-85 (1992) (criticizing *Moore* and discussing alternative theories of compensation for wrongful use of individual's cells or body parts).

62. *See, e.g.*, Greenberg v. Miami Children's Hosp. Research Institute, Inc., 264 F. Supp. 2d 1064, 1074-75 (S.D. Fla. 2003) (holding that voluntary donors of tissue and fluids had no ownership interest in their donations and could not sustain causes of action for conversion against defendant physicians who patented successful research done using their bodily matter).

2. Ownership Interests in Reproductive Material—*Hecht v. Superior Court*

Cases involving reproductive material and current reproductive technology have given courts numerous opportunities to opine about the nature of property interests in human sperm, eggs, and embryos.[63] The seminal case in the area of reproductive materials is *Hecht v. Superior Court* (*Hecht I*).[64] The issue in *Hecht I* arose when William Kane, age forty-eight, took his own life and bequeathed fifteen vials of sperm, already deposited in a sperm bank, to his girlfriend Deborah Hecht.[65] After one year of controversy between Hecht and Kane's two adult children, the court was required to determine who was to receive the sperm. The probate court first ordered that the sperm be destroyed.[66] Hecht appealed, and the Kane children argued that *Moore* controlled and precluded Kane from having an ownership or possessory interest in his sperm once it left his body.[67]

The court first held that it was "self-defeating" to follow *Moore* because if Kane had no property interest in his sperm once it left his body, "the sperm would not constitute part of Kane's estate and the probate court would not have jurisdiction over its disposition."[68] The court then distinguished *Moore* in several ways. It noted that the *Moore* decision relied largely on a specific statute intended to control the use and destruction of biological material and left open the possibility that other specialized statutes may evince "some limited right to control" over excised cells.[69] The *Hecht I* court ultimately held that, at the time of his death, Kane had an ownership interest in the sperm "to the extent that he had decision making authority" with regard to its intended use and that "[s]uch

63. For a comprehensive discussion of cases, statutes, and medical issues involving property and personhood interests in cryopreserved embryos, see Laura S. Langley & Joseph W. Blackston, *Sperm, Egg, and a Petri Dish: Unveiling the Underlying Property Issues Surrounding Cryopreserved Embryos*, 27 J. LEGAL MED. 167 (2006).

64. 20 Cal. Rptr. 2d 275 (Ct. App. 1993). *Hall v. Fertility Inst. of New Orleans*, 647 So. 2d 1348 (La. Ct. App. 1994), is a less familiar case with many factual similarities to *Hecht*. Hall, upon discovering that he was seriously ill, deposited fifteen vials of sperm with a sperm bank and legally executed an "Act of Donation," thereby conveying his interest in the frozen semen deposits to his girlfriend. *Hall*, 647 So. 2d at 1350. Hall's mother, the executrix of his estate, wanted the sperm to be considered succession property or to be destroyed and sought an injunction preventing the release of the semen to the girlfriend. *Id.* at 1349. The appellate court upheld the trial court's grant of summary judgment and held that the sole issue in the case was the validity of the Act of Donation, an issue to be determined at a full trial. *Id.* The court held that if, at trial, the decedent was found competent and not under undue influence at the time the act was executed, the frozen semen would become his girlfriend's property and she would be given full rights to its disposition. *Id.* at 1350-51. This case illustrates another instance in which a court alluded to a "property" interest where excised cell or tissue would pass in some way from a donor to a donee-recipient.

65. A letter recovered after Kane's death indicated that he had in fact been "assiduously generating" his sperm, knowing that he intended to take his own life. *Hecht I*, 20 Cal. Rptr. 2d at 277.

66. *Id.* at 279.

67. *Id.* at 280-81.

68. *Id.*

69. *Id.* at 281.

interest is sufficient to constitute 'property' within the meaning of [the probate code]."[70]

In a subsequent proceeding, the court reemphasized the uniqueness of both Kane's and Hecht's property interest in the sperm.[71] Focusing on Kane's intention of bequeathing Hecht the sperm to produce a child with her, the court limited Hecht's property interest and held that she lacked the "legal entitlement to give, sell, or otherwise dispose of [the] sperm."[72] It stated that "to the extent this sperm is 'property' it is only 'property' for [the person to whom it was bequeathed]."[73] The court, focusing on Kane's intent, sought to protect Kane's fundamental right to procreate and held that, to protect this right, the donee-recipient of the sperm is prohibited from selling or contracting away the bequest.[74]

In reaching its conclusion, the *Hecht I* court cited the Ethical Statement of the American Fertility Society, which states that "'gametes . . . are the property of the donors.'"[75] The *Hecht I* court also relied on *Davis v. Davis*,[76] in which the Tennessee Supreme Court faced the task of determining a divorced couple's respective interests in seven of their cryogenically preserved preembryos. That court held that the preembryos were neither persons nor property but "occup[ied] an interim category that entitle[d] them to special respect because of their potential for human life" and concluded that the plaintiffs had "an interest in the nature of ownership, to the extent that they have decision-making authority concerning disposition of the preembryos."[77]

3. A Novel Question: A Donee-Recipient's Interest in a Donated Organ—*Colavito v. New York Organ Donor Network*

In a recent case of first impression in the American legal system, Robert Colavito brought a claim for conversion of a directed organ donation against the New York Organ Donor Network ("NYODN") and several physicians.[78] On

70. *Hecht I*, 20 Cal. Rptr. 2d at 283. The probate code defined property very broadly as "'anything that may be the subject of ownership and includes both real and personal property and any interest therein.'" *Id*. at 281 (quoting CAL. PROB. CODE § 62).

71. Hecht v. Superior Court (*Hecht II*), 59 Cal. Rptr. 2d 222, 226 (Ct. App. 1996) (order not to be officially published). The initial settlement gave Hecht twenty percent of the estate's assets, including the sperm, and therefore she was given only three of the fifteen vials of sperm. *Hecht II*, 59 Cal. Rptr. 2d at 225. In this proceeding, Hecht sought to get the other twelve vials of sperm, which the court ordered released to her. *Id.* at 227-28.

72. *Id.* at 226.

73. *Id.*

74. *Hecht II*, 59 Cal. Rptr. 2d at 226-27.

75. *Hecht I*, 20 Cal. Rptr. 2d at 282 (quoting ETHICS COMM. OF THE AM. FERTILITY SOCIETY, ETHICAL CONSIDERATIONS OF THE NEW REPRODUCTIVE TECHNOLOGIES (1986)).

76. 842 S.W.2d 588, 597 (Tenn. 1992).

77. *Davis*, 842 S.W.2d at 597.

78. Colavito v. N.Y. Organ Donor Network, Inc. (*Colavito I*), 356 F. Supp. 2d 237, 238 (E.D.N.Y 2005), *aff'd in part*, 438 F.3d 214 (2d Cir. 2006). Colavito's claims also included fraud and violations of the New York public health laws, which will not be discussed in this Comment. *Id.*

August 21, 2002, following the death of her husband, Debra Lucia and her family decided to donate her husband's kidneys to Colavito, a close family friend who was suffering from end-stage renal disease.[79] Mrs. Lucia met with an NYODN official and filled out an organ donor form to effectuate the donation.[80] At this time, the NYODN official notified Mrs. Lucia that generally both kidneys are removed simultaneously to avoid damaging the organs, and she agreed that they both be sent to Colavito.[81] NYODN then sent one of Lucia's kidneys to Miami where Colavito was being prepared for surgery. Prior to surgery, physicians assured Colavito that the kidney was compatible with his body.[82] Minutes before the surgery, the surgeon discovered that the kidney was damaged and the transplant was therefore medically untenable.[83] When one of the surgeon's staff members contacted NYODN to request that the second kidney be sent to Miami, NYODN responded that the organ had already been directed to another patient earlier that morning.[84] The surgery was thus cancelled, and the Colavitos immediately contacted the Lucias to inquire about the second kidney.[85] When they inquired, NYODN informed the Lucia and Colavito families that the kidney was already implanted in someone else and that the organization was not responsible for the surgeon's failure to inspect the organ until immediately prior to the surgery.[86] The Director of Clinical Operations at NYODN informed them that Colavito would be placed on the top of the organ donor list.[87] No match was found and Mr. Colavito died in June 2006.[88]

Colavito brought his suit in the U.S. District Court for the Eastern District of New York.[89] He argued that Mrs. Lucia's directed donation of her husband's kidneys granted him a property right in the kidneys and that the defendants' wrongful and intentional acquisition, misuse, and transfer of the kidneys constituted a cause of action for conversion.[90] As a threshold matter to Colavito's first claim of conversion, the court was required to determine whether the donated organ was in fact a piece of property, and, if so, whether the plaintiff

79. Colavito v. N.Y. Organ Donor Network (*Colavito II*), 438 F.3d 214, 217) (2d Cir. 2006).

80. *Id.*

81. *Id.* A factual dispute exists with regard to Mrs. Lucia's understanding about what would happen to the second kidney. She testified that she was never made aware of what would happen, but her understanding was that if Mr. Colavito was "'taken care of and he was fine, then the kidney could be given to another person.'" *Id.* at 218 (quoting Debra Lucia's testimony). The NYODN official's report, however, indicates that Mrs. Lucia "'consented to donating the second kidney to the pool.'" *Id.* at 218 n.4 (quoting report).

82. *Colavito II*, 438 F.3d at 218.

83. *Id.*

84. *Id.*

85. *Id.* at 219.

86. *Id.*

87. *Colavito II*, 438 F.3d at 219.

88. Mark Johnson, *Court Dismisses Lawsuit over Organ Transplant: 17th-Century Common Law Cited in Ruling Against Man Who Didn't Get Kidney*, ALBANY TIMES UNION, Dec. 15, 2006, at A5.

89. Colavito v. N.Y. Organ Donor Network, Inc. (*Colavito I*), 356 F. Supp. 2d 237, 237 (E.D.N.Y. 2005), *aff'd in part*, 438 F.3d 214 (2d Cir. 2006).

90. Complaint at 7-8, *Colavito I*, 356 F. Supp. 2d 237 (No. 03-4187), 2003 WL 23883879.

had legal ownership rights over the organ.[91] The district court held that contract law cannot be applied to organ donations and ultimately concluded that "it would be against public policy to engage in a valuation of Mr. Colavito's kidneys, which are not property" and it is "inappropriate to expand the limited right that courts recognize in a deceased's body, which only belongs to the next of kin to ensure proper burial."[92]

The court also rejected Colavito's argument that he had standing to bring this claim under New York public health law. The court recognized that N.Y. Pub. Health Law § 4301(5) gave some rights to organ donees but held that "[i]n the context of the statute as a whole . . . '[t]he rights of the donee' . . . are not readily discernable."[93] The court concluded that the rights of the donee are "never made absolute by the rest of the statute."[94]

Colavito appealed the district court's grant of summary judgment, and the Second Circuit addressed the question of "whether [Colavito]—or any organ donee—may bring [a cause of action for conversion]."[95] The Second Circuit disagreed with the district court's conclusion that prior case law established a public policy against finding property rights in donated organs and dismissed its assumption of a broad public policy consensus prohibiting a cause of action for conversion for human organs.[96] The Second Circuit distinguished the cases involving preservation of a deceased's body parts brought by decedent's relative and noted that courts refused to grant property rights because the claims were, in essence, claims for emotional distress.[97] The court went on to distinguish the cases that focused on the rights of the next of kin in the body of a deceased, stating that in "a lawsuit based on the loss of a donated organ [the intended donee] typically seeks more than compensation for injured feelings. . . . He or

91. *Colavito I*, 356 F. Supp. 2d at 242. A claim for conversion requires that the plaintiff "'establish legal ownership of a specific identifiable piece of property and the defendant's exercise of dominion over or interference with the property in defiance of the plaintiff's rights.'" *Id.* at 242 (quoting Ahles v. Aztec Enters., Inc., 502 N.Y.S.2d 821, 822 (App. Div. 1986)).

92. *Id.* at 244. Recognizing that this was an issue of first impression in American case law, the district court turned to cases discussing the existence or extent of property rights that attach to the body at death and concluded that courts have not applied traditional property law to the body or organs of the deceased. *Id.* at 242. The court then discussed cases in which courts recognized a "quasi-property" right in a deceased relative's body for the spouse or next of kin in order to ensure proper burial or to recover for emotional distress for negligent mishandling of the corpse of a close relative. *Id.* at 242-43 (discussing, among others, Bauer v. N. Fulton Med. Ctr., 527 S.E.2d 240, 243 (Ga. Ct. App. 1999), which characterized "quasi-property" as term of convenience rather than term to denote full property rights). For a further discussion of these cases, see *supra* Part II.A.2.

93. *Colavito I*, 356 F. Supp. 2d at 247 (quoting N.Y. PUB. HEALTH LAW § 4301(5) (McKinney 2002)). Section 4301(5) of the N.Y. Public Health Law states that "[t]he rights of the donee created by the gift are paramount to the rights of others." N.Y. PUB. HEALTH LAW § 4301(5) (McKinney 2002 & Supp. 2007).

94. *Colavito I*, 356 F. Supp. 2d at 247.

95. Colavito v. N.Y. Organ Donor Network, Inc. (*Colavito II*), 438 F.3d 214, 223 (2d Cir. 2006). Neither the Second Circuit's opinion nor this Comment addresses the merits of Colavito's claim on the facts of his particular case.

96. *Id.* at 223-25.

97. *Id.* See *supra* notes 29-32 and accompanying text for a further discussion of this line of cases.

she sues for the loss of a functioning organ."[98] The court further noted that, in the present case, the plaintiff was "not using the term 'property' as a legal fiction upon which to base a claim for emotional harm" but was asserting "a practical use for the organ."[99] Finally, the court stated that New York public health law[100] may provide "an enforceable property right in a functioning organ."[101]

Ultimately, the Second Circuit found that this issue dealt with an "important and sensitive area of state law and policy" and certified the questions of whether New York's public health laws gave an intended organ recipient any specific rights and whether any such rights created a common-law action for conversion to the New York Court of Appeals.[102] Beginning its discussion with the common law relative to property rights in the body, New York's highest court immediately recognized that it would not find an answer in perfect congruity with the common law because "[t]he common law on this subject extends back for centuries while organ donation and transplantation are measured by mere decades."[103] Seeking guidance from the incongruous common law, the court began its discussion with the seventeenth-century "edict" of Lord Coke to the effect that "a corpse has no value."[104] The court analyzed its past jurisprudence on the topic of property rights in dead bodies dating back to 1875 and concluded that the precedent had never "strayed meaningfully from the doctrine that there is no common-law property right in a dead body."[105] Without further analysis, the court concluded that, in this case, the plaintiff, as a specified donee, had no common law right to the donated organ.[106] Reiterating the fact that the common law jurisprudence was developed without consideration of the possibility for medical advancements such as organ transplants, the court left open the possibility that circumstances may arise in which someone may have

98. *Colavito II*, 438 F.3d at 225.

99. *Id.* The court also observed that federal case law has recognized that state law preventing mutilation or removal of organs from a decedent's body can constitute a property interest under the Due Process Clause of the Fourteenth Amendment. *Id.* at 225 n.12. For a further discussion of courts finding property interests under the Due Process Clause, see *supra* Part II.A.3.

100. New York Public Health Law Article 43 codifies the state's Uniform Anatomical Gift Act. For a further discussion of the Uniform Anatomical Gift Act see *infra* Part II.C.

101. *Colavito II*, 438 F.3d at 225-26 (noting that statute states that "'[t]he rights of the donee created by the gift are paramount to the rights of others,'" and opining that other sections indicate potential opportunities for litigation to enforce these rights) (quoting N.Y. PUB. HEALTH LAW § 4301(5)). The court distinguished *Moore v. Regents of the University of California*, 793 P.2d 479, 493 (Cal. 1990), in which the court dismissed plaintiff's common-law conversion action in part because the legislature had not spoken on the issue, because in this instance the New York public health laws evinced that the legislature had articulated public policy on this issue. *Colavito II*, 438 F.3d at 225-26.

102. *Colavito II*, 438 F.3d at 229; *see id.* at 227-29 (discussing in depth New York public health laws relating to organ donation and explaining further reasoning behind certifying these questions to New York State Court of Appeals).

103. Colavito v. N.Y. Organ Donor Network, Inc. (*Colavito III*), 860 N.E.2d 713, 717 (N.Y. 2006).

104. *Id.* at 717-18 (citing 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 203 (1644)).

105. *Id.* at 718-19.

106. *Id.*

actionable rights in the body or organ of a deceased person.[107]

The court found that the New York organ-donor statute was silent with regard to what rights an intended donee has in a donated organ.[108] In reaching its decision, the court largely relied on the statutory provision stating that a donor may make a donation to a specified donee "'*for therapy or transplantation needed by him*.'"[109] Defining donee as "someone who needs the donated organ," the court held that "gifts of a deceased donor are conditioned upon medical benefit to the intended recipient."[110] The court held that Mr. Colavito was not actually a donee because the kidneys were determined to be medically incompatible and therefore he could derive no benefit from them and did not "need" them as required by the statutory definition of "donee."[111] This determination led to the court's ultimate conclusion that Mr. Colavito had no cause of action under the New York public health laws.[112] This survey of existing case law clearly indicates great disparity in both the methods of analysis and the outcomes in cases involving property interests in the human body or its parts.

C. Organ Donation in the United States—A Statutory Framework

The first successful organ transplant occurred in 1954,[113] and today there are currently 99,338 Americans on the waiting list to receive an organ.[114] Each year, organ transplantation saves thousands of lives, and donors and their families consider the decision to donate a gratifying choice through which they "can leave a positive legacy."[115]

Unfortunately, the demand for donated organs and tissues far exceeds the supply. On any given day, approximately seventy-seven individuals receive organ transplants, while nineteen people die waiting for an organ or tissue transplant.[116]

In light of significant advances in technology and an increasing demand for

107. *Id.*

108. *Colavito III*, 860 N.E.2d at 720.

109. *Id.* at 721 (quoting N.Y. PUB. HEALTH LAW § 4302(4) (McKinney 2002)).

110. *Id.* at 722.

111. *Id.*

112. *Id.* The Second Circuit ultimately concluded as a matter of law, in light of the New York Court of Appeals' answer to the certified question, that Colavito had no cause of action under either the New York common law of conversion or the New York public health law and granted summary judgment for the defendants. Colavito v. N.Y. Organ Donor Network, Inc. (*Colavito IV*), 486 F.3d 78, 81 (2d Cir. 2007).

113. Alicia M. Markmann, Comment, *Organ Donation: Increasing Donations While Honoring Our Longstanding Values*, 24 TEMP. ENVTL. L. & TECH. J. 499, 504 (2005).

114. The Organ Procurement and Transplantation Network Data, http://www.optn.org (last visited Aug. 27, 2008).

115. The Organ Procurement and Transplantation Network, Who Can Be a Donor, http://www.optn.org/about/donation/whoCanBeADonor.asp (last visited Aug. 27, 2008). "In 2000, organ donation saved or enhanced the lives of more than 20,000 men, women, and children." *Id.*

116. OrganDonor.gov, How to Be an Organ & Tissue Donor, http://organdonor.gov/donor/index.htm (last visited Nov. 28, 2008).

organs, federal and state governments established a formal organ transplant administrative framework.[117] In 1968, the National Conference of Commissioners on Uniform States Laws passed the first version of the Uniform Anatomical Gift Act ("UAGA").[118] The goal of the UAGA was to harmonize competing interests and answer the legal questions that were arising about organ donations.[119] The catalyst in the process was the idea of the "legal gift"—"the voluntary act of an individual in writing, before two witnesses, giving some or all of one's body at death for transplantation."[120] The UAGA framework incorporated the common law of gifts and added additional statutory conditions specific to an anatomical gift.[121] The UAGA states that gifts may be made by will or a document of gift signed by the donor.[122] Section 2(e) specifically states that an anatomical gift made by will takes effect upon the death of the testator, regardless of whether the will is probated and even if it is declared invalid for testamentary purposes.[123] This gift is irrevocable and does not require the consent or concurrence of any person after the donor's death.[124] The UAGA also allows a decedent's next of kin to make an anatomical gift absent contrary instructions of the deceased.[125] It is important to note that the Act does not discuss "living" organ donations, but "living" donations are encouraged and the consent process is identical to that of an organ donation from a deceased donor.[126]

All fifty states have adopted some version of the UAGA of 1968.[127] The UAGA was amended in 1987, and this revised version has been adopted in twenty-two states.[128] Notably, the revised version also added a provision prohibiting the purchase or sale of an organ for valuable consideration.[129]

117. Markmann, *supra* note 113, at 504.

118. Robert E. Sullivan, *The Uniform Anatomical Gift Act*, *in* ORGAN AND TISSUE DONATION: ETHICAL, LEGAL, AND POLICY ISSUES 19, 20 (Bethany Spielman ed., 1996).

119. *Id.* at 21-22.

120. *Id.* at 22.

121. Brief for American Association of Tissue Banks et al. as Amici Curiae Supporting Respondents at 16, Colavito v. N.Y. Organ Donor Network, Inc., 438 F. 3d 237 (2d Cir. 2006) (No. 2005-01305), 2006 WL 3916975 (citing UNIF. ANATOMICAL GIFT ACT, 8A U.L.A. 24 (1987)).

122. UNIF. ANATOMICAL GIFT ACT § 2(b), (e) (amended 2006), 8A U.L.A. 24 (1987).

123. *Id.* § 2(e), 8A U.L.A. 24.

124. *Id.* § 2(h), 8A U.L.A. 25.

125. *Id.* § 3(a), 8A U.L.A. 33.

126. OFFICE TECH ASSESSMENT, U.S. CONGRESS, NEW DEVELOPMENTS IN BIOTECHNOLOGY: OWNERSHIP OF HUMAN TISSUES AND CELLS—SPECIAL REPORT OTA-BA-337, at 76 (1987) [hereinafter "OTA REPORT"].

127. Klaiman, *supra* note 17, at 481.

128. *Id.*; Kelly Ann Keller, Comment, *The Bed of Life: A Discussion of Organ Donation, Its Legal and Scientific History, and a Recommended "Opt-Out" Solution to Organ Scarcity*, 32 STETSON L. REV. 855, 885-86 (2003).

129. Klaiman, *supra* note 17, at 481; Keller, *supra* note 128, at 885 n.241. The Act provides that "[a] person may not knowingly, for valuable consideration, purchase or sell a part for transplantation or therapy, if removal of the part is intended to occur after death of decedent." UNIF. ANATOMICAL GIFT ACT § 10(a) (amended 2006), 8A U.L.A. 62 (1987).

Both the original 1968 version and the 1987 version of the UAGA allow for what is known as "directed donation" by permitting a donor to designate a specific hospital, surgeon, physician, medical school, storage facility, or individual for transplantation or therapy.[130] Although permitted by the UAGA, this designated donation is more frequently the norm for living organ donation and usually involves donations to family members or close friends.[131] The directed donation is widely accepted and presents few ethical concerns because in most cases such organs would not be offered to any other person, and, therefore, the donation does not diminish the existing organ pool. They often have a positive effect because if a directed donation is made, the intended recipient is not required to be placed on the lengthy waiting list for an organ.[132]

While this type of directed donation is both recognized by the UAGA and widely accepted in the context of living donation, there is minimal discussion of the rights of the recipient and no discussion of the rights that the recipient can exercise over the donated organ. In a brief discussion of the organ donee, a provision in the 1968 version of the UAGA and the majority of state adaptations states that "[t]he rights of the donee created by the gift are paramount to the rights of others."[133] The UAGA fails to expound any further on specific rights of the intended donee and fails to clarify what specific "rights" the donee is given and who may be considered as the "others" discussed in the statute.

On the federal level, in 1984, Congress enacted the National Organ Transplant Act ("NOTA"), which explicitly prohibits the sale of human organs.[134] In contrast to the UAGA, this federal statute deals with "living" organ donations.[135] NOTA, in addition to setting out an administrative framework for an organ donation system, makes the prohibited sale of organs a felony and imposes stringent fines and penalties.[136] In enacting this statute, Congress's primary concern was the commodification of organs, the resulting effects on the current system of voluntary organ donation, and the potential for exploitation of the poor, who could feel pressure to become organ suppliers.[137]

D. A Theoretical Perspective

"The concept of 'property' in the law is extremely broad and abstract,"[138] and "[t]he definitions of property are not restrictive and exclusive."[139] The legal

130. Mark D. Fox, *Directed Organ Donation: Donor Autonomy and Community Values*, *in* ORGAN AND TISSUE DONATION, *supra* note 118, at 43, 43-44..

131. DAVID PRICE, LEGAL AND ETHICAL ASPECTS OF ORGAN TRANSPLANTATION 450 (2000).

132. *Id.*

133. UNIF. ANATOMICAL GIFT ACT § 2(e) (amended 2006), 8A U.L.A. 116 (1968).

134. National Organ Transplant Act, 42 U.S.C. § 274e (2006).

135. Wancata, *supra* note 50, at 215.

136. 42 U.S.C. § 274e(b).

137. OTA REPORT, *supra* note 126, at 76.

138. Brotherton v. Cleveland, 923 F.2d 477, 481 (6th Cir. 1991).

139. Moore v. Regents of the Univ. of Cal., 249 Cal. Rptr. 494, 504 (Ct. App. 1988), *aff'd in part, rev'd in part*, 793 P.2d 479 (Cal. 1990).

definition of property does not refer to a specific material object but to the rightful dominion or indefinite right of use, control, and disposition, which can be exercised over particular things or objects.[140] Thus, property is often characterized as a "'bundle of rights' that may be exercised with respect to an object," including the right to possess, use, exclude others from, and dispose of the property by sale or gift.[141]

While many theorists have opined on property interests in the human body, well-known property theorist Margaret Radin proposes a "personhood model" of property rights that proves most useful in discussing property rights in human bodies and human body parts. This theory proposes that certain types of property are integral to personhood.[142] The gauge of how integral an object is to personhood is measured by the pain that would be occasioned by its loss.[143] Radin identifies "personal property" as that which is so bound up with the holder that it becomes irreplaceable.[144] A wedding ring, worn by a loving wife for twenty-five years, is an example of "personal property."[145] If lost, replacing the ring with a replica does not alleviate the disappointment of the wearer, because the ring is integral to her personhood and has a value beyond its market price. Conversely, "fungible property" is property that can be replaced by substituting a similar good of equal market value.[146] Cars in the hands of a dealer or an apartment owned by a commercial landlord are examples of "fungible property."[147] Radin notes that these categories are not fixed but represent two end points on a larger continuum in which greater protection is given to those interests more closely connected with personhood.[148]

Radin states that the body is "quintessentially personal property."[149] She specifically notes that, because "the idea of property seems to require some perceptible boundary" or "separation from self," it is even more intuitive to refer to body parts separated from the system as "personal property."[150]

The personhood theory also provides insight into why protecting people's expectations of continuing control over "personal property" is significant.[151] "If

140. 63C AM. JUR. 2D *Property* § 1 (1997).

141. *Moore*, 793 P.2d at 509-10 (Mosk, J., dissenting). The Supreme Court has consistently conceptualized property as a "bundle of rights." *See* United States v. Craft, 535 U.S. 274, 283 (2002) (stating that tenant by entirety was entitled to bundle of rights including right to use property, to receive income from property, and right to exclude others from property); Fresh Pond Shipping Ctr., Inc. v. Callahan, 464 U.S. 875, 878 (1983) (recognizing that property ownership carries bundle of rights including right to possess, use, and dispose of property); United States v. Gen. Motors Corp., 323 U.S. 373, 378 (1954) (noting that fee-simple ownership implies "group of rights").

142. MARGARET JANE RADIN, REINTERPRETING PROPERTY 36-37 (1993).

143. *Id.*

144. *Id.* at 37.

145. *Id.*

146. *Id.*

147. RADIN, *supra* note 142, at 37.

148. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 986-87 (1982).

149. RADIN, *supra* note 142, at 41.

150. *Id.*

151. *Id.* at 43.

[personal property] is bound up in your future plans . . . your personhood depends on the realization of these expectations."[152] Thus, while donating an organ results in the separation of personal property from the "owner," realizing the owner's future expectation for that property is important to protecting his personhood.

Radin also suggests that when property is integral to personhood, it may be inappropriate to commodify that property and appropriate for it to be inalienable in conventional markets.[153] Generally, commodification describes the buying and selling of a thing in a particular market. Radin suggests that commodification also includes the "practice of thinking about interactions as if they were sale transactions."[154] She argues that once an object is commodified, a slippery slope results, and "market rhetoric will take over and characterize every interaction in terms of market value."[155] Thus, for example, commodification of human organs would cause organs to be treated as fungible property and systematically be considered and sought after as market commodities.

Commodification of personal property is also inappropriate because commodification would be detrimental to personhood. "Personal property is connected with the self, morally justifiably, in a constitutive way . . . ."[156] Furthermore, personal property cannot be replaced with a like object or with money without a significant effect on self-constitution.[157] Thus, to disconnect personal property from the person and assign it a market value would harm or destroy the self.

Refusing to commodify personal property does not require that the property in question be inalienable for all purposes. Radin suggests that personal property should be deemed market inalienable.[158] Property over which traditional rights are exercised is considered fully alienable, or able to be separated from the owner.[159] "Inalienable" may have numerous meanings, including "nongivable, nonsalable, or completely nontransferable."[160] Radin defines market inalienability as prohibiting only transfer by sale.[161] Thus, things deemed market-inalienable may still be transferred by gift. Market inalienability recognizes the distinction between transfer by sale and transfer by gift and therefore "places some things outside the marketplace but not outside the realm of social intercourse."[162] Radin also emphasizes that "market-inalienability does not render something inseparable from the person, but rather specifies that

152. *Id.*

153. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1907, 1909 (1987).

154. *Id.* at 1859.

155. *Id.* at 1914.

156. MARGARET JANE RADIN, CONTESTED COMMODITIES 59-60 (1996).

157. *Id.* at 60.

158. Radin, *supra* note 153, at 1854.

159. *Id.*

160. *Id.* at 1853.

161. *Id.* at 1853-54.

162. *Id.* at 1853.

market trading may not be used as a social mechanism of separation."[163] Deeming certain things, specifically those bound up within the human person, market inalienable is integral to the protection of personhood. As applied to the human body and its constitutive parts, Radin's theory of market inalienability preserves the dignity and respect for the human body by prohibiting sale but also permitting donation for much-needed human organs, tissue, and cells.

III. DISCUSSION

In order to provide proper remedies and protection to both organ donors and donees, courts must recognize that cases involving misappropriated donated organs require the application of novel concepts. Courts should employ Margaret Radin's theory to determine that donated organs and tissue are market-inalienable property that can be transferred by gift but not sale. Courts should also recognize that organ donees have a limited enforceable property right in the donated organ that originates in the right of the donor to control the disposition and use of his body.

A. Step One: Courts Should Employ Radin's Theory of Market Inalienability and Recognize Organs and Human Biological Material as Property

Courts should cease haphazardly applying traditional property theory and employ Radin's market-inalienability theory to answer the threshold question of whether the organ or material in question should be considered property. As demonstrated in *Colavito v. New York Organ Donor Network* (*Colavito II*)[164] and *Hecht v. Superior Court* (*Hecht I*),[165] most courts struggle with this question when confronting cases concerning ownership interests in biological material or organs. When faced with this question in *Colavito III* the court turned immediately to the historical treatment of property interests in dead bodies, citing doctrine dating back to the seventeenth century.[166] But, while relying on this historical doctrine to hold that no property interest existed in the human body, the *Colavito III* court and others have also found it difficult to refrain from using property terminology when speaking of the interest that individuals have in their own bodies or, more recently, the interest that can be exercised over excised organs and tissues.[167]

Application of Radin's theory is useful in this context because it permits individuals to exercise some type of autonomy and ownership interests over the

163. Radin, *supra* note 153, at 1854.

164. 438 F.3d 214, 223-24 (2d Cir. 2006) (struggling initially with notion of whether donated organ was identifiable piece of property).

165. 20 Cal. Rptr. 2d 275, 282 (Ct. App. 1993) (determining threshold question of whether sperm should be considered property under California probate code).

166. Colavito v. N.Y. Organ Donor Network, Inc. (*Colavito III*), 860 N.E.2d 713, 717-18 (N.Y. 2006).

167. *See* Wancata, *supra* note 50, at 223 (noting that courts, legal scholars, and property theorists resort to traditional property terminology and doctrine for purposes of resolving questions concerning human body parts).

organ or biological material while protecting bodily integrity and respecting personhood. Modern science has made organs, cells, and reproductive material separable from the human body. Technological advances also permit this separated biological material to be given to another individual, for example, someone in need of a functioning organ or researchers who use the material to advance medical science capabilities. Deeming the organs and biological materials to be completely inalienable property would completely prohibit their transferability, therefore depriving society of important medical opportunities. Application of Radin's theory strikes a delicate balance and makes the organs and biological material transferable by gift and thus able to be *given* to those who are in need or will use the material for scientific purposes but prohibits the organs and material from being sold outright to the highest bidder in the market. Radin's proposed prohibition of salability was prompted by her concerns about commodification of human biological material and the detrimental effects that it has on "personhood."[168] Her concerns are analogous to the concerns about commodification and harm to bodily integrity that courts express in their reluctance to find a property right in a human organ or its parts.[169]

Statutes have essentially already identified organs as market-inalienable property. The UAGA was specifically designed to facilitate and encourage the *transfer* of organs by a process characterized as a legal *gift*.[170] On the contrary, both NOTA and the 1987 version of the UAGA strictly prohibit the sale of human organs.[171] Thus, statutory law has dictated that, when separated from the body, an ownership interest in or a possessory right of organs can pass as property but this transfer of interest can never be achieved by sale.

In *Colavito II*, the Second Circuit articulated its awareness that a property interest can exist in nonsalable materials: "[T]he fact that the State wishes to prohibit the treatment of functioning human organs as though they were commodities does not necessarily imply that it also intends that no one can acquire a property right in them."[172] Furthermore, the Second Circuit, quoting the Supreme Court, noted that the Supreme Court has never "'held that a physical item is not "property" simply because it lacks a positive economic or market value.'"[173]

A close look reveals that courts have, indirectly and without using the specific terminology, recognized that human body parts are, in fact, market-inalienable property. For example, in *Hecht I*, the court determined that Kane's

168. Radin, *supra* note 153, at 1905-06.

169. *See, e.g.*, Colavito v. N.Y. Organ Donor Network, Inc. (*Colavito I*), 356 F. Supp. 2d 237, 244 (E.D.N.Y. 2005) (claiming it would be violation of public policy to recognize Colavito's kidneys as valuable property); Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 498 (Cal. 1990) (Arabian, J., concurring) (expressing concern that recognition of property right in human bodies would result in marketplace of body parts and insult bodily integrity).

170. UNIF. ANATOMICAL GIFT ACT § 1 (amended 2006), 8A U.L.A. 18 (1987).

171. National Organ Transplant Act, 42 U.S.C. § 247e (2006); UNIF. ANATOMICAL GIFT ACT §10(a) (amended 2006), 8A U.L.A. 62 (1987).

172. Colavito v. N.Y. Organ Donor Network, Inc. (*Colavito II*), 438 F.3d 214, 226 (2d Cir. 2006).

173. *Id.* at 225 n.12 (quoting Phillips v. Wash. Legal Found., 524 U.S. 156, 169 (1998)).

sperm was "property," in that it could be legally transferred via a will to a designated individual.[174] In a subsequent proceeding, the court limited Hecht's ownership interest by prohibiting her from selling or contracting away the sperm.[175] Thus, Hecht had an ownership interest in the sperm in the sense that she was entitled to it and it could not be taken from her because it was *given* to her, but this ownership interest was limited by restrictions against sale or contract, making the sperm market inalienable.[176]

Arguably, the constitutionally protected property interest in the body of a decedent held by the next of kin recognizes the body as market-inalienable property.[177] The ownership interest in the decedent's body passes to the next of kin upon death. As demonstrated by cases such as *Brotherton v. Cleveland*,[178] the next of kin cannot legally be deprived of this ownership interest, but the ownership interest is limited by the fact that next of kin cannot legally then sell the body or its parts for profit. Thus, in this case, the human body is market-inalienable property, prohibited from being subject to sale but able to be "owned" or "possessed" by the next of kin.

Courts have generally identified the ownership interest that they have granted in the human body or its parts as something similar to market inalienable; thus, courts should treat organs and tissue as market-inalienable property when making decisions regarding ownership interests in directly donated organs. This treatment will allow the organ or material to be treated as property in order to provide proper relief to the intended donee while implicitly allowing courts to limit the interest to that of gratuitous transfer or inheritance. Deeming organs and tissue market-inalienable property also alleviates the concern that granting a property interest supports commodification of the human body.

B. Step Two: Courts Must Recognize that Organ Donees Have a Limited Enforceable Property Right in a Donated Organ that Originates in the Right of the Donor to Control the Disposition of His Body

After reaching the conclusion that human organs and tissue are market-inalienable property, the questions remain whether an intended organ recipient has any recognizable ownership interest in the donated organ or tissue and from where that ownership interest is derived. An intended recipient of a donated organ has a recognizable, limited property right in the organ. The donee's limited property interest originates in the right of the *donor* to control the

174. Hecht v. Superior Court (*Hecht I*), 20 Cal. Rptr. 2d 275, 283 (Ct. App. 1993).

175. Hecht v. Superior Court (*Hecht II*), 59 Cal. Rptr. 2d 222, 226 (Ct. App. 1996) (order not to be officially published).

176. Current law permits the sale of human sperm and ova, thus making it in some instances an alienable commodity. For a discussion of this industry and the dangers of commodifying this reproductive material, see Wancata, *supra* note 50, at 220-28.

177. *See* Brotherton v. Cleveland, 923 F.2d 477, 480-82 (6th Cir. 1991) (recognizing constitutionally protected property right of next of kin in deceased's body).

178. 923 F.3d 477, 480-82 (6th Cir. 1991).

disposition of his own body. This conclusion protects the autonomy and personhood of donors while providing donees with recourse in the instance of misappropriation of the organ. This solution does not give organ donees any interest in the donated organ beyond those specified by the donor.

The law consistently recognizes "[t]he rights of dominion over one's own body."[179] The previous conclusion that human body parts are market-inalienable property sets some parameters on this dominion.[180] For example, application of the market-inalienability theory does not permit sale of organs or most other body parts.[181] The right of "donor control" and the theory of market inalienability can be harmonized because the absence of absolute dominion does not negate the existence of a property right permitting disposition.[182]

While the majority in *Moore* failed to explicitly address Moore's right to control the disposition of his cells,[183] the *Moore* dissent[184] and the court of appeals[185] identified numerous instances in which the law has recognized the right to control one's body in support of its conclusion that Moore had a cause of action because he had right to control the disposition of his body. The court of appeals noted that a person has a right to determine whether to submit to medical treatment and that statutory law affords participant donors in medical experimentation protection including full advisement and informed consent.[186] One of the dissenting justices in *Moore* suggested that a patient, before a body part is removed, has the right to choose what will be done with the part after removal.[187] Justice Broussard believed that the UAGA made it "quite clear" that a donor retained the sole right to control the use of his organs.[188] The dissenting justice supported his argument with the example that if a hospital misappropriated a directly donated organ "no one would deny that the hospital

179. Moore v. Regents of the Univ. of Cal., 249 Cal. Rptr. 494, 504 (Ct. App. 1988), *aff'd in part, rev'd in part*, 793 P.2d 479 (Cal. 1990).

180. See *supra* Part III.A for discussion of the need to recognize human body parts as market-inalienable property.

181. See *supra* Part II.D for a complete discussion of the theory of market inalienability.

182. *Moore*, 249 Cal. Rptr. at 506-07; *see also Moore*, 793 P.2d at 510 (Mosk, J., dissenting) (discussing property rights generally as "bundle of rights" and opining that while limitations on Moore's property rights may "diminish[] the bundle of rights that would otherwise attach to the property . . . what remains is still deemed in law to be a protectible property interest").

183. *Moore*, 793 P.2d at 490-91 (majority opinion); *see also id.* at 501 (Broussard, J., dissenting and concurring) (finding that majority should have framed issue as whether Moore had right to exhibit ownership over his cells *before* they were removed from his body rather than after researchers developed cell line); Wancata, *supra* note 50, at 210 (concluding that *Moore* court never directly discussed issue of whether Moore had property interest in his cells because it relied on conclusion that Moore had retained no interest after cells were altered to form new cell line).

184. *Moore*, 793 P.2d at 501-02 (Broussard, J., dissenting and concurring).

185. *Moore*, 249 Cal. Rptr. at 505.

186. *Id.* at 505-06.

187. *Moore*, 793 P.2d at 501 (Broussard, J., dissenting and concurring) (noting that UAGA pertained to deceased donors while Moore was living donor, but stating that UAGA reflected state's general policy on "an individual's authority to control the use of a donated body part").

188. *Id.* (citing CAL. HEALTH & SAFETY CODE § 7150 (West 1972)).

had violated the legal right of the donor by its unauthorized use of the donated organ."[189]

Although Justice Broussard's example presented a mere hypothetical, it foreshadowed future cases involving misappropriation of directed organ donations. In the organ donation context, the UAGA is the origin of the donor's legal right to control the disposition of his organs after his death.[190] Several provisions explicitly illustrate how the UAGA embodies the principle of "donor control." The donor can make an anatomical gift to a designated individual, hospital, research institution, or physician for any of the purposes specified in the statute and may make any limitations on the anatomical gift as specified in the statute.[191] The gift may be made using a signed legal gift document or by will.[192] Section 2(e) elevates the donor's right to control disposition of his body after death above his right to control disposition of his real and personal property by permitting the anatomical gift to take effect regardless of whether the will is probated and even if the will is declared invalid for testamentary purposes.[193] Finally, the statute renders the gift irrevocable and completion of the gift does not require the consent or concurrence of any person after the donor's death.[194] Thus, the UAGA clearly recognizes that it is exclusively the donor who has the authority to designate, within the statutorily defined limits, the particular use to which the donated organ may be put and legally recognizes the right of an organ donor to control the disposition of his body parts.

Application of Radin's personhood theory of property would require that the law recognize and uphold one's property interest of control over one's body because failing to do so would result in injury to personhood. Body parts are "quintessentially personal property" and thus these interests must be protected not only from commodification but from any use contrary to the wishes of the owner.[195] Radin also emphasized the importance of protecting expectations of continuing control—including disposition—over "personal property," because if one has expectations involving personal property, then "personhood depends on the realization of these expectations."[196] Thus, a directed donation of an organ or body part, forms of personal property, must be realized in order to protect the donor's personhood.

Although certain limitations may exist, it is clear that the law recognizes a right to control one's body and, in the context of organ donation, the UAGA

189. *Id.* at 502.

190. While the UAGA applies to deceased donors, living donors also have an implied right to control their organs through the legally recognized living directed donation. See *supra* Part II.C for a discussion of deceased and living donors and directed organ donation.

191. *See* UNIF. ANATOMICAL GIFT ACT §6(a)-(c) (amended 2006), 8A U.L.A. 53-54 (1987) (describing donor's options to designate gift for purposes including transplantation, research, education, and stating that it is donor's choice whether to designate donee).

192. *Id.* §2(b)(e), 8A U.L.A. 24.

193. *Id.* §2(e), 8A U.L.A. 24.

194. *Id.* §2(h), 8A U.L.A. 24.

195. Radin, *supra* note 148, at 966.

196. RADIN, *supra* note 142, at 43.

embodies the donors' right to control the disposition of their organs. Application of Radin's personhood theory also suggests that protecting the right to control disposition of personal property is integral to protecting one's personhood. After establishing the *donor's* right to control disposition of his body, it is necessary to determine how the existence of this interest should be interpreted to give a donee a correlative, limited, enforceable property interest in the donated organ.

The case of *Hecht v. Superior Court* (*Hecht I*)[197] is an illustrative example of the reasoning that courts should employ in cases involving a donee's ownership interest in a donated organ. In *Hecht I*, the court determined a donee's ownership interest in sperm that her boyfriend bequeathed to her by will.[198] Cases involving donated organs are analogous to *Hecht I* because the process of organ donation is effectuated as a *legal gift* through either a donor-consent document[199] or by will.[200] In *Hecht I*, the court first found that the sperm was a unique form of property and that Kane had "an interest[] in the nature of ownership," sufficient to constitute property, "to the extent that he had decision making authority as to the use of his sperm."[201] Applying the framework suggested in this Comment would result in a court determining that an organ *is* property, in a unique form, and that a donor can have an interest in the organ to the extent that he can control the uses of the organ, once removed from his body.

The court determined that Deborah Hecht could exhibit an ownership interest over the sperm to the extent that no one could order the sperm to be destroyed.[202] In making this determination, the court focused on Kane's, *the donor's*, intent.[203] The court held that "'the fate of the sperm must be decided by the person from whom it is drawn'" and "'the sole issue becomes that of intent.'"[204] The court emphasized that this intent-driven focus is required because of unique nature of the property at issue in *Hecht I*.[205] Courts determining a donee's ownership interest in a donated organ should apply this same intent-driven analysis because of the unique nature of the organ and because the "fate" of an organ or body part "'must be decided by the person from whom it is [removed].'"[206]

The *Hecht II* court gave Hecht a limited property interest and held that, while she had a right to the sperm as bequeathed to her in the will, she "lack[ed]

197. 20 Cal. Rptr. 2d 275 (Ct. App. 1993).

198. *Hecht I*, 20 Cal. Rptr. 2d at 276.

199. UNIF. ANATOMICAL GIFT ACT § 2(b)(e) (amended 2006), 8A U.L.A. 24 (1987). The donor-consent form embodies the transfer of a legal gift and is legally synonymous to gifts made by will.

200. *Id.* § 2(b)(e), 8A U.L.A. 24.

201. *Hecht I*, 20 Cal. Rptr. 2d at 283.

202. *Id.* at 283-84.

203. *Id.*

204. *Id.* at 288 (quoting E. Donald Shapiro & Benedene Sonnenblick, *The Widow and the Sperm: The Law of Post-Mortem Insemination*, 1 J.L. & HEALTH 229, 229-33 (1986-1987), for discussion of Parpalaix v. CECOS, Tribunal de grande instance [T.G.I.] [ordinary court of original judisdiction] Cretail, Aug. 1, 1984, Gaz. Pal. 1984, 2, pan. jurispr., 560 (Fr.)).

205. *Id.*

206. *Hecht I*, 20 Cal. Rptr. 2d at 288 (quoting Shapiro & Sonnenblick, *supra* note 204, at 232).

the legal entitlement to give, sell, or otherwise dispose of [the] sperm."[207] Courts should also limit the ownership interest bestowed on organ donees, allowing them a right to enforce the agreement that legally gives them the organ but bars them from selling or giving the organ away.[208]

If the *Hecht* court failed to determine that the sperm was property over which Deborah Hecht had a limited ownership interest, both she and Kane would have suffered harm. Kane's fundamental right to determine the disposition and use of his bodily material would be violated and Hecht would be left without recourse after being deprived of the proceeds of a legal gift made specifically to her. The issue presented by the *Colavito* case is analogous to the issue presented in the *Hecht* case.

In the future, courts must follow the *Hecht* court's reasoning and recognize both the right of the *donor* to control the disposition of his own body and the correlative limited ownership interest of the donee. Courts' analyses should be driven by the donor's intent to make a legal gift to the donee. Thus, if the plaintiff-donee can prove that the donor intended that he receive the organ then he should be given an enforceable limited ownership right in the organ. The organ should be considered property that legally passes to the donee as a legal gift upon execution of a donor-consent form or a will as specified by the UAGA.[209] This outcome is required to honor the donor's autonomy and personhood and to uphold his intention in making a legal anatomical gift.[210] This outcome also provides the donee with recourse for his loss of property that was legally given to him.

207. Hecht v. Superior Court (*Hecht II*), 59 Cal. Rptr. 2d 222, 226 (Ct. App. 1996) (order not to be officially published).

208. This prohibition would certainly not limit the donee from refusing the organ or a hospital or organ donor network from finding the organ medically incompatible with the donee's body.

209. This Comment assumes that the donated organ has already been determined to be medically compatible with the donee before it is misappropriated. A major consideration in the future, which this Comment does not discuss, is when exactly the ownership interest comes into existence. The American Association of Tissue Banks, et al., argued as amicus curiae in *Colavito II* that the right to the donated organ comes when the organ is transplanted into the body. Brief for American Association of Tissue Banks et al. as Amici Curiae Supporting Respondents, *supra* note 121, at 15-16. This group based its argument on the adverse consequences that recognizing a possessory right in a donated organ prior to transplantation will have on the national organ donation system and fears of a flood of litigation based on property law. *Id.* at 32. This author would suggest a refinement of the standard articulated in *Colavito* and thus make the possessory interest come into existence, for directed organ donations, as soon as the organ is found to be medically tenable. *See* Colavito v. N.Y. Organ Donor Network, Inc. (*Colavito III*), 860 N.E.2d 713, 722 (N.Y. 2006) (finding that gifts of deceased donor are conditioned on medical benefit to intended recipient); Dina Mishra, Note,*'Tis Better to Receive: The Case for an Organ Donee's Cause of Action*, 25 YALE L. & POL'Y REV. 403, 412 (2007) (noting that donated organs are often incompatible and suggesting that donee's cause of action be conditioned on medical compatibility). This issue is fraught with medical, legal, and ethical policy issues, which this Comment has not discussed.

210. For a discussion of additional social policy reasons supporting the recognition of a donee's cause of action, see generally Mishra, *supra* note 209, at 411-13.

IV. CONCLUSION

Existing case law demonstrates that courts have failed to establish a streamlined framework for dealing with property and ownership interests in human organs and tissue, including a donee's ownership interest in a directed organ donation. If courts fail to look beyond traditional property concepts and societal fears, the resulting legal outcomes will harm both organ donors and donees. It is inevitable that courts will be faced with the issue introduced by *Colavito v. New York Organ Donor Network*[211] in the future. When similar cases arise, courts should first note that the organ donees are not seeking a property interest in a human corpse or recovery for mere harm for emotional injury. In the future, in order to ensure available remedies and protect personal autonomy, courts must consider donated organs and tissue to be market-inalienable property, permitting it to be transferred by gift but not by sale. Courts must also recognize that an organ donee must be given a limited ownership interest in the organ to honor the donor's intent to make a legal gift of his body to a specified individual.

Past societies never imagined that one day we would be able to transplant organs, conceive children after the death of one parent, or store embryos to perform in-vitro fertilization. As medical science advances and courts confront novel and complex legal problems, they should remain mindful that individuals rely on the legal system to provide relief for injury to person and property, identify damages for substantive and emotional harm, and hold culpable or negligent parties accountable. The biotechnological possibilities of the future are beyond prediction, but the timeless purpose of the legal system, to protect individuals from harm and provide relief, endures. For this reason, the legal system must not fall behind medical science.

Erin Colleran

211. 356 F. Supp. 2d 237 (E.D.N.Y. 2005), *aff'd in part*, 438 F.3d 214 (2d Cir. 2006).