

December 2022

Commercialization of Separated Human Body Parts - Unpacking Instrumentalization Approach

Arseny Shevelev

Georgy Shevelev

Follow this and additional works at: <https://digitalcommons.pace.edu/pilr>



Part of the Behavioral Economics Commons, Economic Policy Commons, International Economics Commons, International Law Commons, International Trade Law Commons, Law and Society Commons, Legal Theory Commons, and the Other Public Affairs, Public Policy and Public Administration Commons

Recommended Citation

Arseny Shevelev and Georgy Shevelev, *Commercialization of Separated Human Body Parts - Unpacking Instrumentalization Approach*, 35 Pace Int'l L. Rev. 119 (2022)

Available at: <https://digitalcommons.pace.edu/pilr/vol35/iss1/4>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace International Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

COMMERCIALIZATION OF SEPARATED HUMAN BODY PARTS – UNPACKING INSTRUMENTALIZATION APPROACH

Arseny Shevelev & Georgy Shevelev*

ABSTRACT

The principle of non-commercialization, which prohibits trade in separated human body parts, has long been firmly embedded in many European legal orders and has become an integral part of them. However, many new uses for human biomaterials have now been discovered, and the need for them has reached a historical climax. This paper aims to explain the main tenets of non-commercialization theory, including such principles as human dignity and need to protect human's health, and to show that these categories have so far been understood in a very one-sided and visceral way, and largely in contradiction to their true spirit. We will not dwell on a critique of the existing approach, but will propose an instrumental approach to human health based primarily on the will of the individual. At the end of this paper, we will describe possible legal constructs through which the market for separated human body parts can function, and the outcomes of adoption of one or another model.

KEYWORDS

human body parts, commercialization, biomaterials, law, commercialization of human body parts, separated human body parts, instrumentalization

*Arseny Shevelev is a sole practitioner whose e-mail address is arseny.y.shevelev@gmail.com. Georgy Shevelev is a sole practitioner whose e-mail address is georgy.y.shevelev@gmail.com.

TABLE OF CONTENTS

I. Introduction.....	121
II. Barriers to Recognition of a Commercial Market for Separated Human Body Parts: Debunking Misconceptions.....	122
A. The First Barrier – Sale of Separated Human Body Parts as an Infringement on Human Dignity.....	122
1. A Dexterous Substitution of Concepts: How the Indistinction Between the Persona and the Human Body Serves to Validate the Impossibility of Selling the Separated Body Parts.....	122
2. The Two-Faced Janus: Some Parts of the Human Body Are Blessed With Dignity, While Others Are Not.....	127
3. The Purpose of Alienating the Separated Parts of the Human Body as a Criterion for Legitimacy: Another Dogmatic Manipulation of the Dignitarians.....	133
B. The Second Barrier – Immorality of Non-Gratuitous Disposal of Separated Human Body Parts.....	136
1. Gratuitous and Non-Gratuitous Disposal of Separated Human Body Parts: Illusive Ethical Distinction.....	136
2. Will the Commercial Market for Separated Human Body Parts Result in the Exploitation of Poor?.....	143
3. Instrumental Value of Health – An Approach Based on Respect to the Free Will of Individual and Reflecting the Inevitable Need for Commercialization in Modern Society...	151
III. Modes for Structuring the Commercial Transactions Facilitating Transfer of Ownership in Separated Human Body Parts.....	153
IV. Conclusion.....	157

I. INTRODUCTION

The scientific and technological developments of the end of the last century and the beginning of this century have significantly changed the way we look at the body. The human body, which had always been thought of as a source of profit associated with the use of labor,¹ has now also become valuable as a source of biomaterials² that can be used in a wide range of commercial activities related to medicine, cosmetology, pharmacology and other large and important areas of business. Judgments that previously sounded like jokes, and which might have appeared exclusively in works of fiction, such as Shakespeare's famous "pound of flesh" demanded by Shylock the usurer in *The Merchant of Venice*,³ are now quite meaningful and serious, reflecting the real situation of human body parts in modern developed countries, which have learned to derive unimaginable profits from things that seemed useless in the past.⁴ This transformation of separated body parts into a subject of

¹ See WILLIAM OLDNALL RUSSELL, *RUSSELL ON CRIME* 625 (J.W. Cecil Turner ed., 12th ed. 1964) (1890) (describing the criteria for the crime of "maim," in the meeting of which a person was held criminally liable for committing self-harm); 1 HAWKINS' *PLEAS OF THE CROWN* 107 (8th ed. Sweet 1824); JAMES F. STEPHEN, *DIGEST OF THE CRIMINAL LAW* 145-46 (Macmillan, 1887) (describing how in the past, the state, being deeply interested in individuals and their bodies as a physical and intellectual resource, established liability for self-harm committed by a person).

² RUSSELL SCOTT, *THE BODY AS PROPERTY* 3 (Viking Press 1981); see also Gilda Ferrando, *Diritto e Scienze della Vita. Cellule e Tessuti nelle Recenti Direttive Europee [Law and Life Sciences. Cells and Tissues in the Recent European Directives]*, in *OSSERVATORIO SULL'EUROPA: FAMILIA* 1157, 1162 (2005) (It.) (highlighting that, from the perspective of the natural sciences, a human body is merely a collection of individual parts, each of which can be useful in the production of medical drugs).

³ WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 1, sc. 3, ll. 165-68.

⁴ Andrew Grubb, *The Nuffield Council Report on Human Tissue*, 3 *MED. L. REV.* 235, 235 (1995) (noting the potential for great financial gain from the use of separated body parts); see Emily Davies, *70 years ago, Henrietta Lacks's cells were taken without consent. Now, her family wants justice*, *WASH. POST* (Oct. 4, 2021), https://www.washingtonpost.com/local/legal-issues/henrietta-lacks-family-sues-company/2021/10/04/810ffa6c-2531-11ec-8831-a31e7b3de188_story.html (outlining the claims of a multi-billion dollar dispute which is currently pending in United States' federal courts regarding Henrietta Lacks' cells and the central issue of commercialization of biomaterials separated from the body, which she did not consent to); see also *Henrietta Lacks' estate sued a company saying it used her 'stolen' cells for research*, *NPR* (Oct. 2, 2021) <https://www.npr.org/2021/10/04/1043219867/henrietta-lacks-estate-sued-stolen-cells> (citing the family's attorney, Ben Crump, who sets forth the basis for the claim of Henrietta's descendants).

commerce and civil circulation, called the commercialization of human body parts,⁵ has been the subject of numerous fierce debates in which many scholars and researchers have tried to find answers to the most insidious questions that modernity poses about the human body.⁶ This article demonstrates how law should relate to the commercialization of human body parts.

II. BARRIERS TO RECOGNITION OF A COMMERCIAL MARKET FOR SEPARATED HUMAN BODY PARTS: DEBUNKING MISCONCEPTIONS

Two of the most beloved arguments used in debates about the legalization of trade in separated human body parts are frequently reduced to either the undermining of dignity through commercialization or the stigmatization of commercialization as an immoral practice.⁷ Here, we discuss each of these underpinnings and then address the most pertinent arguments against commercialization and, after establishing their fragile points, propose an instrumental approach that can guarantee human dignity and the autonomy of an individual's will.

A. *The First Barrier - Sale of Separated Human Body Parts as an Infringement on Human's Dignity*

1. A Dexterous Substitution of Concepts: How the Indistinction Between the Persona and the Human Body Serves to Validate the Impossibility of Selling the

⁵ See Carlo Petrini, *Ethical and legal considerations regarding the ownership and commercial use of human biological materials and their derivatives*, 3 J. BLOOD MED. 87, 90 (Sept. 7, 2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3440234/pdf/jbm-3-087.pdf> (defining "commercialization" as the creation of market structures and exchange mechanisms for goods); see Lesley A. Sharp, *The Commodification of the Body and Its Parts*, 29 ANN. REV. ANTHROPOLOGY 287, 306 (2000) (defining commodification as the process of turning biomaterials into goods).

⁶ See, e.g., Davies, *supra* note 4 (exploring modern commercialization of human body parts through Henrietta Lacks' cells being used for commercialization of biomaterials, which she did not consent to).

⁷ R.R. Kishore, *Human organs, scarcities, and sale: morality revisited*, 31 J. MED. ETHICS 362, 362 (2005).

Separated Body Parts

The prevailing opinion, to put it mildly, is unenthusiastic about the idea of non-gratuitous contracts on human body parts.⁸ In the sale of human biomaterials, many manage to see an unacceptable instrumentalization of the human body, which implies a violation of the Kantian attitude that human beings should be seen solely as ends in and of themselves, and not as means.⁹ In this line of reasoning, zealous opponents of the commercialization of separated body parts conclude that any sale of body parts would be unethical.¹⁰ The act of selling a body part turns not only the separated part itself, but the entire human body, into the most commonplace commodity, thereby violating human dignity.¹¹ Many go so far in

⁸ Gaetano Piepoli, *Dignità e Autonomia Privata [Dignity and Private Autonomy]*, 34 POLITICA DEL DIRITTO [POL. D. DIR.] 45, 45 (March, 2003) (It.); Laura Bianchi, *Dentro o fuori il mercato? "Commodification" e dignità umana [In or out of the market? "Commodification" and human dignity]*, in RIVISTA CRITICA DEL DIRITTO PRIVAT [RIV. CRIT. DIR. PRIV.] 489, 517 (2006) (It.).

⁹ See, e.g., Ralf Sasse, *Zivil- und strafrechtliche Aspekte der Ver. . . ußerung von Organen Verstorbener und Lebender [Civil and Criminal Law Aspects of the Sale of Organs of Deceased and Living]*, in EUROP. . . ISCHE HOCHSCHULSCHRIFTEN 102 (1996) (Ger.) (arguing, from the Kantian standpoint, the immorality of trading in human body parts); see also Ralf Lutz, *Mein Körper, Ich und seine Vermarktung - Zwischen Personalit. . . t und Kommerzialit. . . t. Moraltheologische Anmerkungen zur Selbstverfügung über den eigenen Körper [My Body, Me and Its Marketing - Between Personality and Commercialization. Moral Theology Notes on Self-Disposal Over One's Own Body]*, in WEM GEHÖRT DER MENSCHLICHE KÖRPER? 37, 50-51 (Thomas Potthast et al. eds., 2010) (Ger.) (discussing the close ties between the concept of impermissible instrumentalization and Kant's philosophy); see, e.g., IMMANUEL KANT, THE METAPHYSICS OF MORALS 255 (Mary Gregor trans., Cambridge Univ. Press 1991); NICHOLAS MASQUEFA, LA PATRIMONIALISATION DU CORPS HUMAN [THE PATRIMONIALIZATION OF THE HUMAN BODY], 169 (June 28, 2019) (Fr.) (Ph.D. Dissertation, Université d'Avignon) (on file with Université d'Avignon).

¹⁰ See FRIEDRICH BREYER ET AL., ORGANMANGEL. IST DER TOD AUF DER WARTELISTE UNVERMEIDBAR? [ORGAN SHORTAGE: IS DEATH ON THE WAITLIST UNAVOIDABLE?] 180-82 (2006) (Ger.) (reporting that this view is so widespread that it was reflected in many acts of international organizations).

¹¹ Thomas Hamerl, *Rechtsschutz des Spenders von Blut und Knochenmark gegen bestimmungswidrigen Gebrauch [Legal Protections of Blood and Bone Marrow Donors]*, in WARE MENSCH: RECHTSPROBLEME DER MEDIZINISCHEN UND KOMMERZIELLEN VERWERTUNG VON TEILEN DES MENSCHLICHEN KÖRPERS 41, 69 (Gerhardt Plöchl ed., 1996) (Ger.); see also ROBERTO ANDORNO, LA DISTINCTION JURIDIQUE ENTRE LES PERSONNES ET LES CHOSES À L'ÉPREUVE DES PROCRÉATIONS ARTIFICIELLES [THE LEGAL DISTINCTION BETWEEN PEOPLE AND THE THINGS SUBJECT TO ARTIFICIAL PROCREATION] 78 (1996) (Fr.) (describing an equally unsubstantiated view whose proponents erroneously assert that contracting for blood transfusions and organ transplants is identical to contracting for the whole

their criticism of commercialization that they treat the sale of detached human body parts as if they were selling not only a part of the body, but also the part of the individual in the body themselves.¹²

Indeed, it would be difficult to doubt that the commercialization of human body parts is an absolute evil if it entailed the alienation of the human person themselves. In that case, the diminution of human dignity would be as clear and obvious to any observer without exception as the sun in a cloudless sky. However, such thoughts seem to us to be a blatant exaggeration: the sale of separated body parts, their transformation into a commodity does not at all make the human being themselves a commodity.¹³ By and large, to argue otherwise would be to unacceptably equate human beings with their separate parts, and it is precisely in this equation that the overt violation of human dignity by Kant's humanist followers appears, for they see human beings not as persons enclosed and residing in bodies, but merely as sets of material biological parts, some of which are separated from the body, while others are not yet separated.¹⁴ For the sake of comprehensiveness, the human dignity, as stressed in Universal Declaration on the Human Genome and Human Rights,¹⁵ "makes it imperative not to reduce individuals to their genetic [and biological] characteristics." This means that a reductionist approach, blindly pursued by a motley of alleged dignitarians, contradicts the very notion of human dignity which is primarily based on the holistic approach not equating human personality with the outer material sheath, called body.¹⁶ If the opponents of commercialization had not followed the absurd logic we condemn, they would never have transferred the status of

human body; Andrée Jack, *Les conventions relatives à la personne physique* [*The conventions relating to the physical person*], 53 REVUE CRITIQUE DE LégISLATION ET DE JURISPRUDENCE 362 (1933) (Fr.).

¹² Danielle M. Wagner, *Property Rights in the Human Body: The Commercialization of Organ Transplantation and Biotechnology*, DUQ. L. REV. 931, 933-4 (1995).

¹³ *Id.* at 945 (distinguishing the commodification of separated human body parts and the human being itself and noting that the sale of individual's body parts does not impose the yoke of slavery on a person, and is therefore legal).

¹⁴ See generally Stephen R. Munzer, *Kant and Property Rights in Body Parts*, 6 CAN. J. JURIS. 319, 325 (July, 1993) (emphasizing Kant's viewpoint that one should be considered whole if they separate biological material from one's body).

¹⁵ G.A. Res. 53/152, art. 2(b) (Dec. 9, 1998).

¹⁶ See *id.* (explaining that a human being's worth is determined by more than their biological makeup).

the detached part of the body to that of the person themselves and thus would not have found the act of selling the detached part of the body to be a derogation of human dignity.¹⁷

In essence, it can be safely said that the very definition of dignity already implies that it refers to a person and not to the human body.¹⁸ Although “appeals to human dignity [. . .] are comprehensively vague,”¹⁹ and dignity itself, as Mohammed Bedjaoui succinctly notes, became a basis for “some [to] refute the legitimacy of euthanasia whilst others claim it as the ultimate right of those who wish to ‘die in dignity’.”²⁰ Some authors propose a definition of dignity, albeit imprecise and fragile, from which conclusions can be drawn.²¹ Thus, the Ancient Romans, speaking of *dignitas*, had in mind “the prestige of statesmen and officeholders who have served the *res publica*.”²² At the same time, given the modern triumph of democratic values, dignity is not limited to nobles and “conveys the idea that all human persons belong to the same rank and . . . th[e] rank is very high.”²³ Although these characteristics lack descriptive value, they clearly demonstrate that dignity is vested in *persona*, not human body.²⁴ Other authors see the core of dignity in the intrinsic value of persons,²⁵ in the equivalence of all basic

¹⁷ Stefano Biondi, *Property on Bodily Parts, Dignity and Sovereignty: Some Comparative Reflections on the English and Italian Law of Organ Transplantations*, 54 ACTA JURIDICA HUNGARICA [ACTA JUR. HUNG.] 90, 94 (2013).

¹⁸ CBHD Research Staff, *Human Dignity: The Fundamental Concept in Bioethics*, CTR. BIOETHICS HUM. DIGNITY (Jan. 3, 2006), <https://cbhd.org/content/human-dignity-fundamental-concept-bioethics>.

¹⁹ JOHN HARRIS, *CLONES, GENES, AND IMMORTALITY: ETHICS AND GENE REVOLUTION* 31 (Oxford Univ. Press ed., 1st ed. 1998).

²⁰ Mohammed Bedjaoui, President, I.C.J., Address at the Third Session of the Int’l Bioethics Comm. of UNESCO (Sept. 1995), in U.N. Int’l Bioethics Comm. Proceedings, Apr. 1996, 137, 144.

²¹ See, e.g., *id.* (explaining how men and women have different understandings of the term “dignity” because the concept of the term is fragile in nature).

²² Jürgen Habermas, *The Concept of Human Dignity and the Realistic Utopia of Human Rights*, 41 METAPHILOSOPHY 464, 473 (July 2010).

²³ Jeremy Waldron, *Dignity and Rank*, 48 EUR. J. SOCIO. 201, 201 (2007).

²⁴ See *id.*; see Habermas, *supra* note 22 (basing the proposed conclusion on the criteria cited in these two sources).

²⁵ See Deryck Beyleveld & Roger Brownsword, *Human Dignity, Human Rights, and Human Genetics*, 61 MOD. L. REV. 661, 665 (Sept. 1998) (building the link between the effects of human rights violations on one’s dignity and the intrinsic value of that person).

rights of people,²⁶ or in person's social participation.²⁷ These definitions diverge in the sense of dignity, but not in who it belongs to. It is readily apparent that in the philosophical and legal paradigm outlined, there is no room for a view of dignity as an immutable attribute of human flesh, that is, of the body. Culminating here is the judgment of Kant, who specified that "dignity (personality) consists" in that human being "raises himself above all other beings in the world that are not men. . ." ²⁸ He explicitly equated personhood with dignity, eliminating the need to debate who is the true bearer of dignity—the person or their body (yet, as can be seen above, many dignitarians try to arrive at the exact opposite conclusion).²⁹

Putting aside pointless speculation about what constitutes human dignity, we may observe that the expanded conception of human dignity preached with apostolic confidence by opponents of commercialization entails a devaluation of the concept of human dignity.³⁰ This is reflected in the fact that the prohibition on the sale of separated body parts is motivated by the intrinsic human dignity in separated body parts,³¹ which implies that dignity is determined by some pre-ordained biological criteria (and very possibly even genetic criteria), the satisfaction of which entails the recognition of material as endowed with dignity regardless of whether or not it contains a human person.³² Thus, the rejection of the commercialization of the detached parts of the human body in connection with the violation of human dignity means that a fundamental

²⁶ See Georg Lohmann, *Die Menschenrechte: Unteilbar und gleichgewichtig?* [*Human Rights: Indivisible and Equal?*], in *STUDIEN ZU GRUND- UND MENSCHEN RECHTEN* 11 (Menschenrechtszentrum der Universität Potsdam ed., 2005).

²⁷ See *id.* (describing the role human dignity plays in a person's political, social, and societal interests).

²⁸ IMMANUEL KANT, *supra* note 9, at 255.

²⁹ *Id.*

³⁰ See generally Julia Müller & Christian Neuh. . .user, *Relative Poverty On a Social Dimension of Dignity*, in *HUMILIATION, DEGRADATION, DEHUMANIZATION: HUMAN DIGNITY VIOLATED* 159, 170 (Paulus Kaufmann et al. eds., Springer 2011) (explaining an objection to the notion that relative poverty "undermines the self-respect of those who are poor" and if public life were de-commercialized there would be no improvement in human dignity).

³¹ See Kishore, *supra* note 7, at 364 (questioning whether the prohibition on sale of body parts is consistent with the morals of human dignity).

³² See Petrini, *supra* note 5 (discussing the notion that material itself can hold dignity regardless of if it contains a human person).

substitution of concepts is being made: the long-known and generally accepted dignity of the human *being* is being sought by misguided theorists to be replaced by the far-fetched, absurd dignity of the human *body*.³³

2. The Two-Faced Janus: Some Parts of the Human Body Are Blessed With Dignity, While Others Are Not

The substitution of notions of the dignity of the human being and the dignity of the body is not the only argument of the dignitaries that deserves reprimand. Another blunder is the inherent inconsistency and contradiction of the theoretical constructs. It would seem that from the point of view of the inveterate advocates of the theory of the non-commercialization of the human body, once it has been established that a certain object of the material world possesses the qualities of the human body, the only logical consequence is the prohibition of trade in it since otherwise, it would sanction nothing less than a downright attack on the proverbial category of human dignity.³⁴ At the same time, there is a widespread perception that, from both the perspective of law and imposed morality, trade in fingernails,³⁵ hair,³⁶ blood³⁷ and even

³³ See Convention on Human Rights and Biomedicine, *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine*, pmbl., ETS No. 164 (Apr. 4, 1997) [hereinafter Convention on Human Rights and Biomedicine] (highlighting the concepts of dignity in the human being and dignity of the human body in connection to the rejection of commercialization of detached parts of the human body).

³⁴ See generally Roberto Adorno, *Vulnerability and the Sale of Human Organs: A global challenge*, 1 JURA GENTIUM 30, 38 (2020) (claiming that the unity of the functional components of the whole body grants inherent dignity to the individual).

³⁵ See generally Charles A. Erin & John Harris, *An ethical market in human organs*, 29 J. MED. ETHICS 137, 137 (2003) (establishing that the trade in human organs and material is “permissible in countries where trade in biomaterials is generally prohibited”).

³⁶ See *Govt imposes curbs on export of human hair*, ECON. TIMES, (Jan. 25, 2022, 4:04 PM), <https://economictimes.indiatimes.com/news/economy/foreign-trade/govt-imposes-curbs-on-export-of-human-hair/articleshow/89115846.cms> (reporting that the Indian Commerce Ministry has classified the legal exportation of human hair as a newly restricted category of commerce).

³⁷ See *France Exports of human or animal blood, antisera and other blood fractions, vaccines, toxins, to China*, TRADING ECONS., <https://tradingeconomics.com/france/exports/china/human-blood-animal-blood-antisera-vaccines> (last visited Dec. 4, 2022) (illustrating France’s export of human blood and other bodily

reproductive cells³⁸ (which, when fused together produce human life) is permissible in countries where trade in biomaterials is generally prohibited.³⁹ Allowing these biomaterials to be traded is based not only on the fact that many of them have been commodities since time immemorial,⁴⁰ but also on the unusual idea that biomaterials must pass the threshold necessary for them to be covered by trade prohibition.⁴¹

liquids earned the country \$519M in 2022); *see also* BLOOD SAFETY AND AVAILABILITY, WORLD HEALTH ORG., (May 26, 2022) (presenting data on fifty-four countries, including eight high income countries, in which more than 50% of their blood supply is derived from paid individuals); *but see* Cour de cassation [Cass.] [Third Chamber], Case C-237/09, DE FRUYTIER, 2010 E.C.R. I-4997 (discussing the prohibition on trading human organs, milk, and blood in Belgium).

³⁸ *See generally* KATRIN VERFASER AUT SCHWARZBURG, DIE MENSCHENWÜRDE IM RECHT DER EUROP. . . I.SCHEN UNION [HUMAN DIGNITY IN EUROPEAN UNION LAW] 184-85 (Baden-Baden Nomos eds., 2012) (Ger.) (explaining that the prohibition does not apply to “so-called” discarded tissue such as hair or fingernails since their sale does not constitute a violation of human dignity)

³⁹ *See, e.g.*, DE FRUYTIER, 2010 E.C.R. I-4997 (explaining how trading in human organs and samples is prohibited under Belgian law and, therefore, cannot be labeled a “supply of goods”).

⁴⁰ *See* XAVIER LABBÉE, LA CONDITION JURIDIQUE DU CORPS HUMAIN: AVANT LA NAISSANCE ET APRÈS LA MORT [LEGAL STATUS OF THE HUMAN BODY: BEFORE BIRTH AND AFTER DEATH] 341 (Presses Universitaires De Lille 2012) (Fr.) (reporting the longstanding practice of selling blood, hair and nails in France).

⁴¹ *See* SARA KRANZ, BIOMEDIZINRECHT IN DER EU [BIOMEDICAL LAW IN THE EU] 183 (Verlag Dr. Kovac ed., 2008) (Ger.) (explaining that organs are treated as “special” thus resulting in restrictive interpretations of prohibition); *see, e.g.*, Jochen Taupitz, *Verkauf von Restblut an die Medizinprodukteindustrie: nur mit Einwilligung des Patienten?* [Sale of Residual Blood to the Medical Device Industry: Only with the Patient’s Consent?] 35 MEDR 353, 357 (2017) (explaining that such a threshold is not crossed by nails or hair); *see also* ROLF MÜLLER, DIE KOMMERZIELLE NUTZUNG MENSCHLICHER KÖRPERSUBSTANZEN - RECHTLICHE GRUNDLAGEN UND GRENZEN [THE COMMERCIAL USE OF HUMAN BODY SUBSTANCES - LEGAL BASIS AND LIMITS] 121 (Duncker & Humboldt eds, 1997) (Ger.) (explaining how the threshold also applies to blood); *see generally* JOACHIM MAIER, DER VERKAUF VON KÖRPERORGANEN - ZUR SITTENWIDRIGKEIT VON ÜBERTRAGUNGSVERTR. . . GEN [THE SALE OF BODY ORGANS - ON THE IMMORALITY OF TRANSFER CONTRACTS] 20 (C.F. Muller Juristischer Verlag Heidelberg eds., 1990) (Ger.) (explaining that the need for a body part to cross a certain threshold means that, in the absence of an explicit statutory provision prohibiting the circulation of any biomaterial, the general rule is that it is permissible to dispose of the biomaterial on compensation); *see also* Donato Carusi, *Atti di Disposizione del Corpo* [Acts on the Disposal of the Body], ENCICLOPEDIA GIURIDICA ITALIANA, 2 (1998) (It.) (explaining the consequences of applying a formula to the preservation of one’s body); *see also* Massimo D’Antona, *Atti di disposizione sul corpo e teoria contrattuale* [Acts of disposing of our own body and contractual theory], RASSEGNA DI DIRITTO CIVILE 241, 255 (1990) (It.) (establishing that the gathering,

Purely hypothetically, there is a wide range of biological and ethical considerations that can be utilized in articulating the criteria that constitute the prohibitive threshold. However, one of the most common and noteworthy is the criterion of a frontier tantamount to the Rubicon that is referred to as the unregenerability⁴² of traded biomaterials, which is part of the dichotomous division of human body parts that many have known since their school days.⁴³ According to this approach, if a part of the human body is regenerable, it can be alienated legally in exchange for a set price.⁴⁴ In essence,

conservation, and distribution of biomaterials cannot be subject to compensation and its prerogative of the welfare state).

⁴² See, e.g., PAUL SCH. .FER, RECHTSFRAGEN ZUR VERPFLANZUNG VON KÖRPER- UND LEICHENTEILEN [LEGAL ISSUES RELATING TO THE TRANSPLANTATION OF BODY AND CORPSE PARTS] 61 (1961) (Ger.) (determining an unregenerable body part by analyzing whether the body is capable of restoring itself through its own healing powers or artificial measures); see also Bert Heinrichs, *Pecunia (non) Olet? Bemerkungen zur Frage, ob man Eigentümer des eigenen Körpers ist und damit zugleich ein Recht zur Kommerzialisierung verbunden ist* [Remarks on Bodily Autonomy and if this Implies a Right of Commercialization], 50 ZEITSCHRIFT FÜR MEDIZINISCHE ETHIK [J. MED. ETHICS] 277, 286 (2004) (Ger.) (favoring this view from the German standpoint that one is entitled to sell regenerable body parts and any donative part of one's body); see also *Loi n° 94-654, relative au don et à l'utilisation des éléments et produits du corps humain, à l'assistance médicale à la procréation et au diagnostic prénatal* [Law 94-654 Relating to the Donation and the Utilization of Elements and Products of the Human Body, Medically assisted procreation and Prenatal Diagnosis] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] art. L. 152-3 (July 30, 1994) (Fr.); see Décret n° 2003-1206 portant organisation de la biovigilance et modifiant le code de la santé publique [Decree No. 2003-1206 organization on biovigilance and modifying the public health code], art. R.1211-49 (Dec. 12, 2003) (Fr.) (both creating an exception from the non-commercialization rule for certain regenerable human body parts); see also ANDRÉ DECOCQ, *ESSAI D'UNE THÉORIE GÉNÉRALE DES DROITS SUR LA PERSONNE* [ESSAY ON A GENERAL THEORY OF PERSONAL RIGHTS] 31 (1960) (Fr.) (advocating the ethicality of the sale of human milk in view that such practice is intended for separation); see generally HUGO RICCI, *LE STATUT DU CORPS HUMAIN* [THE STATUS OF THE HUMAN BODY], 18 (2019) (Fr.) (describing the exceptions in French law based on regenerability rule); see Anne-Michèle de Cooman van Kan, *L'Insémination Artificielle, Recommandation du Conseil de l'Europe et Perspective de Réglementation Belge* [Artificial Insemination, Recommendations of the European Council and the Belgian Regulatory Perspective], 1981 JOURNAL DES TRIBUNAUX [Ct. J.] 370, 377 (Belg.) (expanding on the lack of criteria for divisible parts of the human body compared to unregenerable features).

⁴³ See SCH. .FER, *supra* note 42 (explaining the way to determine whether a body part is a dichotomous division of the human body).

⁴⁴ See Kristy Lynn Williams et al., *Just Say No to NOTA: Why the Prohibition of Compensation for Human Transplant Organs in NOTA Should Be Repealed and a Regulated Market for Cadaver Organs Instituted*, 40 SU AM. J. L. MED. 275, 293, 315 (2014) (describing the differences in regulatory treatment regarding compensation for different body parts, and the need to set standard prices).

however, the criterion of the regenerability of a severed body part is a particular case of a broader division, which draws a line on the permissibility of selling body parts depending on whether the separation of the sold body parts is capable of causing serious harm to a person's health.⁴⁵ The serious harm criterion appears to have been long-recognized, since it served as basis for a famous first-half-of-twenty-century decision of the Italian Supreme Court allowing the sales of man's testicles.⁴⁶ This argument is in unison with another popular assertion, which holds that the sale of human body parts is permissible if it does not violate a person's identity.⁴⁷ In this case, the criterion of identity is the functional unity of the organs, the absence of which would entail a disruption of the normal and routine order of human biological life.⁴⁸

The desire to undermine structural unity and to generate a heterogeneous perception of the parts of a single whole, the human body, reveals once again the internal impotence of ethical considerations that attempt to prohibit the human body parts market, but simultaneously make concessions that are incompatible with the very basis of these considerations.⁴⁹ The criterion of regenerability cannot metaphysically justify the heterogeneity of the holistically

⁴⁵ RAPHAËL DIERKENS, *LES DROITS SUR LE CORPS ET LE CADAVRE DE L'HOMME* [THE LAW OF HUMAN BODIES AND CADAVERS] § 77 (Masson & Cie eds., 1966) (Fr.); Marie-Thérèse Meulders-Klein, *The Right Over One's Own Body: Its Scope and Limits in Comparative Law*, 6 B.C. INT'L & COMPAR. L. REV. 29, 47 (1983).

⁴⁶ See Mariangela Claudia Calciano, *Le mutilazioni genitali femminili nell'ordinamento giuridico italiano. Una forma di tutela della infanzia e le indicazioni del Comitato Bioetico* (Female Genital Mutilations in the Italian Legal System. Protecting Infancy and the Recommendation of the Bioethical Committee), DIRITTO.IT (Oct. 31, 2012), <https://www.diritto.it/le-mutilazioni-genitali-femminili-nell-ordinamento-giuridico-italiano-una-forma-di-tutela-della-infanzia-e-le-indicazioni-del-comitato-bioetico/> (It.) (describing the Supreme Court of Italy's holding that the absence of serious injury to health is one of the criteria for the legality of alienation of a body part).

⁴⁷ Ruwen Ogien, *Qui a peur des marchés d'organes?* [Who's afraid of organ markets?], 751 CRITIQUE 1027, 1031 (2009) (Fr.) (asserting that if organ separation does not violate the identity of the individual and with their consent, then the right of ownership in organs can raise neither moral, political, nor legal issues).

⁴⁸ See *id.* (showing how even if the replacement of body parts doesn't alter one's identity, society still wouldn't be free of the problems posed by the sale of body parts).

⁴⁹ See *id.* (showing how the author's view differs when stating that so long as the replacement of body parts doesn't alter one's identity & personal responsibility, then there should not be any moral, legal, or political issues, but then concedes that society still would not be free of the problems posed by the sale of body parts).

unified human body,⁵⁰ but rather demonstrates that the arguments of the dignitarians here are pragmatic rather than ontological.

In a vain effort to rehabilitate their own views and make them more coherent and logical, various authors insist that all parts of the human body have dignity, but that it is violated only when the separation of a body part results in physiological suffering.⁵¹ However, this argument may appear convincing only in the eyes of the medieval layperson. Currently, anesthetic technology has reached its zenith.⁵² ny surgery, including extremely invasive ones, can be performed without a single sensation of pain for the patient.⁵³ As recent research testifies the likelihood of causing appreciable pain tends toward zero, for the patient's receiving receptors are turned off, and⁵⁴ the neurons aimed at suppressing pain are turned on.⁵⁵ Consequently, if the crux of the dignity argument lie only in the physical suffering caused by the separation of a human body part, then the scientific progress in the domain of modern medical technology, which blurs the receptor-pain boundaries between the separation of a human organ and, say, their hair, nullifies the entire dogma of human dignity as an obstacle in the commercialization of human body parts.⁵⁶ If this theory is elevated to an absolute, then

⁵⁰ See, e.g., MICHEL HENRY, *PHILOSOPHY AND PHENOMENOLOGY OF THE BODY* 123-24 (Girard Etzkorn ed., 1975) (arguing that all human body parts form "but one and the same organic body" being in the "ensemble" or "unity").

⁵¹ *Id.* (explaining that the body must be understood as a whole).

⁵² See generally Tony Wildsmith, *The History of Anaesthesia*, ROYAL COLL. ANESTHETICS, <https://rcoa.ac.uk/about-college/heritage/history-anaesthesia> (last visited Dec. 4, 2022) (describing the major developments in anesthesia up to now).

⁵³ See *General Anesthesia*, NAT'L HEALTH SERV., <https://www.nhs.uk/conditions/general-anaesthesia/> (last visited Dec. 4, 2022) (reporting that general anesthesia makes people feel no pain and is therefore used in the most painful operations).

⁵⁴ See Han-Ying Wang et al., *Frequency-Dependent Block of Excitatory Neurotransmission by Isoflurane via Dual Presynaptic Mechanisms*, 40 J. NEUROSCIENCE 4103, 4103 (2020) (explaining the mechanism of neurotransmitter release inhibition thought the use of anesthetics).

⁵⁵ Sabbi Lall, *How General Anesthesia Reduces Pain*, MIT MCGOVERN INST. (Aug. 31, 2020), <https://mcgovern.mit.edu/2020/08/31/how-general-anesthesia-reduces-pain/#:~:text=General%20anesthesia%20is%20medication%20that,of%20consciousness%20has%20been%20unclear> (questioning the old and widespread view that pain suppression effect of anesthesia is due to making patients unconscious, and proposing the existence of neurons responsible for managing pain).

⁵⁶ See Adam Omelianchuk, *What Makes Killing for Organs Wrong? A Philosophical Defense of the 'Dead Donor' Rule* (Dec. 3, 2018) (Ph.D dissertation, University of South Carolina) (on file with Scholar Commons, University of South Carolina)

the separation of even vital organs, which would ethically seem to mean murder would be understood as entirely legitimate insofar as it would not lead to physiological suffering.⁵⁷

3. The Purpose of Alienating the Separated Parts of the Human Body as a Criterion for Legitimacy: Another Dogmatic Manipulation of the Dignitarians

The general prohibition on trade in human body parts is circumvented by dignitaries not only by classifying human body parts as regenerable and non-regenerable.⁵⁸ Another subterfuge to circumvent the general rule is employing the purpose of alienating organs and other biomaterials.⁵⁹ Thus, in Germany, the Transplantation Act (TPG) prohibits trade in organs only in the case of the therapeutic use (*Heilbehandlung*) of human organs.⁶⁰ Therapeutic use refers to all types of influences and interventions that, according to medical experience and knowledge, are undertaken in order to prevent, recognize, cure, relieve disease, ailment, bodily injury, physical damage or mental disorder.⁶¹ Placing the prohibition of commerce on the basis of the purpose of the biomaterial being transferred leads to curious consequences. For example, the trade prohibition does not apply to trade in male reproductive cells if they are used simply to become pregnant.⁶² At the same time, if the cells are used not just to get pregnant, but to cure a woman's reproductive disease through a special method of fertilization, they are covered by the trade prohibition, since the treatment of

(presenting that a physician's refusal to perform a medical procedure cannot simply be supported by a belief in human dignity).

⁵⁷ See *id.* at 113 (explaining that a subjective definition of dignity supports the separation of body parts if there is no physical suffering).

⁵⁸ Alexandra George, *Marketing Humanity Should We Allow The Sale Of Human Body Parts?*, 7 UNIV. TECH. SYDNEY L. REV. 2 (2005).

⁵⁹ *Id.*

⁶⁰ See Bundesministerium der Justiz [BMJ] [Federal Ministry of Justice], May 11, 1997, §17, art. 15d (Ger.), https://www-gesetze-im-internet-de.translate.googleusercontent.com/tpg/_17.html?_x_tr_sl=de&_x_tr_tl=en&_x_tr_hl=en&_x_tr_pto=sc (establishing the prohibition of the trade of human organs).

⁶¹ Bundesfinanzhof [BFH] [Federal Fiscal Court], May 18, 1999, Bundessteuerblatt Teil II [BStBl II] 761 (Ger.).

⁶² See Lisa Hird Chung, *Free Trade in Human Reproductive Cells: A Solution to Procreative Tourism and the Unregulated Internet*, 15 MINN. J. INT'L. L. 263, 266-67 (2006) (discussing the globalization of human sperm trade for reproductive purposes).

reproductive disease is considered a therapeutic use.⁶³ In the same fashion, the prohibition of trade in organs also does not apply to trade for cosmetic purposes,⁶⁴ since this does not fall under therapeutic use, and on the use of organs for research purposes.⁶⁵

Moreover, with regard to use for research purposes, some authors have argued vehemently that a fee should be provided to the organ donor,⁶⁶ beyond reasonable⁶⁷ compensation for the time spent in the act of donation.⁶⁸ This conclusion is explained by the scarcity of certain organs and biomaterials, such as ova, which are limited in number and the withdrawal procedure of which is traumatic and fraught with a high risk of donor contamination.⁶⁹ It is well-known that the law, when it authorizes one kind of behavior

⁶³ See Bundesverwaltungsgericht [Federal Administrative Court] Nov. 27, 2003, BVERWG 2 C 38.02, <https://www.bverwg.de/271103U2C38.02.0> (classifying in vitro fertilization as a form of therapy for reproductive diseases).

⁶⁴ Karsten Scholz & Claus Dieter Middle in: SPICKHOFF MEDIZINRECHT, 3rd ed. 2018, TPG § 17 recital 3 (Ger).

⁶⁵ Hans Ekkehard Roidis-Schnorrenberg, *The ban on the commercialization of human body and its parts* (Aug. 2016) (Ph.D. dissertation, University of Mannheim) (on file with the University of Mannheim) [hereinafter *Ban on Commercialization*]; HANS EKKEHARD ROIDIS-SCHNORRENBERG, WEM GEHÖRT DER MENSCHLICHE KÖRPER? [WHO OWNS THE HUMAN BODY?], 223, 233 (Thomas Potthast et al. eds., 2010).

⁶⁶ Russell Korobkin, *Buying and Selling Human Tissues for Stem Cell Research*, 49 ARIZ. L. REV. 45, 47 (2007); Natalie Ram, *Assigning Rights and Protecting Interests: Constructing Ethical and Efficient Legal Rights in Human Tissue Research*, 23 HARV. J. L. & TECH. 119, 133 (2009).

⁶⁷ See Aparna R. Dalal, *Philosophy of organ donation: Review of ethical facets*, 5 WORLD J. TRANSPLANTATION 44, 48 (2015) (suggesting possible compensation that could be available for organ donors, including but not limited to, tax credits, long-term healthcare, tuition, job training, employment, or payment); see also CHRISTIAN KOPETZKI, TISSUE SAFETY LAW 142, 156-57 (Christian Kopetzki ed., 2009) (defining the extent to which the compensation is permissible in Austria as an exception from general rule of non-commercialization); but cf. Giorgio Resta, *La Disponibilita dei Dirritti Fondamentali e Limiti della Dignita (note a Margine della Carta dei Diritti)* [The Availability of Fundamental Rights and the Limits of Dignity (Notes in the Margin of the Bill of Rights)], 48 REV. DIRITTO CIVILE 801, 812 (2002) (demonstrating that inasmuch as compensation is pecuniary in nature, it is also a part of the profit-making paradigm).

⁶⁸ See, e.g., Emy Kool et al., *What constitutes a reasonable compensation for non-commercial oocyte donors: An analogy with living organ donation and medical research participation*, J. MED. ETHICS 736, 736 (2019) (stating how being a donor is a serious time investment and those who are donors should be reasonably compensated for doing so).

⁶⁹ See A. Heidary Rouchi & M. Mahdavi-Mazdeh, *Regenerative Medicine in Organ and Tissue Transplantation: Shortly and Practically Achievable?*, 6 INT'L J. ORGAN TRANSPLANTATION MED. 93, 97 (2015) (differentiating in terms of immunosuppressive-free cells, recipients are highly limited due to the complications after transplant).

and renders another kind illegal, sets its policy priorities.⁷⁰ It follows that if paying for organs for scientific research is allowed but transplantation to another person on the verge of death is banned, then the law places the value of scientific breakthroughs above the value of human life.⁷¹ However, here again, the die-hard proponents of this view of dignity shoot themselves in the foot, for human life, under the basic tenet of the theory of dignity, is of supreme value.⁷² It could be useful to recall Article 2 of the Oviedo Convention establishing that “[t]he interests and welfare of the human being shall prevail over the sole interest of society or science.”⁷³

Consequently, a conclusion can be drawn that the theory of human dignity is incapable of being a guiding principle for the treatment of human organs because its foundation is fallaciously constructed, and any exceptions to the theory are so logically contradictory as to call into question the main rule itself.⁷⁴ Not to mention that the outlined view would clearly weaponize human dignity to limit a person’s own voluntary will, in effect causing thereby a cart-before-the-horse situation.

B. The Second Barrier – Immorality of Non-Gratuitous Disposal of

⁷⁰ See generally *Financial Incentives for Organ Donation*, ORGAN PROCUREMENT & TRANSPLANTATION NETWORK, [https://optn.transplant.hrsa.gov/professionals/by-topic/ethical-considerations/financial-incentives-for-organ-donation/#:~:text=Based%20on%20the%20Uniform%20Anatomical,been%20specifically%20prohibited%20\(2\)](https://optn.transplant.hrsa.gov/professionals/by-topic/ethical-considerations/financial-incentives-for-organ-donation/#:~:text=Based%20on%20the%20Uniform%20Anatomical,been%20specifically%20prohibited%20(2)) (last visited Dec. 4, 2022) (showing the policy priority of forbidding the buying and selling of human organs in the context of life-saving organ donation)

⁷¹ See Sebastian Giwa et al., *The promise of organ and tissue preservation to transform medicine*, 35 NAT. BIOTECHNOL. 530, 530-31 (2017), <https://www.nature.com/articles/nbt.3889> (discussing the organ transplant crisis and dire need for organs to save lives in contrast with the ability to secure organs for scientific research through funding).

⁷² See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS*, 23 (Mary Gregor trans., Cambridge University Press 1998) (asserting that human life is “above all price”); see also JAMES RACHELS & STUART RACHELS, *THE ELEMENTS OF MORAL PHILOSOPHY*, 137 (McGraw Hill Education, 8th ed. 2015) (discussing the Kantian paradigm of dignity).

⁷³ Convention on Human Rights and Biomedicine, *supra* note 34, art. 2.

⁷⁴ See Rachels & Rachels, *supra* note 72, at 72 (arguing that making other people the object of one’s charity degrades them).

Separated Human Body Parts

1. Gratuitous and Non-Gratuitous Disposal of Separated Human Body Parts: Illusive Ethical Distinction

Another barrier to the universal acceptance of the commercialization of severed body parts is the directly opposing⁷⁵ principle of gratuitous disposal of severed body parts, the application of which absolutely precludes receiving a consideration for biomaterials.⁷⁶ The principle of gratuitous disposal of severed body parts, although largely inspired by and closely related to the principle of human dignity,⁷⁷ is a separate objection to the commercialization of body parts by those who firmly believe that the altruistic

⁷⁵ See, e.g., Cosimo Marco Mazzoni, *Etica del dono e donazioni di organi* [Gift ethics and organ donations], in *TEORIA GENERALE E STORIA DEL DIRITTO* 563-65 (Cosimo Marco Mazzoni ed., 1998) (It.) (defining two ideologically opposed recognized systems of organ transfers: the market system based on commercial reciprocity and the solidarity system or donation system based on altruism and non-market relations).

⁷⁶ See Giorgio Resta, *La Disposizione del Corpo. Regole di appartenenza e di circolazione* [The Disposition of the Body. Membership and Circulation Rules], in *TRATTATO DI BIODIRITTO IL GOVERNO DEL CORPO* 805, 818 (Stefano Rodotà & Paolo Zatti eds., Guiffre 2011) (It.) (stating that severed body parts from post-operative procedures deemed as bio-hazardous waste deny an individual the right to own and profit from their severed body part(s), thereby undermining the universal acceptance of the commercialization of body parts).

⁷⁷ See Bernard M. Dickens, *Morals and Legal Markets in Transplantable Organs*, 2 *HEALTH L. J.* 121, 130 (1994) (suggesting that some scholars aver that reciprocal alienation of severed body parts is unacceptable and violates human dignity, because it attempts to put a price on invaluable categories); see Cynthia B. Cohen, *Selling Bits and Pieces of Humans to Make Babies: The Gift of the Magi Revisited*, 24 *J. MED. PHIL.* 288, 288 (1999) (describing the sale of human organs is incompatible with human dignity); see Barbara von Tigerstrom, *Human Tissue Legislation and a New Medical Paradigm: Governing Tissue Engineering in Canada*, 8 *MCGILL J.L. & HEALTH* 1, 32 (2015) (grouping the various moral, ethical, and policy considerations into three categories and recognizing the third category as teleological/Kantian arguments which avers that the commodification of human biological material undermines human dignity “ . . . and attempt[s] to place a commercial value on priceless aspects of humanity”); see Gilles Létourneau et al., *Procurement and transfer of human tissues and organs*, 59 (Law Reform Comm’n of Can., Working Paper 66, 1992) (discussing the moral philosophy of Kant); but see, e.g., Friedrich-Christian Schröder, *Gegen die Spendenlösung bei der Organgabe* [Against the Donation Solution for Organ Donation], 30 *ZEITSCHRIFT FÜR RECHTSPOLITIK [ZRP]* 265, 267 (1997) (Ger.) (criticizing the prohibition of organ donations); see also Thomas Gutmann, *Probleme einer gesetzlichen Regelung der Lebendspende von Organen* [Problems of a Legal Regulation on Live Organ Donation], *MEDR* 147, 154 (1997) (Ger.) (critiquing legislation which bans the commercialization of human organs).

(solidarity) model of providing human biomaterials is the only correct one.⁷⁸ Alongside the admittedly flawed altruistic critique of commercialization, which reflects only the subjective preferences of certain theorists, there are objective arguments aimed at proving the reproachfulness of reciprocal acts of disposal of biomaterials.⁷⁹ The subject of the most persuasive criticism is mainly the effect of consideration on the will of the person alienating their body parts.⁸⁰

For example, the German Constitutional Court noted that a decision as far-reaching as organ donation would not be consistent with a person's dignity and right to self-determination if it was not made of free will, but under the influence of financial factors.⁸¹ Consequently, according to the court, any consideration for biomaterials calls into question the voluntariness of a person's decision regarding their body parts, since financial incentives, not free choice, predetermine a person's propensity to dispose of their own body parts.⁸² This conclusion, according to the logic of opponents of commercialization, acquires even greater force if it is scaled and extrapolated to entire social groups that are considered socially

⁷⁸ See generally DAVID LAMB, ORGAN TRANSPLANTS AND ETHICS 144-45 (1996) (discussing the guidelines for organ donation under the Uniform Anatomical Gift Act in the United States and the Human Tissue Act in the United Kingdom); see also Donna M. Gitter, *Ownership of Human Tissue: A Proposal for Federal Recognition of Human Research Participants' Property Rights in their Biological Material*, 61 WASH. & LEE L. REV. 257, 262 (2004) (tracing the evolution of property rights in human tissue); see Frédérique Granet-Lambrechts, *Les dons d'organes, de tissus, de cellules et de produits du corps humain: de la loi Caillavet aux lois de bioéthique* [Donation of Organs, Tissues, Cells and Products of the Human Body: from the Caillavet Law to the Laws of Bioethics], 1 REVUE DE DROIT SANITAIRE ET SOCIAL [RDSS] 1, 3-4, 19 (1995) (Fr.) (describing that the French legislature has tried to balance the interests of scientific research with the respect for dignity of the human body).

⁷⁹ See e.g., Larry Torcello & Stephen Wear, *The Commercialization of Human Body Parts: A Reappraisal from a Protestant Perspective*, 6 CHRISTIAN BIOETHICS 153 (Jan. 2000) (describing how it is also possible to affirm the appropriateness of the sale of human organs from a religious perspective).

⁸⁰ See Courtney S. Campbell, *Body, Self, and the Property Paradigm*, 22 HASTINGS CTR. 34, 41 (1992) (explaining that the concept of self-ownership permits a person to alienate their own body parts).

⁸¹ See Bundesverwaltungsgericht [Federal Administrative Court] Aug. 11, 1999, BVERWG 1 BvR 2181/98, <https://lexetius.com/1999> (reasoning that the interest between human dignity and organ donation conflicts with respect to the average conscience).

⁸² See *id.* (explaining that the decision to donate should be independent from financial or other external considerations).

insecure or vulnerable.⁸³ In this direction, theorists of the inadmissibility of the commercialization of body parts skillfully manipulate the facts, asserting that without a ban on commercialization, there will be total exploitation of the poor, who will be forced to sell themselves piecemeal to get the money they need to survive.⁸⁴ In other words, allowing the commercialization of body parts becomes tantamount to legalizing crime, and prohibiting commercialization becomes tantamount to freeing the poor from the yoke of the exploiters.⁸⁵ While there is a grain of sense in these considerations, it is difficult to accept them in their entirety.

We are convinced that it is wrong to see the commercialization of body parts as immoral. If the donation of organs does not constitute immoral behavior, then the mere provision of payment for the same action will not necessarily transform it into immoral behavior.⁸⁶ This reasoning cannot help but inspire the thought that in the very permissibility of organ donation - which, characteristically, is present in one form or another in a plethora of states⁸⁷ - lies

⁸³ See generally *id.* (explaining that complainants argue that the removal of an organ does not endanger legal interests but rather constitutes socially useful behavior)

⁸⁴ See Volnei Garrafa, *Usi e Abusi del Corpo Umano [Uses and Abuses of the Human Body]*, in *QUESTIONI DI BIOETICA* 102 (Stefano Rodotà ed., 1993) (It.) (emphasizing the avoidance of total exploitation of the pool by placing bans on commercialization of body parts to limit selling themselves for financial survival); see Giovanni Berlinguer, *Il Corpo Come Merce o Come Valore [The Body as a Commodity or as a Value]*, in *QUESTIONI DI BIOETICA* 79 (Stefano Rodotà ed., 1993) (It.) (displaying the widespread belief that no one should be induced to sell parts of their body in order to survive); see also World Health Organization, WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation, WHO/HTP/EHT/CPR/2010.01(2010) [hereinafter WHO], <https://apps.who.int/iris/bitstream/handle/10665/341814/WHO-HTP-EHT-CPR-2010.01-eng.pdf?sequence=1#:~:text=Guiding%20Principle%205,deceased%20persons%2C%20should%20be%20banned> (emphasizing the unfairness behind the payment of cells, tissues, and organs by expressing the lack of dignity and treatment as an object of these individuals).

⁸⁵ See WHO, *supra* note 84 (suggesting that the poor are most vulnerable and likely to receive payment for cells, tissues, and organs).

⁸⁶ See generally Ernst Benda, *Erprobung der Menschenwürde am Beispiel der Humangenetik [Testing Human Dignity Using the Example of Human Genetics]*, *GENFORSCHUNG - FLUCH ODER SEGEN?, INTERDISZIPLIN...RE STELLUNGNAHMEN* 221 (Rainer Flöhl ed., 1985) (Ger.) (emphasizing the metaphysical aspect in ethical debates on morality of the commercial market in human body parts).

⁸⁷ See Blair Sadler & Alfred Sadler, *Organ Transplantation and the Uniform Anatomical Gift Act: A Fifty-Year Perspective*, 48 *HASTINGS CTR. REPORT* 14, 14 (2018) (reporting all 50 American states, as well as the District of Columbia enacting the

the idea that the act of disposing and transferring organs is itself morally neutral and has no ethical connotation. Only when the act of disposing of organs, essentially emasculated of any moral element, and therefore morally inert, receives a kind of impulse, a vector of movement from one of the directed accidental forces - the gratuitousness or non-gratuitousness - is it conceivable to speak of the morality or immorality of the act of disposing. In other words, in the case of allowing the donation of organs, it is correct to focus exclusively on the ethical or unethical nature of the sale or donation of organs, but not on the acts of disposal of organs themselves, for which the sale or donation will only be *modus operandi*.⁸⁸ The ethical neutrality of the disposal of organs gravitates stronger towards reality, since it reflects an objective view - from a bodily perspective - of the transformations occurring in the body as a result of the alienation of a part of it.⁸⁹ It is hardly possible to deny that the human body does not care whether a part has been alienated from it gratuitously or remuneratively; it is all the same to it.

Correspondingly, the decision to recognize this or that type of body disposal as immoral is clearly driven by a subjective element and personal cherry-picking, and is therefore an arena for debate of a policy-legal sort. In such a situation, it is far more correct and honest to discuss not the immorality and contradiction to *bonos mores* (good morals) of transactions with biomaterials (and their prohibition on this basis), but rather the political and legal expediency

Uniform Anatomical Gift Act providing for a gratuitous disposal of organs by donors); Working Group 1, *Report on the legislation regarding donation and transplantation of organs from living donors in eleven European Countries*, EUR. COMM'N, https://webgate.ec.europa.eu/chafea_pdb/assets/files/pdb/2006211/2006211_322.pdf (describing the living donor legislation in 11 major European countries); Strategy and Plan of Action on Donation and Equitable Access to Organ, Tissue, and Cell Transplants, 2019-2030, Rep. of the 57th Directing Council, 71st Session of the Regional Committee of WHO for the Americas (Aug. 19, 2019), <https://iris.paho.org/bitstream/handle/10665.2/51619/CD57-11-e.pdf?sequence=1%26isAllowed=y> (summarizing the general information on laws and statistics on living organ donation in Latin America).

⁸⁸ R.R. Kishore, *supra* note 7, at 362-63.

⁸⁹ See e.g., *What to Expect After Donation*, NAT'L KIDNEY FOUND, <https://www.kidney.org/transplantation/livingdonors/what-expect-after-donation> (last visited Dec. 4, 2022) (stating that after a kidney donation the body adapts and life expectancy is not altered by the donation).

of prohibiting reciprocal transactions with biomaterials.⁹⁰ If one assumes that good morals are the sense of decency that belongs to every honest and fair-minded person,⁹¹ and that the ethical and legal principles that give meaning to the concept of good morals must be immanent to the legal order, then it is hardly possible to recognize the non-gratuitous disposal of biomaterials as contrary to good morals without reservations, since the non-gratuitousness of the disposal itself does not evoke any unpleasant associations in the average person,⁹² and there are no specific legal institutions inherent to the legal system that would forbid the disposal of one's own organs through transactions.⁹³

Moreover, the assertion that uncompensated organ alienation is a manifestation of the pious phenomenon of altruism⁹⁴ also has a

⁹⁰ See R.R. Kishore, *supra* note 7, at 363 (highlighting the flaws in the legal strategies of several countries that criminalize organ sale and stating that a "person who sells his organ . . . is convinced that he is not doing anything immoral or inhuman").

⁹¹ See BENNO MUGDAN, DIE GESAMMTEN MATERIALIEN ZUM BÜRGERLICHEN GESETZBUCH FÜR DAS DEUTSCHE REICH, II [THE ENTIRE MATERIALS ON THE CIVIL CODE OR THE GERMAN EMPIRE, II] 406 (1899) (reasoning that an abuse of natural freedom occurs when a person acts in a manner that contradicts "the opinions expressed in good manners and the sense of decency of all those who think fairly and justly").

⁹² See, e.g., Richard Knox, *Should We Legalize the Market for Human Organs?*, NPR (May 21, 2008), <https://www.npr.org/2008/05/21/90632108/should-we-legalize-the-market-for-human-organs> (reporting the results on the debate of Intelligence Squared U.S. with 60% of attendee favoring the commercial market for human organs); see also Julio Elias et al., *Sacred Values? The Effect of Information on Attitudes toward Payments for Human Organs*, 105 AM. ECON. REV. 361, 363 (May 2015) (demonstrating that US citizens become more unbiased and open to the idea of organ sales when presented with information on their potential benefits).

⁹³ See Marcus Heinz, *Der Handel mit Organen aus strafrechtlicher Sicht [Trade in Organs from a Criminal Point of View]*, in WARE MENSCH: RECHTSPROBLEME DER MEDIZINISCHEN UND KOMMERZIELLEN VERWERTUNG VON TEILEN DES MENSCHLICHEN KÖRPERS 101, 113-14 (Gerhardt Plöchl ed., 1996) (describing an author's note: it seems to us that it is this lack of intrinsic immorality that accounts for the unique situation in Austria, where, contrary to the general rule that valid consent to the removal of a person's organs, which excludes criminal liability for bodily injury, must comply with the Transplantation Act, a violation of its rules on the prohibition of organ removal for consideration does not in itself render consent invalid under criminal law); but see Monique C. Gorsline & Rachelle L.K. Johnson, *The United States System of Organ Donation, the International Solution, and the Cadaveric Organ Donor Act: "And the Winner is . . ."*, 20 IOWA J. CORP. L. 5, 22 (1994) (noting criticism that presumed consent in Austria equates silence to consent and ignores instances where a decedent's clear opposition is known).

⁹⁴ Roberto Andorno, *Vulnerability and the Sale of Human Organs: A global challenge*, 17 JURA GENTIUM 30, 36 (2020) (speaking of the "laudable and even heroic act of altruism" in case of gratuitous transfer of human organs).

superficial and rather illusory merit. Reasonable skepticism, not based on ethical prejudices that impose notions of “right” and “wrong,” yields a fairly logical inference that both altruistic and reciprocal relationships are expressions of human egoism,⁹⁵ and that each person, as a rational economic actor, still acts in their own interest according to Adam Smith’s postulates.⁹⁶ Egoism is not limited to the pursuit of economic profit, but profit can also be translated into other forms.⁹⁷ A telling example is the main protagonist of Dostoevsky’s *Notes from the Underground*, who with all his being wished to show the people around him that if he acts “at his own loss,” it does not automatically mean that he acts contrary to his own interests.⁹⁸ The “altruistic” transfer of biomaterials also finds a niche in this paradigm. For example, many actors and other public figures donate not because they are guided by sublime and sacrosanct objectives, but by the primitive and vulgar belief that such acts will increase the number of their fans, admirers, advertisers, and in any other way increase their material well-being.⁹⁹

⁹⁵ THE CAMBRIDGE HISTORY OF EIGHTEENTH-CENTURY PHILOSOPHY 493 (Knud Haakonssen ed., Cambridge Univ. Press 2006); see also BERNARD MANDEVILLE, THE FABLE OF BEES OR PRIVATE VICES, PUBLIC BENEFITS 56 (1732) (arguing that “[t]here is no Merit in saving an innocent babe ready to drop into the fire: The Action is neither good nor bad, and what Benefit soever the Infant received, we only obliged ourselves; for to have seen it fall, and not strove to hinder it, would have caused a Pain, which Self-preservation compell’d us to prevent”).

⁹⁶ ADAM SMITH, THE THEORY OF MORAL SENTIMENTS AND ON THE ORIGINS OF LANGUAGES 82 (Stewart ed., 1759) (stating that “[e]very man is, no doubt, by nature, first and principally recommended to his own care”); see also Michel S. Zouboulakis, *On the social nature of rationality in Adam Smith and John Stuart Mill*, 49 CAHIERS D’ÉCONOMIE POLITIQUE 51, 52 (citing ADAM SMITH, THE THEORY OF MORAL SENTIMENTS AND ON THE ORIGINS OF LANGUAGES 82 (Stewart ed., 1759)).

⁹⁷ See John Dovidio et al., *The arousal: Cost-reward model and the process of intervention: A review of the evidence*, in PROSOCIAL BEHAV. 86 (Russel Clark ed., 1991) (discussing other possible forms of self-benefiting through altruism, including praise, honor, enhanced self-image, reciprocity credit etc.); see generally John D. Bishop, *Adam Smith’s Invisible Hand Argument*, 14 J. BUS. ETHICS 165 (1965) (introducing Adam Smith’s invisible hand argument, that pursuing profits is not only acting in self-interest, it is also morally justified because the invisible hand of the market place will ensure that such profit will result in the general good of society).

⁹⁸ See FYODOR DOSTOYEVSKY, NOTES FROM UNDERGROUND pt. VII (Constance Garnett trans., 1996) (arguing fervently that a person, from an objective standpoint, can simultaneously harm oneself, but continue to act in one’s own interests at the same time).

⁹⁹ See Pat Barclay, *The evolution of charitable behaviour and the power of reputation*, in APPLIED EVOLUTIONARY PSYCH. 159-60 (Craig Roberts ed., 2011) (naming this phenomenon “competitive altruism,” which also helps to access to desirable social partners); see also Karolina Sylwester & Gilbert Roberts, *Cooperators benefit through*

Forbes has not without reason maintained that “a charitable connection is now considered essential for a serious celebrity building a brand.”¹⁰⁰ Even “altruism,” including in the realm of organ donation, which is not motivated by any indirect material gain, remains selfish.¹⁰¹ Many persons pursuing altruistic goals, as a result of their actions, simply either get increased approval on the part of society, thereby raising their social status and satisfying their need for pride by performing a moral duty,¹⁰² or fulfill religious and moral dogmas, thereby fulfilling their aspirations for a future staying in paradise and getting other material or non-material benefits from the absolute powers.¹⁰³

2. Will the Commercial Market for Separated Human Body Parts Result in the Exploitation of Poor?

In addition to the fact that the commercialization of human body parts cannot be recognized as immoral, nor can it be recognized as entailing the exploitation of the body of the poorest segments of the population.

First, regardless of whether or not commercial circulation of organs is prohibited or permitted, it actually exists, being caused by the objectively present demand resulting from the state’s inability to meet people’s needs for necessary organs and tissues.¹⁰⁴ On

reputation-based partner choice in economic games, 6 *BIOLOGY LETTERS* 659, 662 (2010) (arguing that many altruists expect “indirect reciprocity” from potential partners to cooperate with them because of their high due-to-altruism reputation).

¹⁰⁰ Monte Burke & William P. Barrett, *Celebrity Charities: Good For Image, But What About Good Works?*, *FORBES* (June 30, 2010, 6:20 PM), <https://perma.cc/V9NS-E8JW>.

¹⁰¹ See Scott Barry Kaufman & Emanuel Jauk, *Healthy Selfishness and Pathological Altruism: Measuring Two Paradoxical Forms of Selfishness*, 11 *FRONTIERS PSYCH.* 1, 2 (May 21, 2020) (explaining the relationship between altruism and selfishness and their inherent overlap).

¹⁰² See Daniel Batson et al., *Four Forms of Prosocial Motivation: Egoism, Altruism, Collectivism, and Principlism*, in *SOC. MOTIVATION* 103, 117 (David Dunning ed., 2011) (referring to benefiting another to uphold a moral principle as principlism, one of the forms of egoism).

¹⁰³ *Id.* at 106.

¹⁰⁴ Jesse Dukeminier, Jr., *Supplying Organs for Transplantation*, 68 *MICH. L. REV.* 811, 812 (1970) (author’s note: in addition, it must be remembered that it is not the existence of a market for biomaterials that entails the exploitation of people, but the dire economic conditions in which they are forced to exist); Andrew H. Barnett et al., *Improving Organ Donation: Compensation Versus Markets*, 29 *INQUIRY* 372, 376 (1992).

the contrary, allowing commercialization by law is capable of bringing the activities of biomaterial donors into a legal framework, protecting them from abuse and misconduct.¹⁰⁵

It is instructive to compare the situation with the prohibition on the sale of organs to that of the prohibition on abortion for the sake of protecting the lives of unborn fetuses. Indeed, one of the most practically oriented and calibrated arguments against restricting the inalienable human right to obtain an abortion is that this restriction, at the very least, fails to satisfy the purpose for which it is imposed.¹⁰⁶ A person who is determined to have an abortion for any reason will have one anyway, no matter how much effort society and the state invest to the contrary.¹⁰⁷ However, as part of this illegal abortion, one would have to go to unqualified specialists, to undergo a life- and health-threatening procedure in conditions that do not meet the basic requirements of personal care, which could entail harm to and death of both the so delicately and reverently protected fetus and the suppressed and dispossessed of their natural rights person who is carrying that fetus.¹⁰⁸ The procedures used

¹⁰⁵ Michael M. Friedlaender, *The Right to Buy or Sell a Kidney: Are We Failing Our Patients?*, 359 LANCET 971, 973 (Mar. 16, 2002); *contra* Madhav Goyal et al., *Economic and Health Consequences of Selling a Kidney in India*, 288 JAMA 1589, 1589-90 (Oct. 2, 2002) (emphasizing that regulating the market of human body parts would exploit low-income people and prevent a cadaveric transplant system from being created); *see* James Taylor, *Black Markets, Transplant Kidneys and Interpersonal Coercion*, 32 J. MED. ETHICS 698, 698 (Dec. 2006) (rebutting anti-market proponents' claim that regulating the sale of organs increases coercion).

¹⁰⁶ *See, e.g.*, Bela Ganatra et al., *Global, Regional, and Subregional Classification of Abortions by Safety, 2010–14: Estimates from a Bayesian Hierarchical Model*, 390 LANCET 2372, 2379 (Sept. 27, 2017) (concluding that less restrictive laws result in safer abortions, thus saving the lives and health of more women); *see also* Stephan Ratnam & Kuldip Singh, *The Influence of Abortion Legislation on Maternal Mortality*, 63 INT'L J. GYNECOLOGY & OBSTETRICS S123, S126 (1998) (explaining that data "indicates the tremendous drop in maternal mortality rates resulting from liberalization of abortion legislation"); Gilla K. Shapiro, *Abortion Law in Muslim-Majority Countries: An Overview of the Islamic Discourse with Policy Implications*, 29 HEALTH POL'Y & PLAN. 483, 484 (June 8, 2013) (contending that statistical evidence presents "a compelling public health argument for enshrining the right to abortion into law and liberalizing abortion law on the broadest possible grounds").

¹⁰⁷ Olga Khazan, *When Abortion is Legal, Women Rarely Die. But They Still Suffer*, ATLANTIC (Oct. 11, 2018), <https://www.theatlantic.com/health/archive/2018/10/how-many-women-die-illegal-abortions/572638/>.

¹⁰⁸ *See, e.g.*, Lale Say et al., *Global Causes of Maternal Death: A WHO Systematic Analysis*, 2 LANCET GLOB. HEALTH e323, e331 (May 6, 2014) (finding, on the basis of extensive records, that an average of 7.9% of all maternal deaths are due to abortions);

in the separation of various body parts from a human being are, on average, more dangerous and require even greater skill than the performance of abortions.¹⁰⁹ In such a context, should it be surprising that a ban on the sale of organs would merely move this sale into a clandestine, hidden from the eyes of the law zone, where the organ donor, with the blind care of whom the great prohibitionist-state is headed, would receive not only the voluntarily accepted harm to their health from the alienation of organs alone, but also the harm, de facto imposed upon them by the state, from insanitation and other eternal companions of ill-considered prohibitions.¹¹⁰

Second, the claim to prohibit the commercialization of human body parts for the sake of helping the poor sounds absurd in light of the well-known fact that there are many professions that are dangerous and indispensable to society, in which the harm to health and the danger to life is much greater than in the sale of some body parts, yet no one thinks to prohibit them.¹¹¹ This selectivity in the care of human beings and their health indicates that the reason for prohibiting the commercialization of human biomaterials is not its effect on the health of the donor, which the capitalist economy is perfectly willing to ignore, but rather the traditionalism and

see also Elisabeth Åhman & Iqbal H. Shah, *New Estimates and Trends Regarding Unsafe Abortion Mortality*, 115 INT'L. J. GYNECOLOGY & OBSTETRICS 121, 123 (July 27, 2011) (reporting that unsafe abortions cause 13% of all maternal deaths).

¹⁰⁹ See Lale Say et al., *supra* note 108, at e331; see also *AMA Code of Medical Ethics' Opinions on Organ Transportation*, 14 AM. MED. ASS'N J. ETHICS 204 (Mar. 2012) (stating transplant procedures should only be undertaken by physicians with special medical and technical competence developed through special training and experience).

¹¹⁰ See R.R. Kishore, *supra* note 7, at 362-63 (discussing the consequences of the scarcity of organs for transplant around the world including kidnapping and illicit organ sales).

¹¹¹ See Ingrid Schneider, *Die Nicht-Kommerzialisierung des Organtransfers als Gebot einer Global Public Policy: Normative Prinzipien und Gesellschaftspolitische Begründungen* [*The Non-Commercialization of Organ Transfers as a Requirement of Global Public Policy: Normative Principles and Socio-Political Justifications, in the Commercialization of the Human Body*], in *KOMMERZIALISIERUNG DES MENSCHLICHEN KÖRPERS* 109, 111 (Jochen Taupitz ed., 2007) (Ger.) (explaining that a man's importance and ultimate value is determined by his usefulness that is then expressed in a price); but see *Ban on Commercialization*, *supra* note 65, at 62 (explaining how some scholars have attempted to distinguish that in the case of risky professions a person sells their labor and continues to belong to themselves as they can terminate their employment whereas in the sale of non-regenerable organs an individual can inevitably cause serious harm to their body).

unpreparedness of society to allow such a relatively new practice as the separation and alienation of human biomaterials.¹¹²

Third, the commercialization of body parts is a socially beneficial phenomenon,¹¹³ because there is a shortage of human biomaterials required to save lives, which can only be covered by purchasing biomaterials from people in exchange for payment.¹¹⁴ It should be taken into account that although there are various ways to meet the demand for organs and tissues, including their post-mortem harvesting from individuals,¹¹⁵ practice shows that such measures are insufficient to satisfy all the people in need of the necessary biomaterials.¹¹⁶ If we bear in mind the uniqueness of our

¹¹² Julia D. Mahoney, *The Market for Human Tissue*, 86 VA. L. REV. 163, 169, 172 (2000).

¹¹³ See, e.g., HELGA KUHSE, ISSUES OF BIOETHICS 65, 71 (Stefano Rodotà eds., 1993) (supporting the sale of organs to save the lives of others); see also Philippe Steiner, *Organ Transplantation: A New Trade Between Humans?*, 1 THE REV. OF THE MAUSS 455, 455-56 (Jan. 2010) (discussing how some authors correctly suggest that the circulation of separated body parts is a social rather than commercial phenomenon); Philippe Steiner, *Organ Donation: A Family Affair?*, 59 ANNALES HSS 255 (Apr. 2004); Anne-Blandine Caire, *The Body Free: Thoughts on the Principle Free in Matter of Use Products and Elements of the Human Body*, 5 J. HEALTH & SOC. L. 865, 869 (May 2015) (evaluating heritage and inheritance of the human body).

¹¹⁴ See Erin & Harris, *supra* note 35, at 137-38 (supporting that many scholars, referring to the severe shortage of human organs and tissues, vehemently asserted that the creation of a biomaterials market is of vital importance); see also J. Radcliffe Richards, *Commentary, An Ethical Market in Human Organs*, 29 J. MED. ETHICS 139, 139-40 (2003) (discussing opposition towards organ selling); but see J. Savulescu, *Is the Sale of Body Parts Wrong?*, 29 J. MED. ETHICS 138, 138-39 (2003) (arguing that people have a right to sell body parts); see also Leonardo de Castro, *Commodification and Exploitation: Arguments in Favour of Compensated Organ Donation*, 29 J. MED. ETHICS 142, 142-46 (2003) (evaluating commodification, exploitation, and how a compensation organ procurement system may address commodification and exploitation); but see Stephen Wilkinson & Eve Garrard, *Bodily Integrity and The Sale of Human Organs*, 22 J. MED. ETHICS 334, 335 (Dec. 1996) (addressing objections to organ sale).

¹¹⁵ See MARTIN T. WILKINSON, ETHICS AND THE ACQUISITION OF ORGANS 5-6 (Oxford Univ. Press 2011) (explaining how even though substantial numbers of organ donors die each year, those organ donors often cannot donate their organs unless they meet brain-death criteria, which very few do); Govert den Hartogh, *In the Best Interests of the Deceased: A Possible Justification for Organ Removal Without Consent?*, 32 THEOR. MED. & BIOETH. 259, 260 (2011) (describing the two types of post-mortem organ removal systems: opt-in and opt-out).

¹¹⁶ See *Organ Donation Statistics*, HEALTH RES. & SERV. ADMIN., <https://www.organdonor.gov/learn/organ-donation-statistics> (Mar. 2022) (reporting that as of March 2022, there are more than a hundred thousand people on the US national transplant waiting list); see *Organ Donation and Transplantation*, COUNS. EUR., <https://human-rights-channel.coe.int/organ-donation-en.html> (last visited Dec. 4,

organisms and the difficulty of finding a biologically appropriate organ that will not be rejected,¹¹⁷ the best way to quickly increase the supply of organs—and with it the much coveted diversity of biomaterials—is to allow the sale of organs and tissues.¹¹⁸ In such circumstances, we should encourage the reciprocal transfer of human biomaterials to those in need, rather than stigmatizing it as a socially unacceptable practice to be banned and condemned.¹¹⁹ Labeling fails to protect both the people alienating their biomaterials and the people in urgent need of them.¹²⁰

Fourth, the prohibition on commercialization is an extremely ineffective instrument for protecting the poorest segments of the population from exploitation.¹²¹ Indeed, it is not difficult to guess that the suppliers of organs and tissues to the biomaterials market will often be members of the most vulnerable social groups.¹²² However, how will prohibiting them from disposing of their bodies—and at the same time their lives, their destinies—help them get rid of the very problem that is forcing them to take such radical, painful steps? This is a truism, but poverty is not curable by bans or cabinet legislation.¹²³ In this sense, proscribing

2022) (informing that as of 2021, 48,000 new patients enter the waiting lists for organ donations and transplantations each year).

¹¹⁷ See Rafael Beyar, *Challenges in Organ Transplantation*, 2 RAMBAM MAIMONIDES MED. J. 1, 7-8 (2011) (explaining the limited supply of organs and how this new concept could generate a much more biologically plausible and efficient way to use the scarce number of organs).

¹¹⁸ See Arthur L. Caplan, *Finding a Solution to the Organ Shortage*, 188 CAN. MED. ASS'N J. 1182, 1182 (2016) (explaining how some people believe that if donors get compensated for the selling of their organs, it will inevitably increase the supply).

¹¹⁹ See Anthony Gregory, *Why Legalizing Organ Sales Would Help to Save Lives, End Violence*, ATLANTIC (Nov. 9, 2011), <https://www.theatlantic.com/health/archive/2011/11/why-legalizing-organ-sales-would-help-to-save-lives-end-violence/248114/> (demonstrating that arguments against the legal market for human organs, based on allegedly moral and humanitarian premises, serve to only deprive thousands of people, who vitally need these organs for transplantation, of their lives).

¹²⁰ See Allison Tong et al., *The Experiences of Commercial Kidney Donors*, 25 TRANSPLANT INT'L 1138, 1142 (2012) (showing that stigmatizing those who sell to the biomaterial market is harmful to helping those in need).

¹²¹ See *id.* at 1138, 1142 (highlighting that the prohibition on the commercialization of biomaterials is not adequate to protect poor populations from exploitation).

¹²² See *id.* (detailing that the most vulnerable and poor populations will be disproportionately supplying the biomaterial market).

¹²³ See, e.g., Ian Vásquez, *Ending Mass Poverty*, CATO INST. (Sept. 4, 2001), <https://www.cato.org/commentary/ending-mass-poverty/> (establishing that the

commercialization is like trying to combat the symptoms rather than the root cause, the disease itself.¹²⁴ People in the most challenging situations in which they have to sell parts of their bodies choose, from a comparative perspective, a relatively painless way for third parties to rectify their financial situation.¹²⁵ This is because, in such a case, they voluntarily consent to harm themselves rather than other people.¹²⁶ There is a significant risk that if these people, who are ready for anything, are prohibited from selling a portion of their biomaterials, then for the sake of their survival, they may become involved in outright criminal and immoral activities, harmful to society and the state as a whole.¹²⁷

It seems inadmissible to put an equal sign between the commercialization of severed body parts and the exploitation of human beings. The former only denigrates into the latter, when impoverished donors are offered paltry and unreasonable sums for their severed body parts.¹²⁸ If, on the other hand, the amount provided to the individual is adequate, then parting with the body parts is a hard but voluntary decision that will be justified by the autonomy of the individual.¹²⁹ It is more advisable for the state not to prohibit the market for separated body parts, but to become an active

only effective way to eradicate poverty is through economic growth, while economic freedom and liberalized regulation are the way to growth).

¹²⁴ See *id.* (discussing the positive effect of economic growth and how it eliminated mass poverty).

¹²⁵ See, e.g., Monir, Moniruzzaman, "Living Cadavers" in *Bangladesh: Bioviolence in the Human Organ Bazaar*, MED. ANTHROPOL. Q. 69, 91 (2012) (recounting illegal organ trading market concerning the exploitation of its poorest citizens).

¹²⁶ See, e.g., *Laskey v. United Kingdom*, App. No. 21627/93; 21628/93; 21974/93, 24 Eur. H.R. Rep. ¶ 45 (1997) (holding that a restriction of a person's right to self-determination was permissible if one wished through its exercise to cause oneself a significant degree of injury).

¹²⁷ See Gregory, *supra* note 119 (suggesting how legalizing organ trading will lessen criminal activity and may benefit humanity).

¹²⁸ See Monir Moniruzzaman, "Living Cadavers" in *Bangladesh: Bioviolence in the Human Organ Bazaar*, 26 ASTIN MED. ANTHROPOL. Q. 69, 78-79 (2012) (explaining how the commercialization of vital organs in impoverished communities leads to even worse conditions).

¹²⁹ See Courtney S. Campbell, *Body, Self and the Property Paradigm*, 22 HASTINGS CTR. 34, 41 (1992) (explaining that under a stewardship model for the commercial sales of organs, individuals "... would retain the discretion to donate organs, or to donate and refuse financial compensation, or not to donate at all" based on self-ownership principles).

participant in it and to influence it in a beneficial way.¹³⁰ For example, the state, using its enormous economic resources, can very generously pay people who are willing to surrender their body parts to the state medical system.¹³¹ By doing so, the state would kill two birds with one stone, it would help people in need of organs, and it would also make economically absurd offers of private players to purchase organs at bondage prices, because with a constant buyer-state, these players would be forced to raise rates, which is obviously in the interests of those who want to commercialize their separated body parts.¹³²

Regarding the thesis that the reciprocity of the disposal of biomaterials allegedly excludes the free formation of the alienator's will, it should be noted that such judgments are inconsistent with the realities of life, where market and commercial relations are widespread.¹³³ If we follow the logic that the reciprocity of a contract is identical to the involuntariness of its conclusion, then it is possible to invalidate almost any contract of modern times, in which a party receives a consideration for the performance of its obligation.¹³⁴ The correct approach, however, is that the general rules on contracts and their invalidity should apply to the sale of biomaterials, which do not entail such far-reaching conclusions that could paralyze the market for goods that exist in a state.¹³⁵ In

¹³⁰ See Gregory, *supra* note 119 (emphasizing that prohibition drives up black-market profits whereas state regulated organ transactions would help save thousands of lives and ensure that organ donors would not be intimidated or defrauded).

¹³¹ See Kalpana Jain, *It's Not Always Wrong to Pay People for their Organs*, CONVERSATION (June 8, 2017, 5:33 AM), <https://theconversation.com/its-not-always-wrong-to-pay-people-for-their-organs-78573> (suggesting that the government buy organs and pay donors for them, reflecting the current thriving black organ market in Pakistan).

¹³² See *id.* (providing an example where governments may enforce a minimum cash price thus promoting an increase of donating).

¹³³ See *id.* (expressing the belief that individuals who donate organs may sometimes not have a choice but other times the reality is that the reward is too attractive to pass up).

¹³⁴ Hartmut Kliemt, *Zur Kommodifizierung menschlicher Organe im freiheitlichen Rechtsstaat* [*On The Commodification of Human Organs in The Free Constitutional State*], in *KOMMERZIALISIERUNG DES MENSCHLICHEN KÖRPERS* 100 (Jochen Taupitz ed., 2007) (Ger.) (emphasizing that the exclusion of finances regarding the alienation of organs displays illogical and negative consequences).

¹³⁵ Jurgen W. Goebel et al., *Legal and ethical consequences of international biobanking from a national perspective: the German BMB-EU Coop project*, 18 EUR. J. HUM. GENETICS 522, 524 (2010).

addition, the intensified tutelage by the state to protect human dignity by prohibiting a person from alienating their biomaterials is hardly consistent with human dignity itself, at the core of which is the autonomy of the individual.¹³⁶ There can be no human dignity where human autonomy and the right to bodily self-determination are infringed by prohibiting the free disposal of one's own biomaterials.¹³⁷ If there are no circumstances actually precluding the voluntariness of the decision to alienate one's body parts for payment, then the conclusion of the relevant contracts would not only not be contrary to a person's dignity, but would be the brightest manifestation of it.

3. Instrumental Value of Health – An Approach Based on Respect to the Free Will of Individual and Reflecting the Inevitable Need for Commercialization in Modern Society

In a coordinate system in which the origin point is the prohibition on reciprocal alienation of severed body parts, the positioning of the criterion of substantial harm to human health as a watershed in the admissibility of turning biomaterial into an object of trade is undoubtedly correct. However, as opponents of the unjustified prohibition on the commercialization of severed human body parts, we believe it correct to argue that in the presented case, the concept and role of human body health is interpreted in a completely false

¹³⁶ See, e.g., TOM BEAUCHAMP & RUTH FADEN, *THE HISTORY AND THEORY OF INFORMED CONSENT* 7 (1986) (demonstrating the individual's worth is expressed in their dignity, and many link the individual's value with their autonomy); ONORA O'NEILL, *AUTONOMY AND TRUST IN BIOETHICS* 23 (2002); see also Stéphane Prieur, *La Disposition par l'Individu de Son Corps* 30 (1999) (PhD dissertation, Université de Dijon) (Fr.) (considering human dignity in the context of the right to self-determination, which is also an expression of the autonomy of the individual).

¹³⁷ See DERYCK BEYLEVELD & ROGER BROWNSWORD, *HUMAN DIGNITY IN BIOETHICS AND BIOLAW* 214-15, 218 (Oxford University Press, 2001) (noting that prohibiting the recognition of contracts into which a person has voluntarily entered as contrary to the dignity of the person may undermine the autonomy of the person and their dignity by perceiving them in the case of these invalid contracts as an object); see also STEFANIE SCHULTE, *DIE RECHTSGÜTER DES STRAFBEWEHRTEN ORGANHANDELSVERBOTES* [THE LEGAL QUESTION OF THE PENALTY OF ORGAN SELLING BAN] 21-23 (2009) (Ger.) (criticizing state paternalism as expressed in the prohibition of organ trafficking).

way. Health should not be a sacred cow,¹³⁸ endowed with a value *per se* (by virtue of itself) that is subject to absolute protection from any encroaching person, even if that encroaching person is the person whose health is in question.¹³⁹ On the contrary, we believe that health has only an *instrumental value*, which means that it should be considered significant only for as long as it is necessary for the individual to express themselves and to develop themselves.¹⁴⁰ If a person who has health makes a decision, including the separation and sale of their body parts, as a result of which their health deteriorates, then there is nothing wrong or forbidden about it, because the person themselves, in making this decision, considers their autonomy and the achievement of their goals to be significantly more important than their own health. In such a case, it seems utterly ridiculous to cling to a person's health, trying to protect them from themselves and claiming that a person knows far less about their own good than outsiders to them. Thus, we believe that the current exceptions to the principle of non-commercialization are insufficient to permit the individual to decide freely about their own body. A forward-looking law that takes steps toward the emancipation of the human body must gradually free the individual completely from all fetters and bonds that limit the individual's disposal of their body, regardless of whether the acts of disposal of the body are reciprocal or not.

¹³⁸ *Contra* SOPHIE GROMB, LE DROIT DE L'EXPÉRIMENTATION SUR L'HOMME [THE LAW OF EXPERIMENTATION ON MAN] 104 (1992) (the vast majority of naysayers are still captive to the prejudices of the past, erroneously reflecting on the sacral character of the body and the personality of the human being as such); Vincent Ortet, *Le Respect de la Dépouille Mortelle en Droit Français* [French Law and the Respect for Mortal Remains], in SÉMINAIRE D'ACTUALITÉ DE DROIT MÉDICAL. LE RESPECT DU CORPS HUMAIN PENDANT LA VIE ET APRÈS LA MORT. DROIT, ÉTHIQUE ET CULTURE 176 (Anne-Marie Duguet ed., 2005) (Fr.); PIERRE BERCHON, RÉPERTOIRE DE DROIT CIVIL. SÉPULTURES [DIRECTORY OF CIVIL LAW. FUNERALS] § 124 (2009) (Fr.); Wolfgang van den Daele, *Gewinnverbot: Die Ambivalente Verteidigung einer Kultur der Gabe* [No Profit: The Ambivalent Defense of a Culture of Giving], in KOMMERZIALISIERUNG DES MENSCHLICHEN KÖRPERS 127, 128-29 (Jochen Taupitz ed., 2007) (Ger.).

¹³⁹ See Tedros A. Ghebreyesus, *Health is a Fundamental Human Right*, WHO (Dec. 10, 2017), <https://www.who.int/news-room/commentaries/detail/health-is-a-fundamental-human-right> (stating that everyone should be entitled to control their own health and body).

¹⁴⁰ Jukka Varelius, *The value of autonomy in medical ethics*, 9 MED. HEALTH CARE & PHIL. 377, 377 (2006) (highlighting the instrumental value of patient autonomy in medicine and health).

An instrumental view of human health is completely aligned with the latest trend to view the individual as the owner and creator of their own body. Proceeding from the fact that the human body and its health are only the tools of the individual, not their essence, instrumentalization forms a robust framework for the recognition of the individual's ownership rights in the body¹⁴¹ and the parts separated from it.¹⁴² Moreover, instrumentalization effectively de-identifies the individual with their own body, orchestrating a "master-tool" dichotomy, thereby justifying the permissibility of the most radical changes to the body that a free and creative individual can venture into.¹⁴³ The instrumental paradigm therefore contributes significantly to the formation of a new axiology and teleology of the human body, in which the person is liberated from any external constraints conditioned by the arbitrariness of the state and society, and affirms the body as the exclusive territory for self-realization and self-expression.¹⁴⁴ Surely, one of the key and most decisive acts of self-expression justified by instrumentalization will be the separation and commercialization of those parts of the body with which the individual wishes to part.

III. MODES FOR STRUCTURING THE COMMERCIAL TRANSACTIONS FACILITATING TRANSFER OF OWNERSHIP IN SEPARATED HUMAN BODY PARTS

If we have proven that the admissibility of the involvement in economic circulation of separated body parts is a reflection of existing reality, then another important question arises: how, from the

¹⁴¹ Arseny Shevelev & Georgy Shevelev, *Proprietary Status of the Whole Body of Living Person*, 86 RABEL J. COMPAR. & INT'L PRIV. L. 977 (2022) (explaining the theory of abstract ownership in the human body as a whole, and its application).

¹⁴² Arseny Shevelev & Georgy Shevelev, *Defending Henrietta Lacks: Justification of Ownership Rights in Separated Human Body Parts*, 55 VAND. J. TRANSNAT'L L. 957, 957-58 (2022) (justifying the right of ownership in separated human body parts and vesting it in the source of these parts).

¹⁴³ See generally Arseny Shevelev & Georgy Shevelev, *Body Revolution in Comparative Perspective: Promoting Equality Through Adoption of New Theory of Bodiliness*, 55 UICL. REV. 615 (2022) (proposing a brand-new broader concept of the human body).

¹⁴⁴ See *id.* (explaining how bodiliness can be viewed to include things attached to the body which do not have a biologically significant function, but serve a personal aesthetic purpose, giving proper meaning to the will of the individual in this sense).

perspective of legal dogmatics, should we qualify the relationship mediating the alienation of such economic goods as biomaterials?

One of the first and most attractive options to logic, of course, is buying and selling biomaterials. Thus, in *Scroggam against Stewardson*,¹⁴⁵ considered in the late 17th century, the English courts came to the conclusion that the alienation of human hair in exchange for money was a sale. However, the transaction itself was prohibited, since a 16-year-old girl hoped to sell her hair, who according to mores and realities of the time, was not considered fully capable of acting.¹⁴⁶ At the present time, the issue of qualification of these contracts is quite acute and is not a reflection of some theorists' whims but has a great applied meaning in the framework of civil and criminal law relations.¹⁴⁷ First and foremost, when discussing the alienability of biomaterials, it is necessary to give the biomaterial itself the quality of an object to be alienated. As we emphasized earlier, for many authors and legal orders, due to false considerations of non-commercialization, it is unthinkable to alienate organs for payment, but they cannot deny that biomaterial even in such a case has the characteristics of a commodity, but only that which is alienated gratuitously: this was the conclusion reached, for example, by the European Court of Justice, which noted the commodity nature of blood even in the case of its gratuitous alienation.¹⁴⁸ High Court of Australia reached similar conclusions in *Clark v. Macourt*,¹⁴⁹ where the court relied on provisions of law that prohibit a physician from selling sperm to a patient for more than they purchased it. The Court emphasized that the sale agreement

¹⁴⁵ *Scroggam v. Stewardson* (1673) 84 Eng. Rep. 771 (KB).

¹⁴⁶ *Id.*

¹⁴⁷ Brian Grow & John Shiffman, *In the U.S. market for human bodies, almost anyone can dissect and sell the dead*, REUTERS (Oct. 24, 2017), <https://www.reuters.com/investigates/special-report/usa-bodies-brokers/> (showing the legal issues of how the sale of body parts is so closely regulated, however, no federal law governs the sale of body parts for use in research or education but few state laws provide regulation that allows almost anyone to dissect and sell human body parts).

¹⁴⁸ See Case C-296/15, *Medisanus d.o.o. v. Splošna Bolnišnica Murska Sobota*, ECLI:EU:C:2017:431, ¶ 10 (June 8, 2017); Frédérique Berrod, *Marché Intérieur. Le Localisme "Légitimable" Dans le Marché Intérieur* [*Internal Markets. The "Legitimate" Localization of Internal Markets*], 3 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN [RTD EUR.] 682, 682 (2018) (Fr.); Ann Lawrence Durviaux, *Droit Européen des Marchés et Autres Contrats Publics. La Concurrence et la Santé Publique* [*European Market Law and Other Public Contracts. The Competition and the Public Health*], 2 RTD EUR. 376 (2017).

¹⁴⁹ *Clark v. Macourt*, [2013] H.C.A. 56 (Austl.).

considered in the case should rather be understood as a way of transferring the right of ownership, rather than as a typical legal construction that actually reflects the relationship of the acquisition of property against payment.¹⁵⁰ Despite the gratuitousness of the sale in this case, the transferred semen was recognized by the court as a commodity.¹⁵¹

If we imagine blood transfusion, then the relationship on its transfer to the patient may well be qualified as a sale: in this situation, the medical organization, in the case of substandard blood, will be responsible for any harm arising in the patient.¹⁵² On the other hand, if these relations take on the nature of paid services to the patient,¹⁵³ then the medical organization will be responsible only for the poor quality of the service,¹⁵⁴ but not for the goods that are provided as part of that service: here, the person who provided the medical organization with the corresponding biomaterial will be responsible for the poor quality of the goods.¹⁵⁵ These rules are

¹⁵⁰ *Id.*

¹⁵¹ *See id.* (referring to the plaintiff's potential need to source sperm, which implies that sperm is a commodity which is sourced and traded).

¹⁵² *See e.g.*, Patrice Jourdain, *Responsabilité Civile et Contamination par le Virus du SIDA à la Suite de Transfusions [Civil Responsibility (or Liability) and Contamination of the AIDS Virus following Transfusions]*, 1 RTD Civ. 117, 120 (1992); Yvonne Lambert-Faivre, *L'Indemnisation des victimes post-transfusionnelles du Sida: hier, aujourd'hui et demain [Compensation for AIDS Victims post Transfusions; Yesterday, Today and Tomorrow]*, 1 RTD Civ. 1, 9 (1993).

¹⁵³ *See* *Perlmutter v. Beth David Hosp.*, 123 N.E.2d 792, 794 (N.Y. 1954) (qualifying this relationship as the rendering of services, *Perlmutter* holds that "[s]uch a contract is clearly one for services, and, just as clearly, it is not divisible"); *see also* *Reilly v. King Cnty. Cent. Blood Bank*, 492 P.2d 246, 248 (Wash. Ct. App. 1971) (holding the same as in *Perlmutter* where the relationships are contractual in nature).

¹⁵⁴ *See* Cour d'appel [CA] [regional court of appeal] Poitiers, June 28, 1995, 921322 Rec. Lebon (holding that a hospital cannot be held liable for contaminating a patient's blood with a tainted blood sample provided by a transfusion center); *see also* CAA Nancy, 1^e ch., June 27, 1996, 95NC00917 (Fr.) (holding that a hospice center cannot be found responsible for administering a blood sample containing the human immunodeficiency virus to a patient as it was prepared by a blood transfusion center); *see also* CAA Paris, 1^e ch., Sept. 12, 1996, 94PA01667 (Fr.) (holding that a blood bank is liable for the blood contamination of a patient as a result of a poor quality blood sample).

¹⁵⁵ *See e.g.*, *Carter v. Inter-Faith Hosp. of Queens*, 304 N.Y.S.2d 97, 100 (N.Y. Sup. Ct. 1969) (interpreting the supplying of blood by a blood bank as a sale); *see also* *Cnty. Blood Bank, Inc. v. Russell*, 196 So. 2d 115, 116-17 (Fla. 1967) (holding that detecting impurities in blood transfusion is a question of fact, therefore the motion to dismiss by the blood bank where a blood transfusion was a transaction, and not a sale, was denied).

not limited in their application to blood transfusions: they apply to any biomaterial.¹⁵⁶ It is also true that the recognition of blood, semen, and other biomaterials as commodities no less than any movable thing,¹⁵⁷ also entails significant consequences in the sphere of criminal law.¹⁵⁸ For example, if blood is a commodity, then death as a result of a blood transfusion is a crime resulting from the provision of a substandard commodity.¹⁵⁹ In turn, those authors who do not recognize that blood became a commodity,¹⁶⁰ will view blood transfusions as the act of poisoning someone to death.¹⁶¹

Note that there are cases where the compliance or non-compliance of an agreement on the transfer of biomaterial will have little effect on the essence of the contractual relationship between both

¹⁵⁶ See James D. Kerouac, Note, *A Critical Analysis of the Biomaterials Access Assurance Act of 1998 as Federal Tort Reform Policy*, 72 B.U. J.SCI. & TECH. L. 327, 339 (2001) (explaining how a biomaterials supplier may be held liable if they are: a manufacturer of medical implants, the supplier is a seller of implants, or the supplier sold materials that did not meet the contractual specifications of the manufacturer).

¹⁵⁷ See *United States v. Garber*, 607 F.2d 92, 97 (5th Cir. 1979) (holding that “[b]lood plasma, like a chicken’s eggs, a sheep’s wool, or like any salable part of the human body, is tangible property” and is therefore taxable chattel).

¹⁵⁸ See *id.* at 99 (explaining how in this case, there are competing theories regarding the defendant’s criminal liability in these cases).

¹⁵⁹ See Cour de cassation [Cass.] [supreme court for judicial matters] crim., June 22, 1994, Bull. crim., No. 248 (Fr.), <https://www.legifrance.gouv.fr/juri/id/JURITEXT000007065935> (showing that blood as a commodity can lead to criminal consequences)

¹⁶⁰ See generally *Roberts v. Suburban Hosp. Ass’n*, 532 A.2d 1081, 1086–87 (Md. Ct. Spec. App. 1987) (determining that blood transfusion is a service provided by hospitals rather than a sale of goods) (citing *Perlmutter v. Beth David Hosp.*, 123 N.E.2d 792, 795 (N.Y. 1954)); see also *Balkowitsch v. Minneapolis War Mem’l Blood Bank, Inc.*, 132 N.W.2d 805, 811 (Minn. 1965) (establishing that blood transfusion is a service).

¹⁶¹ See Alexander Dorozynski, *Ex-Ministers to Face trial in French “Blood Scandal,”* BRITISH MED. J. (Aug. 1, 1998), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1174664/> (reporting on the 1992 French “contaminated blood affair” in which three French Magistrates faced criminal charges for allegedly poisoning over half of Europe’s hemophiliacs by selling them HIV infected blood); but see Romain Ollard, *De l’opportunité de la pénalisation de la transmission du virus de l’immunodéficience humaine par voie sexuelle: analyse de droit comparé* [The opportunity for the penalization of the human immunodeficiency virus transmission through sexual means: a comparative law analysis], in 1 REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ 37–45 (2016) (Fr.) (discussing French jurisprudence which generally no longer criminalizes the transmission of AIDS through sexual activity if said transmission lacked scienter).

parties.¹⁶² So, for example, whatever this contract may be, it is clearly impossible to force a person to fulfill the obligation to transfer organs (or other biomaterials),¹⁶³ since human organs are not simple raw material¹⁶⁴ that can be foreclosed upon. Also, based on the special nature of the object of such contracts, which have a non-commercial value for the alienator sometimes greater than the pecuniary consideration for the object under the contract,¹⁶⁵ the unilateral withdrawal of consent to the transfer of the organ, which will terminate the relevant contract, will also be permissible.¹⁶⁶ However, this does not mean that the other party, whose reasonable and legitimate expectations have been violated, will be left with nothing: it can claim damages for non-performance of the relevant obligations and violation of contractual expectations.¹⁶⁷

IV. CONCLUSION

Dignity no longer serves the person; now the person serves dignity. In other words, it is not the dog that wags its tail, but the tail that wags the dog. An understanding of dignity filled with a host of socio-philosophical prejudices has resulted in a situation in which it is the human body, not the person themselves, that has value. Dignity is such a rigid and peremptory category that its perception, which forbids the sale of human body parts, encourages

¹⁶² See Silvia Cervo, *Drafting Biological Material Transfer Agreement: A Ready-to-sign Model for Biobanks and Biorepositories*, INT'L J. BIOL. MARKERS e215 (Wichtig eds., 2016) (illustrating how the parties' contractual essence may remain intact through the "ready to sign" Material Transfer Agreement, which details the process by which either party may terminate the agreement yet still be bound to some terms up to five years post termination).

¹⁶³ See, e.g., Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, CORE (Oct. 13, 2006), <https://core.ac.uk/outputs/76623430> (stating, "But the federal ban on payment for organs sharply limits the number of available matching kidneys. . .").

¹⁶⁴ See WILKINSON, *supra* note 115, at 45 (discussing the nature of human organs from the ethics perspective); see Teck Chuan Voo & Soren Holm, *Organs as Inheritable Property?*, 40 J. MED. ETHICS 57, 61 (2014) (arguing that organs should be included in what constitutes as inheritable property for purposes of inheritance rights).

¹⁶⁵ See, e.g., COSIMO M. D'ARRIGO, *IL CONTRATTO E IL CORPO: MERITEVOLEZZA E LICEITÀ DEGLI ATTI DI DISPOSIZIONE DELL'INTEGRITÀ FISICA* [THE CONTRACT AND THE BODY: MERITABILITY AND LAWFULNESS OF THE PROVISIONS OF PHYSICAL INTEGRITY], 816 (Familia ed., 2005) (It.) (arguing that sometimes a person may change its decision to sell its body part and to prefer one's own health over the interest of the asset governed by the contract).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

dignitarians to make concessions in order to somehow legitimize the customary sale of biomaterials such as hair, nails, blood or reproductive cells. In making this compromise, they argue the unthinkable: that some parts of the human body have dignity while others do not, and therefore can be sold. Of course, in their paradigm, this means that sometimes a person themselves, like their body, is not entitled to dignity.

The point that commercialization would cause parts of the human body to be treated as property also fails to withstand reasonable criticism. If a body part can be transferred as a donation, then it is already a thing, and the execution of a counter-presentation in the form of payment is not qualified to change the nature of the alienated human body part. And the argument about altruism as the driving socially useful purpose of donation is not an obstacle to commercialization, for philosophy and psychology have long established that the altruist intending to make a donation is propelled by egoistic motives no less than the entrepreneur trying to get a high price for the goods they own. However, prohibiting the trade in human parts would mean that many people who need an organ would continue to die because of state-imposed ethical notions that the commercialization of body parts would exploit the unprotected and poorer classes.¹⁶⁸

It is common knowledge that outlawing the sale of organs will not make poor people richer, which means that they will inevitably continue to seek illegal ways to sell their body parts and to alleviate their miserable financial situation at least a little. In turn, the underground market of organ trafficking not only implies that people are underpaid because of the monopoly of criminal groups on organ harvesting, but also that the super invasive operation of organ harvesting itself will be performed by self-taught doctors in what are probably non-sterile conditions, thereby exposing these people

¹⁶⁸ See, e.g., Linda Searing, *Nearly 106,000 U.S. Residents Are Waiting for a Life-saving Treatment*, WASH. POST (May 24, 2022, 6:34 AM), <https://www.washingtonpost.com/health/2022/05/24/organ-transplant-waiting-list-numbers/> (explaining that “on average, 17 people die each day while waiting for an organ transplant” in the United States); see also *Too Many Donor Kidneys Are Discarded in U.S. Before Transplantation*, PENN MED. NEWS (Dec. 16, 2020), <https://www.pennmedicine.org/news/news-releases/2020/december/too-many-donor-kidneys-are-discarded-in-us-before-transplantation> (stating, “[a]nually, nearly 5,000 people on the transplant list die without getting a transplant” in the United States).

to unreasonable risk.¹⁶⁹ In other words, in wanting to save people, the state is only killing them. First, those people who, because of the ban on trade in organs, could not acquire the necessary organ for transplantation, and then those who, in an endeavor to escape from poverty, go under the knife of black marketeers.¹⁷⁰ In such a scenario, commercialization would both help stabilize the supply and demand balance¹⁷¹ in the market for human body parts and reduce deaths from unclean and unsterile surgical conditions.¹⁷²

In addition, contemporary times have shown that human dignity is not a mythical category requiring respect for a soulless body, but that it seeks to strengthen the guarantee of the autonomy of the human will, which is the exclusive attribute of the individual.¹⁷³ The human body and health should not be totems before which society must worship *volens volens*.¹⁷⁴ Society can only be recognized as respecting intrinsic human dignity, when it enables the person's will, which strikingly distinguishes them from the rest of the animal world, to be embodied in real life.¹⁷⁵ This will can include both acts of gratuitous and non-gratuitous disposition, neither of which can be neglected.

¹⁶⁹ See, e.g., Brian Grow & John Shiffman, *In the U.S. market for human bodies, almost anyone can dissect and sell the dead*, REUTERS (Oct. 24, 2017), <https://www.reuters.com/investigates/special-report/usa-bodies-brokers/> (describing who body brokers are and what they do).

¹⁷⁰ Walter Block, *The Ban on Organ Sales is killing People. It Doesn't Have to Be This Way*, FEE STORIES (Feb. 4, 2022), <https://fee.org/articles/the-ban-on-organ-sales-is-killing-people-it-doesnt-have-to-be-this-way/>.

¹⁷¹ *Organ Donation Statistics*, HEALTH RES. & SERV. ADMIN., <https://www.organdonor.gov/learn/organ-donation-statistics> (Mar. 2022) (revealing the colossal and fatal difference between people willing to donate their organs and people in vital need of organs by documenting that roughly 7,000 living people and 14,000 dead people are donors in the US, while more than 100,000 people are on waiting lists).

¹⁷² J S Taylor, *Black Markets, Transplant Kidneys and Interpersonal Coercion*, 32 J. MED. ETHICS 698 (2006).

¹⁷³ John F. Kilner, *Human Dignity*, ENCYCLOPEDIA.COM (Nov. 20, 2022), <https://www.encyclopedia.com/science/encyclopedias-almanacs-transcripts-and-maps/human-dignity>.

¹⁷⁴ See Bernard Baertschi, *Human Dignity as a Component of a Long-Lasting and Widespread Conceptual Construct*, 11 J. BIOETHICAL INQUIRY. 201, 206 (2014) (explaining that putting the body before everything else is akin to bestial in nature).

¹⁷⁵ See *id.* (showing historical precedents in thinking for the notion that it is the elements of our dignity, what brings us intrinsic value, our reason, that lifts us above bestial brutes).

The instrumental approach to human health proposed in this article breaks with the phantoms of the conservative past and harmonizes with the liberal zeitgeist of the now by opening the way for the commercialization of separated body parts. Allowing the commercial market of human body parts would introduce the usual means of private law, such as sale and barter, for the alienation of these parts, while an improved guarantee of donor and recipient rights in the removal of these parts would be secured by service rendering regulations, the violation of which, including the causing of death, would trigger civil liability for the person who committed the offense.