Buy Me a Pound of Flesh: China's Sale of Death Row Organs on the Black Market and What Americans Can Learn from It

Sunny Woan

Follow this and additional works at: http://digitalcommons.law.scu.edu/lawreview

Part of the Law Commons

Recommended Citation

Sunny Woan, Comment, Buy Me a Pound of Flesh: China's Sale of Death Row Organs on the Black Market and What Americans Can Learn from It, 47 SANTA CLARA L. REV. 413 (2007).
Available at: http://digitalcommons.law.scu.edu/lawreview/vol47/iss2/5
BUY ME A POUND OF FLESH: CHINA'S SALE OF DEATH ROW ORGANS ON THE BLACK MARKET AND WHAT AMERICANS CAN LEARN FROM IT

Sunny Woan*

I. INTRODUCTION

In the last decade, China took immense strides to promulgate new government orders that would closely mirror Western ideologies on law and society.1 On March 28, 2006, China’s Health Ministry issued legislation that banned the sale of human organs.2 As of this writing, there has not yet been an in-depth analysis or commentary on the significance and likely results of this new policy. While this comment offers a rationale for the sudden change in law, the primary focus will be on China’s former market in human organs, which were principally harvested from its death row inmates,3 and the continuing residual effects of this practice. Numerous commentators cite the

* Articles Editor and Book Review Editor, Santa Clara Law Review, Volume 47; J.D. Candidate, Santa Clara University School of Law; B.A., Creative Writing and Rhetoric, Binghamton University.


situation in China as an example of why Western nations such as the United States should continue to uphold the ban on human organ sales. Trends change with time, however, and despite the current global shift toward banning the commodification of organs, this comment considers the benefits of permitting private contracts for the sale of such in the United States. Lifting the ban on organ commodification would effectively combat the dearth of available organs that American patients in need of transplants presently face.

This comment will first provide background on the issue of organ commodification by examining how China harvested organs from executed prisoners prior to the implementation of the recent ban. Harsh scrutiny of China’s former approach serves as a lesson as to why individual rights must be protected and why the proposition of taking organs from America’s death row prisoners is injudicious. With that said, China’s administration of this free market approach should not deter Americans from noting the benefits of organ commodification.

This comment will then explore the law and policy of the American organ donation system and examine why the inefficiencies of the current structure have led many to opt for clandestine alternatives abroad, particularly in China’s black market organ trade. Despite the formal ban on organ

4. See generally Curtis E. Harris & Stephen P. Alcorn, To Solve a Deadly Shortage: Economic Incentives for Human Organ Donation, 16 ISSUES L. & MED. 213, 231 (2001) (proposing a government regulated market for posthumous organs where licensed brokers operate under the oversight of the Food and Drug Administration, and noting that the “example of China’s sale of organs from executed prisoners and the fear that the practice may become more common is enough to give anyone pause”).

5. The term “commodification” is used in this comment to denote the “free market” approach to organ procurement, or the treatment of human organs as an item that may be purchased and sold, similar to other forms of property. However, William Anderson, an adjunct scholar of the Mises Institute, notes:

[U]se of the word “commodification,” . . . in economic parlance truly is meaningless. The word is supposed to denote the seizure by unscrupulous business people of what should be a “free” good; thus having the good in their possession, the new owners then slap a price on it, thus creating artificial scarcity. . . . “[C]ommodification,” . . . has become a buzzword . . . .


commodification in the United States, this comment exposes the fact that a market for organs is nonetheless alive and thriving within American borders.

To supply the demand for replacement kidneys, human tissue, and other organs, and simultaneously reduce American citizens' participation in the international black market, this comment proposes the dismantling of the current prohibition on organ sales. Time and time again, financial incentives have proven to be the only reliable means of encouraging people to act. Accordingly, the most efficient way to address the organ shortage in the United States is to legalize the sale of human organs. This comment therefore proposes the legalization of organ sales as well as the establishment of a privatized institution to supervise the trade.

II. THE JUXTAPOSITION OF TWO SYSTEMS: CHINA EMBRACES COMMERCIALISM AND AMERICA'S DISGRACE BEHIND THE FACEADE OF ALTRUISM

The bottom line premise of China's organ allocation system prior to 2006 constituted the sacrifice of the life of an offender in order to save the life of one wealthier. Although Chinese law officially banned the sale of human body parts, government officials profited so greatly from underground organ sales that they had no incentive to enforce such prohibitions. Thus, despite its express disdain for free market principles, China's socialistic government ironically profited greatly from organ commodification. On the other hand, the United States, traditionally a champion of laissez-faire economics, denounces the commodification of human

Transplant Act ("NOTA"), which prohibits the sale of organs for profit, has created an artificial demand, driving Americans overseas to purchase organs from live donors.

7. See infra Part V.
8. See infra Part IV.B.3.
9. See infra Part V.
11. See infra Part II.A.1.
body parts, and relies solely on the altruism of its citizens.\textsuperscript{13} The underlying hypocrisy in both approaches results in the deaths of thousands. Chinese prisoners neither consent to the government's procurement of their organs, nor are they offered compensation in return for their sacrifice. Meanwhile, thousands of American patients die while waiting for an organ donor to emerge. In order to contextualize the organ procurement issue, this section will provide a background of the two contrasting systems.

A. China's Approach to Organ Procurement

\textit{1. Capitalist Ventures, Communist Style: The Law Pre-2006}

The Chinese government vehemently denies that the sale of human body parts occurs within its borders.\textsuperscript{14} It claims that the accounts of hundreds of doctors,\textsuperscript{15} prison officials,\textsuperscript{16} human rights activists,\textsuperscript{17} and even patients who say they have received such services\textsuperscript{18} are lies. If China's claims are true, then why, in March of 2006, did the Chinese government feel the need to announce a new, formalized law expressly banning organ sales?\textsuperscript{19}

Just days before that announcement, undercover reporters disclosed news of a massive harvest of human tissue obtained from prisoners in northern China.\textsuperscript{20} Many of the prisoners were political dissidents while others were individuals who practiced the Falun Gong religion.\textsuperscript{21} The

\textsuperscript{13} See infra Part II.B.1.
\textsuperscript{15} See infra text accompanying notes 29-34 for the content of interviews with local Chinese doctors.
\textsuperscript{16} See generally Smith, supra note 10 (interviewing prison officials about the government's involvement in the black market trade in death row organs).
\textsuperscript{17} See infra note 62 (referencing Harry Wu, a well-known political activist who investigates China's human rights violations).
\textsuperscript{18} Interview with family friend of the author, in Houston, Tex. (Sept. 24, 2004).
\textsuperscript{19} See infra Part II.A.2.
\textsuperscript{21} See id. In April 2000, hundreds of police officers reportedly arrested ninety-five members of the Falun Gong religion who were demonstrating
prisoners were detained in an underground facility below a hospital and discovered by a news reporter during an investigation of an unrelated matter. The reporter decried the incident as "murder, and murder sponsored by the state."

The Chinese government insists that even if organs were taken from executed prisoners, the practice only proceeded after the prisoners or their families consented. Despite such assertions, investigative reports show otherwise. In the few instances that consent was sought, China's coercive administrative approach inevitably raises suspicion peacefully at Tiananmen Square and hauled them away in white vans. Chinese Seize Falun Gong Protesters, WASH. POST, Apr. 25, 2000, at A18. The Communist Party labels the Falun Gong an "evil cult" and bars its practices within China. Thousands of Falun Gong followers have been sent to labor camps without a fair trial. Id.


23. See id. Approximately 6,000 people were imprisoned in the underground detention center. Id. The unused remains of the killed prisoners were burned in a boiler room located inside the hospital. Id. When confronted about this matter, Chinese public officials refused to comment. Id.

24. Id.

25. If a prisoner expressly states his refusal to donate his organs, "the likelihood of his declaration... reaching his family is highly doubtful." Allison K. Owen, Comment, Death Row Inmates or Organ Donors: China's Source of Body Organs for Medical Transplantation, 5 IND. INT'L & COMP. L. REV. 495, 502 (1995). Furthermore, officials have the right to edit the wills and last statements of prisoners for "slanderous statements and grievances." Id. As human rights activists note, "There is nothing to prevent them from omitting any expression by the prisoner of his intention to keep his organs. Officials have carte blanche with regard to manipulating any documents written by the prisoners." Id. The families of such prisoners are often afflicted with poverty, and the government uses financial incentives to lure them into acquiescing to the commodification of their relatives' organs. See id. If the families refuse, the government will often send them exorbitant bills to cover the prisoner's food, the bullet used to kill the prisoner, and other related expenses. Id. Some families, however, are not notified of their relatives' execution. In one instance, several government officials visited the family of a death row inmate prior to his execution in an attempt to solicit the family's consent for the government to use their son's organs. See Smith, supra note 10 (citing the case of Zhao Wei, a prisoner executed in the Hunan province, whose execution took place without any prior notice to his family). The family refused. Id. As a consequence, the prisoner was later executed without any notice to his family. Id.


27. The night before a prisoner's execution, he or she is bound, shackled, and tied down to a chair while a judge reads a death warrant and presents the warrant to the prisoner for his or her signature. Id. at 501. If the prisoner refuses to sign, the judge then forcibly presses the prisoner's finger onto an inkpad and stamps the document with the prisoner's fingerprint. Id. As punishment for his or her lack of cooperation, the prisoner is then left in the
regarding the voluntary nature of the prisoners' consent. As
one Western commentator observed, "Based on the abusive
circumstances of detention in China, from the time a person
is first accused of a capital offense until the moment of his or
her execution, any notion of 'free and voluntary consent' is
absurd."28

In June of 2005, reports surfaced on an incident in a
province just outside Beijing where retinas and kidneys were
being taken from executed gang members without their
consent.29 Many patients defended the practice, however,
arguing that whether or not prisoners consented, "Saving
someone's life using executed prisoner's organs is worth it."30
Others, however, such as Dr. Wang Guoqi, are less certain
that the benefits outweigh the costs. Dr. Wang, who worked
at the Tianjin Paramilitary Police General Brigade Hospital,
testified before the United States Congress that his hospital
often sold organs to wealthy patients overseas.31 His
superiors would order him to remove the requested body
parts from executed prisoners.32 Though he conceded to these
orders initially, Dr. Guoqi firmly refused to comply when
asked to remove kidneys from a living prisoner.33 His refusal
ultimately forced him to leave China, and he now seeks
political asylum in the United States.34

Experts report that approximately ninety percent of all
organs transplanted in China come from executed prisoners,35
yielding tens of millions of dollars in profit to the Chinese
government.36 Commentators who favored this practice


See id. at 500.
29. Mark Magnier & Alan Zarembo, Death Row is Organ Source, China
Admits; A large share of the executions benefit foreign patients., L.A. TIMES, Nov.
30. See id.
31. Bill Nichols, Panel Told of Organ Harvests on Executed Chinese Inmates,
USA TODAY, June 28, 2001, at A12.
32. Id.
33. See id.
34. Id.
35. Magnier & Zarembo, supra note 29.
36. See Whitney Hinkle, Note, Giving Until It Hurts: Prisoners Are Not the
Answer to the National Organ Shortage, 35 IND. L. REV. 593, 598 n.28 (2002)
(citing Dan Burton, Editorial, Outraged at China's Sale of Organs,
INDIANAPOLIS STAR, June 29, 1998, at A5); Smith, supra note 10 (stating that a
argued that the prisoners committed atrocious crimes, and that their personal rights could be revoked as a result. However, in China, more than half of the "atrocious crimes" for which a death sentence may be issued are non-violent. In a March 2004 report, Amnesty International stated that China executed 15,000 people per year, and that sixty-nine percent of the country's executable offenses were for non-violent crimes, such as drug dealing or the public practice of illegal religions. Most kidneys purchased by patients came from prisoners executed for minor offenses. Furthermore, many of these "criminals" who became the unwitting organ donors to wealthy Americans were likely innocent, as all too often, the accused were convicted after rushed trials based on confessions extracted under torture.

International human rights groups and activists began covering China's black market organ sales extensively in the early 1990s, shedding light on China's practices to Western Chinese prison official acknowledged China's practice of stripping organs from executed prisoners for wealthy patients and claimed that the practice produced "tens of millions of dollars a year").

37. See generally Amnesty International USA, People's Republic of China: Executed "According to Law"?—The Death Penalty in China, http://www.amnestyusa.org/abolish/document.do?id=806E474A6F07DCC05980256E5C00688E40 (last visited Jan. 23, 2007). The "strike hard" programs implemented by the government are intended to target crimes it considers to be atrocious, including white collar crimes. Id. According to Hu Jintao, President of the People's Republic of China and Chairman of the CCP, "Any crime which the law regards as serious should certainly receive serious penalties, and any crime which is punishable by the death penalty according to the law, should certainly receive the death penalty. This will ensure the healthy progress of strike hard." Id.

38. See Sheri R. Glaser, Formula to Stop the Illegal Organ Trade: Presumed Consent Laws and Mandatory Reporting Requirements for Doctors, 12 HUM. RTS. BRIEF 20, 20 (2005), available at http://www.wcl.american.edu/hrbrief/12/2glaser.pdf?rd=1; see also Owen, supra note 25, at 499 ("As a result of legislative changes promulgated by the government since 1982, there are two and a half times as many criminal offenses punishable by the death penalty and almost three times as many articles of law stipulating capital punishment as there were prior to the introduction of the criminal law in 1979.").

39. See Glaser, supra note 38.


42. See id. (noting that human rights groups claim that many individuals are convicted after hurried trials based on confessions extracted under torture).

43. See generally Lena H. Sun, China's Executed Convicts Donate Organs
nations for the first time. Yet it was not until 1997 that the FBI, in response to information obtained by the Justice Department regarding China's death row organ trade, began to investigate these allegations. In 2001, a congressional subcommittee in Washington, D.C. rigorously questioned Chinese government representatives regarding China's commerce in organs from death row inmates. The Chinese representatives unequivocally denied the existence of the enterprise. An official from the Justice Ministry maintained that the trafficking of death row organs was infrequent, and that it was carried out with the "presumed consent" of the prisoners when it did happen. Although the Chinese government claimed this phenomenon "rarely occurred," it refused to disclose any information on the number of organ extractions from prisoners that actually did occur. The Chinese embassy in Washington, D.C. maintained that "[t]he so-called sale of criminals' organs in China is a deliberate fabrication with ill intentions." In a 2001 news conference, Zhang Qiyue, China's Foreign Ministry spokeswoman, stated

Unwittingly, WASH. POST, Mar. 27, 1994, at A22.


46. Annie Huang, China's Black Market for Body Parts Reaches the U.S., COLUMBUS LEDGER-ENQUIRER (Ga.), Apr. 19, 1998, at C9; see also Nancy Scheper-Hughes, Postmodern Cannibalism?: Organ Transplants in the Globalocal Market, WHOLE EARTH REV., Summer 2000, at 16 ("China enacted a rule in 1984 stipulating that 'the use of corpses or organs of executed criminals must be kept strictly secret, and attention must be paid to avoid negative repercussions.'").

47. Huang, supra note 46.

48. The phrase "presumed consent" is defined as "the legal assumption that organs and tissue may be taken from a brain-dead patient unless he or she has previously registered a refusal." David Rowan, A Pound of Flesh For Sale, TIMES (U.K.), Feb. 21, 2004, at 5, available at http://www.davidrowan.com/2004/02/times-inside-kidney-trade.html.

49. Id.

50. See Huang, supra note 46.


52. See PrimeTime: Blood Money: Black Market for Kidneys From Chinese Prisoners (ABC News television broadcast Oct. 15, 1997) [hereinafter PrimeTime] (noting that after the Chinese embassy learned that PrimeTime would broadcast its findings on China's trade in death row organs, the embassy sent a letter to ABC requesting that it reconsider televising the report).
that testimony regarding the country's black market trade in death row organs were "sensational lies" and "a vicious slander" against China.53

Pressure from Western nations may have caused China to buckle, however, and government officials now admit the existence of the black market organ trade.54 At a 2006 conference of surgeons in Guangzhou, China, Deputy Health Minister Huang Jiefu acknowledged the flourishing sale of organs to foreigners.55 He conceded that the source of these organs was executed Chinese prisoners.56 While the Deputy raised this information in the context of a call to stop the illegal organ trade, his statement is one of the first admissions by high-ranking officials that this practice exists.57

2. Following in the Footsteps of the West

A new law announced on March 28, 2006 by China's Health Ministry officially banned the sale of human organs and strengthened regulation over organ transplants by mandating the written consent of organ donors,58 effective July 1, 2006.59 Prior to the implementation of this policy, the Chinese government insisted that it never harvested organs from its death row inmates,60 nor did it permit transplants to occur without the written consent of donors.61 In light of China's previous denials of the existence of the organ trade, the new rules appear somewhat redundant, or perhaps

53. See Smith, supra note 14. Zhang further declared, "With regard to the trade in human organs, China strictly prohibits that. . . . The major source of human organs comes from voluntary donations from Chinese citizens." Id. However, she did not deny that the government removes organs from executed prisoners. Id.
54. Magnier & Zarembo, supra note 29.
55. See id.
56. Id.
57. See id.
58. Lindsay Beck, China Says to Ban Sale of Human Organs, REUTERS, Mar. 28, 2006, available at http://www.populistamerica.com/china_says_to_ban_sale_of_human_organs (reporting on the recent ban of organ sales in China and the government's objective of requiring written consent of donors and restricting the number of hospitals permitted to perform transplant operations, along with the establishment of ethics committees).
59. Id.
60. See supra text accompanying notes 14-25.
61. See id.
indicative of a government that has not been entirely forthright with its past black market involvement.62 Furthermore, the legislation requires all hospitals licensed to administer transplant operations to form ethics committees to review the treatment of each transplant procedure performed.63 Essentially, the Chinese government instituted a law to prevent a problem that it previously insisted did not exist.

In light of the 2008 Olympics scheduled to take place in Beijing, the quick change in law could be due to the recent increase in worldwide media attention to China's death row organ market.64 If China were to acknowledge that it prospers financially from the sale of death row organs, such an admission would almost certainly generate increased contention and protests from human rights organizations.65 Congress has already condemned China's practices.66 In fact, California Representative Tom Lantos directed a resolution to the International Olympic Committee advising it to reject Beijing's bid to host the 2008 Summer Olympics based on China's record of human rights violations, notably citing the commodification of death row organs.67 Thus, it comes as no

---

62. Huang Jiefu, the Chinese Vice Minister of Health, noted that the overwhelming majority of organs used for transplants in China presently come from executed prisoners. See Beck, supra note 58. However, China's Foreign Ministry spokesperson, while acknowledging that death row organs may have been used on rare occasions, stated that the practice never occurred without the prisoners' consent. Id. "It is slander to say that China tries to take away the organs of death penalty victims," he said. "In China, if you want . . . to donate or receive transplant organs, you must go through strict formalities." Id. However, as Harry Wu notes, "[The Chinese] don't have a concept to donate body parts to other people." Vanessa Hua, Patients Seeking Transplants Turn to China, S.F. CHRON., Apr. 17, 2006, at A1. On account of their culture and tradition, most Chinese want to die whole. Id.

63. See Beck, supra note 58.


65. See Hearings, supra note 45.


67. Donny J. Perales, Rethinking the Prohibition of Death Row Prisoners as Organ Donors: A Possible Lifeline to Those on Organ Donor Waiting Lists, 34
surprise that the Chinese government would formally publish legislation to show the world that it is taking proactive measures toward reformation. Despite these steps, the enforceability of this new law remains to be seen.

B. The United States' Approach to Organ Procurement

1. Reliance on Altruism and Bureaucracy

The United States embraces an altruistic approach toward organ procurement law. In 1984, Congress developed a nationwide organ network to improve the efficiency of organ allocation through the National Organ Transplant Act (NOTA). Along with the Uniform Anatomical Gift Act of 1968 (UAGA), which focuses on procurement of cadaveric organs, NOTA frames the current organ donation policy in the United States. Under NOTA, the Organ Procurement and Transplantation Network (OPTN) was developed, which created the United Network...
for Organ Sharing (UNOS). OPTN and UNOS are primarily composed of transplant centers and a handful of organ procurement organizations, laboratories, and other health and professional organizations. Together, OPTN and UNOS serve to effectuate the goals of NOTA by maintaining a national list of donors and donees and a standardized system for matching donors to donees based on established medical criteria. Regional Organ Procurement Organizations (OPOs) enforce UNOS directives throughout the respective geographic territories of the United States.

NOTA implemented UNOS in order to reduce bureaucratic hurdles and to leave ample discretion to the individual medical professionals who participate in the OPOs. Although the drafters of NOTA sought to encourage organ donation, the Act expressly outlaws the sale of human organs and prohibits direct compensation to organ donors or their families. Although "valuable consideration" is strictly impermissible in exchange for human organs, a 1999 amendment to NOTA allowed for the reimbursement of travel and related expenses to donors. Thus, despite this amendment, human organs donated for transplantation in the United States are essentially treated as a public trust.

Critics of the current system argue that NOTA’s legal structure for organ procurement has hindered, rather than helped, the success of organ recruitment. Forbidding the

74. See Kolber, supra note 70, at 680; see also United Network for Organ Sharing, Who We Are, http://www.unos.org/whoWeAre/ [hereinafter Who We Are] (last visited Jan. 20, 2007).
76. See Who We Are, supra note 74.
77. Kolber, supra note 70, at 680.
78. See id.
79. See 42 U.S.C. § 274(a) (2000) (codifying the national ban on the commodification of human organs); see also Kolber, supra note 70, at 680.
81. H.R. 2418, 106th Cong. § 1 (1999). Such “related” expenses include “payment of such incidental non-medical expenses that are so incurred as the Secretary determines by regulation to be appropriate.” Harris & Alcorn, supra note 4, at 223 (quoting H.R. 2418).
83. Harris & Alcorn, supra note 4, at 223.
transfer of valuable consideration to organ donors shuts the door on any kind of incentive other than altruism for persuading healthy citizens to donate. Moreover, both UAGA and NOTA impair the cost-effectiveness of transplants for medical institutions. This, in turn, has caused many institutions to cut back on resources allocated for organ transplantations.

2. An Underground Market in Body Parts, Domestic and International

Despite the adamant insistence on a purely altruistic model for organ procurement and allocation, an economic market for organs nonetheless exists in the United States. In fact, financial exchanges take place throughout the current organ transplantation process. "The organ recipient 'pay[s] to receive [the] organ,' procurement specialists are paid to recruit donors, organ procurement organizations are compensated for providing their services, and doctors are paid to transplant the organ." It seems the only service not receiving financial compensation is the giving of the organs by the donor—which by all accounts is the most crucial step in the entire process.

Furthermore, a domestic black market in human body parts runs along the underbelly of American society. For example, in 1997, the Doheny Eye & Tissue Transplant Banks struck million dollar deals with the Los Angeles County's Coroner's Office for thousands of corneas that were harvested without the donors' consent. In addition, Professor Michele Goodwin, who spoke about organ procurement and commodification issues at the 2002
Medicine & Ethics Teachers Conference, noted:

[O]ther financial exchanges occur regularly in the human biological transplantation community, involving the transfer of organs . . . for often-significant sums. . . . [T]hese exchanges occur in view of the law, without clear regulation, language, or standards. For organ transfers, consumers turn to the internet, newspapers and sometimes clandestine organizations (and foreign governments) to purchase these human supplies, while biopharmaceutical companies are involved with a broad array of business partnerships, the scope of which includes collaborations with university hospitals, coroners' offices, abortion clinics and morgues.92

However, Americans increasingly turn to the international marketplace due to legal obstacles preventing access to organ markets on the domestic front.93 Jim Cohan,94 an organ broker in California, arranges transplants for U.S. citizens abroad, in countries including China.95 He works out of his Los Angeles office, J. Cohan & Associates,96 receiving a commission for referring American patients overseas. These overseas hospitals provide organs that Cohan believes are taken with the “presumed consent” of the donor.97

A 1997 ABC News broadcast documented the purchase of China’s black market organs by American citizens.98 To buy an organ from China, patients contact a “go-between,” an organ broker with ties to the Chinese military.99 The go-between is paid a commission by both the patient and the military hospital for setting up the transaction.100

Advertisements are often posted in Chinese-language
newspapers in the United States for those looking to hire a go-between.101

After establishing a relationship with a go-between, buyers wait for the next scheduled round of executions; generally, no longer than a few months.102 The go-between furnishes a list of the buyers' needs to the military hospital, which then schedules the next round of executions accordingly.103 The cost of a death row organ varies from organ to organ.104 For example, at Shanghai's China International Organ Transplant Center, transplants are priced as follows: a kidney transplant costs $62,000; a liver transplant costs between $98,000 and $130,000; a lung transplant costs between $150,000 and $170,000; and a heart transplant costs between $130,000 and $160,000.105

Although the average American may not be aware that these international black market transactions take place on a fairly routine basis, physicians in America are not so naïve.

101. E.g., id. Harry Wu, a human rights activist committed to exposing the Chinese black market trade in body parts, showed ABC's Brian Ross a clipping from a Chinese-language newspaper in New York that contained an advertisement reading, "Kidney transplant in Mainland China. Don't miss the opportunity. Call." Id. Investigators called the number, which led them to a Chinese couple in Bridgeport, Connecticut, who served as organ brokers, acting as the go-between for American buyers and a hospital supplier in southern China owned by the People's Liberation Army. Id. Over the past several years, hundreds of foreigners went to that particular hospital to receive death row organ transplants. Id.

102. Contrast this with the waiting period on a donor list in the United States and the temptation to go abroad will seem even stronger. See, e.g., House Joins Senate Counterparts in Seeking to Get Organ Transplant Act Fully Funded In FY 2006, TRANSPLANT NEWS, May 13, 2005, available at http://www.allbusiness.com/health-care-social-assistance/ambulatory-health-services/427730-1.html (noting that, in 2005, the median waiting time from when the patient is placed on a donor waiting list to transplantation exceeds 4 years).

103. See, e.g., Hearings, supra note 45; PrimeTime, supra note 52.

104. Gorman, supra note 10, at 76 (stating that after an execution in China, "[d]octors at military hospitals . . . transplant the organs into wealthy foreigners willing to pay anywhere from $10,000 to $40,000 for the operation").

105. Hua, supra note 62. Many go-betweens have been caught and arrested by U.S. police. See generally John J. Goldman, Arrests Shed Light on China's Booming Trade in Body Parts, EDMONTON J. (Can.), Feb. 25, 1998, at A11. One such incident involved a 41-year-old New York resident, Cheng Yong Wang, who illegally brokered corneas, kidneys, livers, lungs, skin, and other organs from executed Chinese prisoners. Id. Wang was contracted by Chinese government agencies and hospitals to provide interested organ buyers from New York. Id.
Dr. Thomas Diflo, the director of kidney transplants at the New York University Medical Center, notes that one of his patients suffering from kidney failure returned from a trip to China seeking post-operative care after receiving a new kidney. Dr. Diflo has encountered several other patients who concede that their newly acquired organs came from executed Chinese prisoners. Dr. Stephen Tomlanovich, a kidney transplant specialist at the University of California, San Francisco, has treated several patients whom he suspects also received kidneys from executed Chinese prisoners. Thus, there is a growing concern within the medical profession over the ethical dilemma these patients present to American doctors when they fly overseas and allow another life to be taken in order to save their own.

Presently, American patients who travel to China for organ purchases often adopt an ambivalent attitude toward the fact that the organs originate from unwitting death row inmates. When Daniel Farley, a 57-year-old American, traveled to China to buy a liver through a Shanghai hospital, he discovered that the organ he received came from an executed prisoner. In response, Farley said, "I'm a fairly liberal guy, and it's not the greatest thing to think about. . . . But when you're faced with a certainty—and (the donors) have a certainty—it's easier to take. Either someone was sentenced to die or it was their time." Tony Lee, the senior medical consultant of a Shanghai hospital offering transplant services to Americans, reasons that "people come here because they're desperate, and we offer them a chance of living. . . . That's why they come here, because of something we have here and nowhere else is offering."

C. What Scholars Suggest that the U.S. Learn from China

1. Quid Pro Quo Bargains with Death Row

A growing number of scholars advocate the adoption of
China's policy of organ procurement from prisoners. They maintain that permitting prisoner organ donation would significantly increase the supply of organs in the United States and utilize organs that would otherwise go to waste. In 1998, a "Life for a Life" bill was introduced in Congress which would have allowed death row prisoners to donate their kidneys in exchange for commuted sentences. Then, in 2000, House Bill 999 proposed to encourage death row prisoners to donate their organs. Numerous state legislators have pushed for similar bills to promote prisoner organ donations by offering reductions of death sentences to life imprisonment. However, such legislative attempts were ultimately unsuccessful.

2. Permitting a Domestic Free Market in Organs

On the other hand, a separate school of commentators remains reluctant to tap into the American death row community for organ supply. They point out the challenges posed by organ procurement from prisoners executed by lethal injection. Instead, they advocate the implementation of a legalized organ market in the United States.

113. See Patton, supra note 51, at 431-33.
114. Perales, supra note 67, at 694.
116. See Hinkle, supra note 36, at 599.
117. See Patton, supra note 51, at 432.
118. See Hinkle, supra note 36, at 600. See generally Missouri May Use Death Row Organs: Inmates Could Trade Organ For Life Without Parole, AKRON BEACON J. (Ohio), Mar. 16, 1998, at A7 [hereinafter Missouri] (commenting on the national outrage incited when reports surfaced that China procured organs from death row inmates as well as how proposals for procuring organs from death row inmates in the United States were also met with disfavor). As Carmen Epps of St. Louis, Missouri, puts it, "I wouldn't want [death row] organs in my body." Id. Epps has been on a kidney waiting list for over three years, but says she would rather continue dialysis than accept "an organ from a murderer." Id.
119. See Missouri, supra note 118 (reporting that many Americans find the notion of transplanting organs from prisoners into civilians to be unsettling).
120. See Perales, supra note 67, at 697. Lethal injection affects the prisoner's circulatory system and contaminates the organs, rendering the organs unusable for transplantation. See generally Fuller, supra note 64 (noting how execution by gunshot is more "conducive to transplants because it does not contaminate the prisoners' organs with poisonous chemicals, as lethal injections do, or directly affect the circulatory system").
121. See, e.g., Steve P. Calandrillo, Cash for Kidneys? Utilizing Incentives to
there is presently no federal law prohibiting financial compensation for egg or sperm donations, many argue that organ procurement laws should follow suit.\textsuperscript{122}

\textbf{D. Bodies as Property and the Controversy Over Commodification}

The status of the human body as property,\textsuperscript{123} a privacy right,\textsuperscript{124} or something in between\textsuperscript{125} remains unsettled.\textsuperscript{126} In 1872, a Rhode Island court held that "the body is not property in the usually recognized sense of the word,"\textsuperscript{127} but rather, should be viewed as a form of "quasi property, to which certain persons may have rights."\textsuperscript{128} Under such a philosophy, a person is not considered the owner of his body; he merely holds "a sacred trust for the benefit of all who may

---


122. See generally Sobota, supra note 121, at 1244 (proposing that organ donation should be compensated in a fashion similar to the current system of compensation for egg donation).

123. As Professor Radhika Rao writes in a comprehensive and illuminating article:
The image of the body as a form of property possessed by its 'owner' dates back at least to John Locke . . . who asserted: . . . "[E]very Man has a Property in his own Person. This no Body has any Right to but himself. . . . Yet Locke apparently envisioned the body as property of a special sort, held in trust rather than as an individual owner. . . . Thus Locke apparently viewed individuals as stewards over their bodies, possessing themselves in trust rather than as outright owners. Therefore, despite his reliance upon property rhetoric, his image of the rights individuals possess in their bodies clearly does not rise to the level of complete ownership.


124. See id. at 387 ("In other contexts, individuals are afforded autonomy over their bodies under the umbrella of constitutional privacy rather than the rules of property. Laws prohibiting contraception and abortion, for example, are not addressed as 'deprivations' of a woman's bodily property or ' takings' that require the payment of just compensation, but instead as invasions of her constitutional privacy interests.").

125. See id. at 363.

126. See id. at 365-66 (noting that "[s]ometimes the body is characterized as property, sometimes it is classified as quasi-property, and sometimes it is not conceived as property at all, but rather as the subject of privacy rights.").


128. \textit{Id.}
from family or friendship have an interest in it."\textsuperscript{129} However as Professor William L. Prosser contends, "It seems reasonably obvious that such ‘property’ is something evolved out of thin air to meet the occasion” and is “a fiction likely to deceive no one but a lawyer.”\textsuperscript{130}

Thus, the debate over whether human tissue and organs may be seen as property roars on.\textsuperscript{131} While the proposition of a property interest in the body has yet to be expressly addressed by the United States Supreme Court,\textsuperscript{132} post-NOTA case law has considered property rights in sperm and egg cells.\textsuperscript{133} For example, a California court held that a person could have a property interest in his excised spleen, blood, sperm, bone marrow, and skin cells.\textsuperscript{134} However, the California Supreme Court later reversed the decision,\textsuperscript{135} concluding that the plaintiff abandoned his claim to the excised tissue after it was removed.\textsuperscript{136} Although the California Supreme Court based its majority opinion in part on the policy consideration that profiteering off a person’s own body parts should not be permitted,\textsuperscript{137} it did not expressly reject the notion that a person may have property

\footnotesize
\begin{itemize}
\item \textsuperscript{129} Id. at 243.
\item \textsuperscript{130} Rao, supra note 123, at 385 n.95 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 63 (5th ed. 1984)).
\item \textsuperscript{132} Chang, supra note 6, at 413 (noting that the Supreme Court has yet to address the issue of the body as property).
\item \textsuperscript{133} E.g., Hecht v. Super. Ct., 20 Cal. Rptr. 2d 275, 276 (Ct. App. 1993) (dispute over whether deceased’s frozen sperm that he bequeathed to his girlfriend constituted property); York v. Jones, 717 F. Supp. 421, 422 (E.D. Va. 1989) (dispute on whether property rights existed in cryogenically preserved zygotes).
\item \textsuperscript{134} Moore v. Regents of Univ. of Cal., 793 P.2d 479 (Cal. 1990) petition for cert. denied, 499 U.S. 936 (1991).
\item \textsuperscript{135} Id. at 148.
\item \textsuperscript{136} Chang, supra note 6, at 414.
\item \textsuperscript{137} Id.; see also United States v. Garber, 607 F.2d 92 (5th Cir. 1979) (implying that the sale of plasma may be permissible).
\end{itemize}
rights in his own organs.138

In terms of international treatment of the commodification issue, the sale of organs is banned in almost every country139 and condemned by virtually all medical associations around the world.140 Following China’s recent legislation,141 Iran is likely the only exception to the anti-commodification rule.142 Furthermore, the World Health Organization (WHO),143 the United Nations’ specialized agency for health, expressly condemns commodification.144 Thus, now that China has retreated from commodification, the legalization of an organ market in the United States will be a challenging uphill battle, and will not likely reach fruition any time soon.145 However, this should not be taken to mean that such an alternative is not worth exploring.

III. THE CALL FOR A BETTER SYSTEM IN THE UNITED STATES

The United States’ reliance on altruism has resulted in a failed system of organ procurement and allocation.146 Although eighty-five percent of those surveyed in a 1990 Gallup poll expressed support for NOTA and the current

138. Id.
139. With the exceptions of Iran and Pakistan, where legal markets for organs exist, free trade in human organs is banned in nearly all developed nations. Calandrillo, supra note 121, at 86-87. However, this is not to say that a black market in organ trading does not exist. Countries such as China, Israel, South Africa, Turkey, Iraq, Argentina, India, and Brazil have very lenient laws and their respective prohibitions are not strictly enforced. Id.
140. See Calandrillo, supra note 121; Christina Spencer, Permit Kidney Sales, MDs Say, EDMONTON JOURNAL (CANADA), Jul. 4, 1998, at B7 (“The sale of organs . . . is condemned by the World Health Organization.”); see also Finkel, supra note 93, at 26.
141. See supra Part II.A.2.
142. See Finkel, supra note 93, at 26.
146. Goodwin, supra note 69, at 319.
altruistic scheme, only twenty percent carried organ donor cards. As of April 2006, there were only 1,200 registered donors in the United States. Comparatively, there were over 92,000 waiting list candidates hoping for an organ donation, only 2,300 of whom actually received transplants. Such discrepancies between thought and action among the general American public typify the basis for the scarcity.

As a result of this scarcity, more than 6,000 American patients die each year waiting for an organ transplant, while a new patient is added to a waiting list every fourteen minutes. In 2001, the national waiting list for donors had more than 78,350 Americans waiting for organ transplants. In less than three years, that number has climbed to 85,000. For every 50,000 patients that need a kidney, only 15,000 transplant operations will actually be performed. Thus, the average wait for a replacement kidney is four or more years.

As Professor Gary Becker points out, "To an economist, the major reason for the imbalance between demand and supply of organs is that the United States . . . forbid[s] the purchase and sale of organs." Unless American society can live with its conscience when it turns a blind eye to these terminally ill patients, a more efficient system of balancing the demand and supply of organs must come forward. Although China's black market approach proved less than

---

147. Perales, supra note 67, at 691.
149. Id.
150. Id.
151. Chang, supra note 6, at 409. Chang notes that "on average, 17 people die every day waiting for an organ transplant, which translates to 6,100 individuals a year, while a new person is added to the organ donor waiting list every 14 minutes." Id. See generally Cong. Kidney Caucus, 25 Facts About Organ Donation and Transplantation, http://www.house.gov/mcdermott/kidneycaucus/25facts.html (last visited Jan. 20, 2007) (providing more information and statistics on organ transplants).
152. See Smith, supra note 41.
153. Calandrillo, supra note 121, at 69.
154. Id. Of those waiting on the list, roughly 50,000 need a kidney. Id. Experts anticipate this number will double within the next decade. Id.
156. Id.
157. Id.
humanitarian, it at least tackled the scarcity issue and saved lives. While the United States should never condone China’s pre-2006 practice of harvesting death row organs and should ban Americans from going abroad for these services, it should provide a practical and efficient domestic alternative.

IV. WHAT AMERICA CAN LEARN FROM CHINA, AND SECOND THOUGHTS ON THE BODY AS PROPERTY

A. Death Row Prisoners Are Not a Viable Option

The American Society of Transplantation firmly opposes organ donations from death row inmates. The primary concern with harvesting organs from inmates is whether institutionalized persons can truly give informed consent. Their decision-making processes often become burdened with: (1) their dependence on a system that both incarcerated them and subsequently asks them to donate; (2) the potential pressures to conform; and (3) fear of the consequences that may ensue if they decide not to donate.

Throughout the 1960s, a market for plasma-derived products emerged between plasma research centers and major biologics firms that led to the exploitation of prisoners. In particular, Austin R. Stough, a prison physician, established a plasma center near a penitentiary and injected volunteer prisoners with antigens, collecting their hyperimmune plasma to be sold to major biomedical firms. While the federal government should have been aware of this practice, it did nothing to stop the exploitation of these prisoners. With no one regulating his business, Stough went on to open more centers, and by the mid-1960s, supplied twenty-five percent of the nation’s hyperimmune gamma globulin. Critics noted that this operation was run

---

158. See Smith, supra note 41.
160. Id.
162. Id.
163. Id.
164. See id. at 133 n.121.
“careless[ly] and reckless[ly]”\textsuperscript{165} and often “risk[ed] the lives and health of the prisoners in exchange for access to the plasma.”\textsuperscript{166} The exploitation of American prisoners did not end there, however. As late as 1972, the pharmaceutical industry performed more than ninety percent of its experimental testing on prisoners.\textsuperscript{167}

With little to no ability to substantively prevent the violation of prisoners’ rights, the United States should not look to its prisoners or death row for organ harvesting. The likelihood and gravity of coercion and harm is too great to risk. This argument, however, should be distinguished from the one anti-commodification advocates make on behalf of the poor.\textsuperscript{168} No matter how afflicted with poverty, the poor are free citizens of society with the liberty to choose how to live. Unlike the poor, prisoners are, by the very nature of imprisonment, in bondage. The fact that they may be criminals does not justify exposing them to the conditions death row inmates in China were subjected to.\textsuperscript{169}

\textbf{B. What America Should Consider: Commodification of Organs}

\textit{1. The Mounting Need for Commodification}

Although China adjusted its organ procurement laws to more closely reflect American standards, Chinese government officials noted that the new legislation was tentative, and subject to future modifications.\textsuperscript{170} In all likelihood, China's organ procurement laws will be altered in the future because the legislation provides no feasible means of legally obtaining an organ. Prior to the 2006 legislation, citizens all over the world who could not secure organs in their country due to the altruistic model flocked to China to reap the benefits of commodification.\textsuperscript{171} With fewer places to turn to for legal

\textsuperscript{165} Id.
\textsuperscript{166} Id.
\textsuperscript{167} See Baruch, supra note 159.
\textsuperscript{168} See infra note 182 and accompanying text.
\textsuperscript{169} See supra Part II.A.1.
\textsuperscript{170} See Beck, supra note 58.
\textsuperscript{171} The demand initially came from China's neighbors in Asia, predominantly patients from Hong Kong and Taiwan, though Singapore, Indonesia, and the Philippines quickly caught on to the business as well. Goldman, supra note 105. Australians have also dealt with their citizens
international organ sales, desperate patients, including American citizens, will inevitably turn to the black market, as they have done with China in the past. If China tightens its enforcement of the death row organ trade, the organ scarcity problem will become an even more glaring issue in the coming decades. Eventually, an open market on organs must be given serious consideration.

2. Arguments Against Commodification

The majority of Western nations "abhor the idea" of commodifying human organs and putting body parts up for sale. For the most part, the objections to a free market for human organs are vocalized predominantly by "nonparticipants," or those who do not need replacement organs. It may be painless for a healthy individual to decry those who buy organs from China's black market and admonish those who suggest commodification as a solution to the shortage of organ donors, but "[w]hen a terminally ill patient faces imminent death, the knowledge that death is near often brings about an intense struggle for survival." Thus, it seems that mainstream society—those who are not immediately confronted with the organ shortage problem—is at leisure to debate the iniquity of commodification.

The argument against commodification that is least traveling to China for transplants, a practice they call "transplant tourism." See Dunn, supra note 64 (discussing the recent spawn of demand for transplantable organs from China). In 2005, a British newspaper documented twenty-nine patients who purchased an organ from China's death row. Sam Greenhill, British Patients Buy Death Row Kidneys, DAILY MAIL (U.K.), Dec. 12, 2005, at 24. Canada, too, has discovered its own citizens traveling to China to buy organs from China's death row. Spencer, supra note 140.

172. See supra notes 139-40 and accompanying text.

173. Spencer, supra note 140 (citing a survey taken on medical ethics that showed people consistently "abhorred the idea" of exchanging money for organs).

174. Posting of Richard Posner to The Becker-Posner Blog, http://www.becker-posner-blog.com/archives/2006/01/organ_salesposn.html (Jan. 1, 2006) (last visited April 22, 2006) ("It seems that the prohibited transactions are prohibited because they are highly offensive to nonparticipants; why they are highly offensive remains to be explained.").


176. See id. If probity is at issue, then it is just as iniquitous for Americans to not participate in offering a viable solution to the failing altruistic model on one hand and the black market on the other.
grounded in a concrete rationale also happens to be the one most often and passionately raised—the fundamental concern that organ commodification violates "the dignity of man." This contention is based on the belief that limitations exist as to what can be bought or sold as a commodity. Some argue that the personal body ought to be considered so "valuable, priceless, or sacred that [it] should never be allowed into the marketplace."

A second concern that opponents of commodification raise is the strong potential for exploitation of the poor, who might too easily be persuaded into selling a kidney to escape mounting debt. Opponents argue that, more often than not, the seller will be poor enough to consider the sale while the buyer is likely to be wealthy enough to afford the purchase. Additionally, another concern often raised is that organ sellers will lack informed consent or, even if they comprehend the implications of the transaction, they will not heed precautions with adequate deliberation. The common theme throughout these contentions is a general fear that

179. Id. at 142.
181. Id.
182. Calandrillo, supra note 121, at 95. Moreover, the lure of payment to escape debt might lead poverty-stricken individuals to believe that selling a kidney is worth any health risk. Id. at 95. Professor Calandrillo further writes on arguments that commodification opponents often enumerate:

Compounding this problem is that potential sellers often suffer from "optimism bias"—i.e., even if they understand the precise risks involved, they often believe that those risks simply "won't happen to me." Furthermore, sellers might impose unknown risk on buyers by concealing adverse health information in their own past so as not to be ruled out as a potential candidate for sale. Thus, if sellers are pressured by poverty and simultaneously underestimate the risks that organ sales involve or overestimate their ability to escape them, society's confidence in their informed consent to the sale is seriously undermined. The state therefore has a legitimate interest in stepping in to protect the mental and physical health of potential sellers against risks that they do not fully appreciate.

Id. at 95.
legalizing an organ market will compromise the autonomy of individuals comprising the lower economic rungs of society.  

3. Arguments in Favor of Commodification

Running beneath the arguments in favor of commodification lies the deep-rooted belief that in a free society, citizens have the right to do as they will with their own body.  

Under this approach, a person's own organs should be treated as his property in order to promote economic efficiency and to guard negative liberty.  

Economic efficiency is promoted when a person has the power to "internalize the costs and benefits" of the use of his resources and to "facilitate the market allocation of resources to their highest-value users," allowing participants to benefit according to market demand. Further, acknowledging property rights in the human body would help "secure negative liberty, that is, to protect their owners from interference by others in their affairs."

To counter the criticism that a legalized organ market will coerce the poor into selling their organs, those in favor of commodification liken the sale of organs to any other manner of making money. As one commentator noted:

If the poor should not be allowed to sell a kidney . . . , then they should not be allowed to take a job at a factory either, or to shine shoes, etc. The poor agree to do any of these only because they are "forced by poverty" to do so. Why should someone be allowed to improve his financial position in one manner but not in another?  

------

183. See generally Hurley, supra note 131, at 132 (arguing that allowing for economic incentives in organ procurement will lead to exploitation of the underprivileged).
184. Francois Tremblay, Organ Trade is Moral, LIBERATOR, Oct. 30, 2002, http://www.liberator.net/articles/TremblayFrancois/OrganTrade.html (last visited Jan. 23, 2007) (asserting that the freedom to do with our bodies as we want "is the most noble and fundamental right that each human being has").
186. See Purdy, supra note 185, at 1240.
187. See id.
188. See id. at 1241.
189. See Bart Croughs, A Man's Body, A Man's Right, LIBERTY, June 2005, at
If the objective is to increase the supply of replacement organs for America's terminally ill, allowing a free market for organ sales seems to be the most pragmatic solution. An example of commodification's efficacy may be seen in the procurement of oocytes, the undeveloped female reproductive cells. The method of extracting oocytes may be comparable to that of kidneys or other organs, as both are extremely intrusive to the donor. Oocyte donors are compensated anywhere between $4,000 and $35,000 per extraction. Prompted by the financial incentive, and despite the inherent risks in oocyte extractions and the discomfort involved, thousands of women choose to market their eggs, substantially reducing national oocyte shortages.

Advocates of organ commodification are convinced that similar success may be found in the legalization of valuable consideration for organs.

In December 2001, the American Medical Association's Council for Ethical and Judicial Affairs held that organ commodification was not intrinsically unethical and that the possibility of legalizing it in the United States warranted further study. Frank Riddick, chairman of the Council, commented that the altruistic model was ineffective and that "anything that is reasonable and ethical should be tried."

Then, in June of 2002, the Council voted to encourage in-

---

190. See generally Rebecca Mead, Eggs for Sale, NEW YORKER, Aug. 9, 1999, at 56.
191. Harris & Alcorn, supra note 4, at 230.
192. Oocyte extraction involves three consecutive weeks of intensive hormone injections into the woman, temporarily halting ovulation. Id. Then, more hormone stimulants are injected to cause ovarian hyperfunction. Id. The woman's ovaries engorge while oocytes develop at an unnaturally rapid pace inside her. Id. To extract the oocytes, she is sedated and a needle is inserted into her to extract twelve oocytes, one at a time. Id. In light of how invasive this procedure is, many commentators have drawn similarities between oocyte extraction and organ transplants. Id.
193. Id. at 231.
194. See id. In 2001, approximately 5,000 women offered to sell their oocytes. Id. at 230.
195. See Mead, supra note 190, at 56.
196. See Harris & Alcorn, supra note 4, at 231.
198. Id.
depth research and study on financial incentives as a means of increasing organ donations.\textsuperscript{199}

Finally, bartering organs for valuable consideration already occurs in the United States behind the veil of altruism. Professor Richard Epstein illustrates this point with a hypothetical involving two married couples. Wife 1 with blood type A needs a kidney, but Husband 1 is blood type B. Wife 2 with blood type B also needs a kidney, but Husband 2 is blood type A. Under the present system, there would be no issue with Husband 1 donating a kidney to Wife 2 in exchange for Husband 2 donating a kidney to Wife 1—in other words, a swap.\textsuperscript{200} To this, Professor Epstein adds:

There is a legal objection that you're not allowed to trade or sell organs for "valuable considerations," but the folks who run the kidney establishment—which is a world unto itself—[have] managed to delude or persuade themselves that these swaps are, in fact, pure altruism instead of altruism within families or swaps across families. I don't care about the linguistics at this point—I think it's baloney . . . .\textsuperscript{201}

Whether the bargained-for exchange is kidney-for-kidney or kidney-for-money, both agreements commodify the human organ. Why, then, is one, the "market for barter"\textsuperscript{202} of kidney-for-kidney, permissible in the United States, and the other market, kidney-for-money, not only illegal, but considered morally reprehensible?

V. DYING FOR A BETTER SOLUTION

A. Establishing a Private Institution to Supervise Organ Commerce

The utilization of a natural resource of which the United States has plenty—human bodies—and motivating the use of such with the strongest incentive known to man short of survival—financial compensation—is the best way to

\textsuperscript{199} Kolber, \textit{supra} note 70, at 672.
\textsuperscript{201} Id.
\textsuperscript{202} Id.
alleviate organ scarcity. To adequately supply the present demand for replacement organs in this country, Congress should legalize the trade of organs. As a means of regulating this trade and safeguarding the rights of the parties involved, a private agency should be established to supervise transactions for the sale of organs. While many hesitate to trust administrative agencies, particularly in a matter as controversial and sensitive as organ commerce, it is significant to note that organ procurement is already monitored through a network of organized institutions—the regional OPOs that administer the current system under the authority of OPTN and UNOS. Thus, agency involvement in the organ procurement system is not a novel proposal. In fact, this comment proposes that the United States retain the current model, subject to the following modifications.

The first step in the proposed change is to repeal the ban on commodification contained in NOTA. Presently, the OPTN facilitates the organ matching process and implements policy pursuant to authority granted by NOTA. However, the OPTN should be empowered to serve dual regulatory purposes: (1) to maintain UNOS and the regional OPOs under the current altruistic model; and (2) to oversee a new private administrative agency (Agency) to regulate the organ market. Thus, the altruistic model would continue to thrive, as it would be supplemented by legalized commodification.

The Agency would report to a committee specifically established within the OPTN to oversee the Agency's activities. Similar to transplants conducted through the regional OPOs under the altruistic model, all transplants set up by the Agency would take place at hospitals belonging to the OPTN. This would permit the OPTN to meet its goal of ensuring quality medical care to transplant patients by regulating the quality of the hospitals in which patients receive transplants.

Although the Agency would report to the OPTN, it should be privately funded and, to the greatest extent possible,

203. See generally Becker Organ Blog, supra note 145 ("My conclusion is that markets in organs are the best available way to enable persons with defective organs to get transplants much more quickly than under the present system.").
204. See supra Part II.B.1.
205. See supra Part II.B.1.
206. See supra Part II.B.1.
privately run, independent of government intervention. The current organ procurement system is set up in layered tiers, with NOTA above OPTN and UNOS, which are then further partitioned into the regional OPOs.\footnote{See supra Part II.B.1.} The rationale behind this structure was to keep the system as free from bureaucracy as possible.\footnote{See supra Part II.B.1.} Similarly, keeping the Agency privately funded would mean less bureaucracy imposed by federal government involvement. The ideal scenario would be for the Agency to operate autonomously, with periodic reports issued to the OPTN as a means of safeguarding the welfare and basic rights of the individuals involved in transplants. All procedures carried forth by the Agency would be in accordance with sound medical judgment, under the same standards as the current system.

The repeal of the ban on commodification in NOTA would mean that parties could buy and sell human organs under terms they negotiate, but only under exacting conditions set forth by the Agency.\footnote{Cf. Harris & Alcorn, supra note 4 (proposing a government-regulated market for posthumous organs where licensed brokers operate under the oversight of the Food and Drug Administration).} The OPTN would furnish to the Agency a list of buyers, or terminally ill patients who wish to purchase replacement organs. Those who wish to sell their organs would contact the Agency and fill out a comprehensive application that would supply enough information for the Agency to conduct a background check. The purpose of such investigations would be to confirm the healthy condition of the seller, adequate matching between buyer and seller, and a means of verifying the parties' intentions in an effort to detect any sign of coercion as early as possible. If there is a match between a buyer and a seller, a representative from the Agency would meet with the seller and exhaustively review the consequences of the operation. The buyer and seller would then negotiate their own contract, under the guidance of the Agency representative assigned to that particular pairing. The representative's primary function in this phase would be to ensure that the agreement is not unreasonable, and that the parties have equal bargaining power. A fixed cap and floor on the price for the organ would further help ensure fairness. Terms regarding who should
bear the risk of loss in the event of complications would also be settled by the parties, though the Agency representative could encourage terms as favorable to the seller as possible (e.g., the buyer could promise to pay up to a certain amount of medical expenses for the seller in the event something goes wrong after the exchange).

B. Fostering a Future Market for Organs

Since only non-vital organs may be retrieved from live donors, a future market in posthumous organs should be established and run by the Agency in conjunction with the aforementioned proposal. Under this proposal, individuals would be able to approach the Agency and agree to sell their organs postmortem for transplantation purposes. Each organ would have a bargained-for price determined by negotiations between the Agency and the conferring individual. Then, for each of the organs removed, the individual’s family or heirs would be compensated in the bargained-for amount. The individual, however, would be able to rescind the contract at any time before his death, thereby making the contract binding and enforceable only posthumously. Furthermore, these contracts should remain strictly confidential, and would ideally remain undisclosed to the individual’s family until after death.

VI. CONCLUSION

In light of the strong opposition to a free market approach toward organ procurement and allocation, any changes in law to the contrary of current policy will take decades to implement. But this does not mean such a proposal should be disregarded. China’s former black market in death row organs merely presents a stark example of what can go wrong with the free market approach if it is not carefully regulated. This comment does not propose an anarchic attitude toward organ commodification; it simply

210. For example, if a pair of vital organs, such as kidneys, both function properly, one of the two paired kidneys may be considered “non-vital.” See id. at 215. Regenerative organs, such as skin, blood, hair, sperm, and oocytes may also be taken from live donors. Id. at 216.

211. Many scholars urge that even if organ commodification remains prohibited, a “future market” should be pursued. See Harris & Alcorn, supra note 4, at 214.
advocates that both the legal and medical communities devote a more thorough consideration to this prospect. If this does not occur, thousands of innocent patients will die because a life-saving replacement organ was not available.

212. For a comprehensive anthology on the issue of commodification, see RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE (Martha M. Ertman & Joan C. Williams eds., 2005).