

'Tis Better To Receive: The Case for an Organ Donee's Cause of Action

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INTRODUCTION

For five years, Robert Colavito suffered from end-stage renal disease for which he was placed on a kidney transplant waiting list.¹ On August 21, 2002, Colavito's longtime friend, Peter Lucia, died of intracranial bleeding. Lucia's widow decided to donate both of his kidneys to Colavito. Lucia's left kidney was air-lifted to a Miami hospital. But contrary to his widow's wishes, the right kidney remained in New York, in the custody of the New York Organ Donor Network (NYODN).² On August 23, 2002, Colavito was fully prepared for surgery³ when Dr. George Burke, his surgeon, discovered that the donated left kidney was irreparably damaged, and therefore useless for transplantation. When a member of Burke's staff called the NYODN to request the second kidney for Colavito's use, he was told that it already had been transplanted into another patient.⁴ Subsequent tests indicated that both of Lucia's kidneys were incompatible with Colavito's antibodies, so neither could have been transplanted successfully.⁵

Colavito filed suit in federal court against the NYODN and individual doctors involved in the kidney disposition. He claimed the defendants were liable for fraud, conversion, and violation of New York Public Health Law. The district court granted the defendants' motion for summary judgment, dismissing Colavito's fraud claim on the merits, and finding that he could not sustain a common law action for conversion or a claim based on New York Public Health Law.⁶ Colavito appealed, and the Second Circuit affirmed with respect

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1. Linda Delmonico Prussen, *Organ Owners: L.I. Families Force Courts To Decide Who Owns Our Body Parts*, LONG ISLAND PRESS, July 21, 2005, http://www.longislandpress.com/?cp=40&show=article&a_id=4954.

2. *Colavito v. N.Y. Organ Donor Network, Inc.*, 438 F.3d 214, 216 (2d Cir. 2006).

3. *Colavito v. N.Y. Organ Donor Network, Inc.*, 356 F. Supp. 2d 237, 239 (E.D.N.Y. 2005).

4. *Colavito*, 438 F.3d at 218.

5. *Id.* at 219.

6. *Colavito*, 356 F. Supp. 2d at 246.

to Colavito's fraud claim.⁷ However, the court reserved judgment on the conversion and Public Health Law claims, determining that both raised novel and important questions of New York law. As a result, the Second Circuit certified several questions to the New York Court of Appeals, including:

- (1) Do the applicable provisions of the New York Public Health Law vest the intended recipient of a directed organ donation with rights that can be vindicated in a private party's lawsuit sounding in the common law tort of conversion or through a private right of action inferred from the New York Public Health Law?
- (2) Does New York Public Health Law immunize either negligent or grossly negligent misconduct?⁸

The New York Court of Appeals responded, concluding that "a specified donee of an incompatible kidney . . . has no common law right to the organ"⁹ because, under New York law, "there is no common law property right in a dead body."¹⁰ The court also determined that Colavito could not recover under New York Public Health Law because section 4302(4) only authorizes donors to make a gift to "any specified donee, for therapy or transplantation *needed by him*."¹¹ While "he was in need of a functioning kidney, both of Peter's kidneys were of no use to [Colavito]."¹² The court thus found that Colavito had no cause of action because Lucia's kidney was medically incompatible. But the Court of Appeals left open the possibility that, when a donated organ *is* medically compatible, New York Public Health Law might define a cause of action for the intended organ recipient (donee) for its improper disposition.

This Comment argues that there are sound policy justifications for allowing an intended organ donee to have a cause of action if several caveats are accounted for. Part I briefly outlines the scientific and legal background regarding human organ transplants. Part II explains that a *donee's* cause of action could be superior to a *donor's* cause of action under narrowly defined circumstances, because the donee's greater material stake in the organ's proper disposition makes her more likely to effectively enforce that outcome. The conclusion proposes several liability exceptions, and discussing why a donee's cause of action is of growing importance, based on current trends in organ transplantation.

7. *Colavito*, 438 F.3d at 216.

8. *Id.* at 216-17. The Second Circuit certified a third question as well: "If a donee can bring a private action to enforce the rights referred to in question 1, may the plaintiff recover nominal or punitive damages without demonstrating pecuniary loss or other actual injury?" *Id.* at 217.

9. *Colavito v. N.Y. Organ Donor Network, Inc.*, No. 106, 2006 N.Y. LEXIS 3655, at *16 (N.Y. Dec. 14, 2006). Robert Colavito died in June 2006, so his widow, Patricia Colavito, served as his personal representative for the remainder of the case.

10. *Id.* at *14-15.

11. *Id.* at *24 (emphasis added).

12. *Id.* at *25.

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I. BACKGROUND

Donated organs include vital organs (e.g., the heart, the stomach) and nonvital organs that can be removed from the donor without causing death by their absence (e.g., one kidney, a section of the liver).¹³ Human organ donation can be accomplished through cadaveric donors of either vital or nonvital organs, or living donors, who are only permitted to donate nonvital organs.¹⁴ Organs are donated to anonymous recipients through the national waiting list¹⁵ or to recipients specified by the donor or her next-of-kin in a process known as "directed donation."¹⁶

Approximately 96,000 people are on the national waiting list for organ transplantation.¹⁷ Thousands more await tissue transplantation.¹⁸ The demand for transplants far outpaces the supply. Between January and November of 2006, only 28,923 transplants were performed.¹⁹ Each day, an average of seventeen people in the United States die waiting for transplants.²⁰ Those who survive require expensive treatment.²¹

Under most states' common law, "next of kin have a 'quasi-property' right in the decedent's body for purposes of burial or other lawful disposition."²² But the narrow definition of this quasi-property right²³ has led courts and commentators to suggest that it is actually "a legal fiction created to enable relatives to recover for the tort of mental distress."²⁴ Several cases interpret this

13. Gloria J. Banks, *Legal and Ethical Safeguards: Protection of Society's Most Vulnerable Participants in a Commercialized Organ Transplantation System*, 21 AM. J.L. & MED. 45, 53 (1995).

14. *Id.*

15. See 42 U.S.C. § 274(b)(2) (2000).

16. LifeGift.org, Donors & Recipients, http://www.lifegift.org/Directed_Donation.html (last visited Mar. 26, 2007).

17. The Organ Procurement and Transplantation Network, Waiting List Candidates, <http://www.optn.org/data/> (last visited Mar. 26, 2007) [hereinafter OPTN, Waiting List Candidates].

18. New York Organ Donor Network, Overview, http://www.nyodn.org/organ/o_statistics_overview.html (last visited Mar. 26, 2007) [hereinafter NYODN, Overview].

19. OPTN, Waiting List Candidates, *supra* note 17.

20. NYODN, Overview, *supra* note 18.

21. Leonard H. Bucklin, *Woe Unto Those Who Request Consent: Ethical and Legal Considerations in Rejecting a Deceased's Anatomical Gift Because There is No Consent by the Survivors*, 78 N.D. L. REV. 323, 343 (2002) (estimating that replacing dialysis with kidney transplants in one thousand cases would produce taxpayer savings of \$500 million over a twenty-year period).

22. *Brotherton v. Cleveland*, 923 F.2d 477, 481 (6th Cir. 1991). This quasi-property right is of relatively recent vintage. For many years, English and U.S. courts declined to recognize common law property interests in dead bodies or body parts. See Amy S. Pignatella Cain, Note, *Property Rights in Human Biological Materials: Studies in Species Reproduction and Biomedical Technology*, 17 ARIZ. J. INT'L & COMP. L. 449, 451 (2000).

23. See, e.g., *Fuller v. Marx*, 724 F.2d 717, 719 (8th Cir. 1984) (declining to extend the "quasi-property" interest to "all of the body's organs"); *Snyder v. Holy Cross Hosp.*, 352 A.2d 334, 341 (Md. Ct. Spec. App. 1976) (finding a property right existed ordinarily only for purposes of burial); *Pierce v. Swan Point Cemetery*, 10 R.I. 227, 242 (1872) (noting that "certain persons may have rights" (emphasis added)).

24. Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 385 (2000).

right to allow next-of-kin to sue for improper harvesting of a decedent's organs; some cases even find the right to be of constitutional dimension.²⁵ But these cases all address the right to *prevent* medical personnel from harvesting organs from dead relatives, not to *require* such personnel to harvest and allocate them according to the donor's wishes. Courts have also significantly constrained common law property rights of a person to her own body parts. For example, several courts have decided that common law does not support a tort claim of conversion for the research use of a patient's tissue without her permission.²⁶

The Uniform Anatomical Gift Act (UAGA) of 1968 and its 1987 revision, which regulate cadaveric donation and have been adopted in some form in all fifty states and the District of Columbia,²⁷ permit a donor's (or her next-of-kin's) cause of action when her organs are harvested beyond the scope of consent.²⁸ However, the UAGA's "good faith" immunity provision often protects medical personnel.²⁹ The UAGA may provide grounds for a donor to sue when physicians cause the donated organ to be used for a purpose other than her specified purpose of transplantation, although, again, physicians may be excused from liability for good faith.³⁰

The *donee's* right to sue seems mostly confined to medical malpractice cases in which she experiences harmful treatment at the hands of the transplanting surgeon.³¹ But a few cases and statutes suggest another donee's cause of action: for improper disposition of the organ. For example, the UAGA states, "The rights of the donee created by the gift are paramount to the rights of others"³² Additionally, an Indiana court reserved judgment on the issue of whether an intended donee had a protectable liberty interest in receiving a promised organ.³³ And Ohio explicitly defines a donee's property right in the

25. See *Newman v. Sathyavaglswaran*, 287 F.3d 786, 796 (9th Cir. 2002); *Brotherton*, 923 F.2d at 482. *But see* *Georgia Lions Eye Bank, Inc. v. Lavant*, 335 S.E.2d 127, 128 (Ga. 1985).

26. See *Washington Univ. v. Catalona*, 437 F. Supp. 2d 985, 997 (E.D. Mo. 2006); *Greenberg v. Miami Children's Hosp. Research Inst.*, 264 F. Supp. 2d 1064, 1074 (S.D. Fla. 2003); *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 480 (Cal. 1990).

27. Banks, *supra* note 13, at 66; Rhonda Gay Hartman, *Face Value: Challenges of Transplant Technology*, 31 AM. J.L. & MED. 7, 11 (2005). Another revision of the UAGA was released on October 13, 2006, but it has not yet gained widespread adoption. AnatomicalGiftAct.Org, Uniform Anatomical Gift Act (2006), <http://www.anatomicalgiftact.org/DesktopDefault.aspx?tabindex=1&tabid=63>.

28. See, e.g., *Perry v. St. Francis Hosp. & Med. Ctr., Inc.*, 886 F. Supp. 1551, 1563-64 (D. Kan. 1995); *Sattler v. Nw. Tissue Ctr.*, 42 P.3d 440, 442 (Wash. Ct. App. 2002).

29. See, e.g., *Andrews v. Ala. Eye Bank*, 727 So. 2d 62, 64 (Ala. 1999); *Ramirez v. Health Partners of S. Ariz.*, 972 P.2d 658, 662 (Ariz. Ct. App. 1998); *Schembre v. Mid-Am. Transplant Assoc.*, 135 S.W.3d 527, 531 (Mo. Ct. App. 2004).

30. See *Carey v. New Eng. Organ Bank*, 843 N.E.2d 1070, 1077 (Mass. 2006).

31. See, e.g., *Gonzalez v. Katz*, No. 2005-00217, 2006 Mass. Super. LEXIS 358, at *11 (Mass. Super. Ct. July 14, 2006); *Ravenis v. Detroit Gen. Hosp.*, 234 N.W.2d 411, 414 (Mich. Ct. App. 1975).

32. UNIF. ANATOMICAL GIFT ACT (UAGA) § 2(e) (1968) (amended 1987).

33. *Martin v. Kim*, No. 2:03cv536, 2005 U.S. Dist. LEXIS 20595, at *17 (N.D. Ind. Sept. 19, 2005).

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anatomical gift, although the only remedy provided is a declaratory judgment.³⁴ Indeed, the importance of *Colavito* is that “[no] court has [yet] held that an intended recipient has any right in a donated organ or tissue prior to the completion of the gift,” that is, prior to “actual transplantation into the recipient.”³⁵

II. POLICY REASONING SUPPORTING A DONEE'S CAUSE OF ACTION

Colavito illustrates how medical personnel may disregard or even flout a donor's wishes by transplanting an organ into someone other than the intended donee. Physicians have even transplanted organs into the wrong individuals in other, more appalling instances.³⁶ Individual states may react to these cases by more closely monitoring or regulating the organ transplantation process or by providing a private cause of action for improper organ disposition.³⁷ States should consider a donee's cause of action because it would be more effective than a donor's cause of action in enforcing proper organ disposition.

A. *Competing Interests*

In creating a private cause of action, a state is likely to balance the same sort of competing interests underlying the UAGA. Those include “the wishes of the deceased during [her] lifetime concerning the disposition of [her] body . . . the desires of the surviving spouse or next of kin”³⁸ and “the need of society for bodies, tissues and organs for medical education, research, therapy and transplantation.”³⁹ To apply to living as well as cadaveric donors, these interests seem best summarized as “donor's wishes,” “donor's agent's wishes, if donor's wishes cannot be ascertained,”⁴⁰ and “societal and donee's personal

34. OHIO REV. CODE ANN. § 2108.02(F) (LexisNexis 2002). This author has found no cases testing the limits of that Ohio statute.

35. Brief of Am. Ass'n of Tissue Banks et al. as Amici Curiae Supporting Respondents at 15-16, *Colavito v. N.Y. Organ Donor Network, Inc.*, 438 F.3d 214 (2d Cir. 2006) (No. 05-1305), available at http://www.unos.org/SharedContentDocuments/Colavito_Amicus_Brief_and_Motion_-_As_Filed.pdf.

36. See, e.g., Charles Ornstein, *Hospital Halts Organ Program: St. Vincent Center in L.A. Says a Patient, 52nd on Liver Transplant List, Got Improper Priority and the Action was Covered Up*, L.A. TIMES, Sept. 27, 2005, at A1.

37. This Comment does not seek to promote a donee's cause of action over regulation of the organ transplantation process. However, for directed donations, the costs of monitoring and regulating organ donations in order to sanction improper physician behavior might be very expensive. A donee's cause of action might be less expensive, because the donee's potential recovery would give her an incentive to come forward when improper disposition occurs and so the state need not monitor each donation as intensely. For organ donation through the national waiting list, however, this reasoning favoring a cause of action does not apply. See *infra* Section II.D.

38. UAGA, prefatory note (1968) (amended 1987). Note, however, that such desires are nonbinding when they contradict the explicit wishes of the donor. UAGA § 2(h) (1987); UAGA § 2(b) (1968); Hartman, *supra* note 27, at 23.

39. UAGA, prefatory note (1968).

40. A living donor's wishes tend to be difficult to ascertain only when the donor is a minor or incompetent. In those cases, a close relative of the donor, such as a parent, may be permitted to decide

interest in effective organ use.” In light of those competing interests, providing a narrowly defined donee’s cause of action seems superior to providing a donor’s cause of action.

B. *The Donee’s Greater Material Stake in the Organ Makes Her a Superior Enforcer of the Donor’s Wishes*

When a donor or her agents specify a transplantation recipient, a donee’s cause of action against medical personnel for improper organ disposition is likely to be a more effective way of enforcing the donor’s or her agents’ wishes while protecting the donee’s reliance interests in the organ. Unlike the donor, the donee has great material stake in the organ’s proper disposition. While the donor may only suffer intangible emotional or dignitary harms by having her wishes ignored, the donee suffers pecuniary harms including medical expenses for prolonged treatment, lost wages due to that prolonged treatment, and lower future wage potential due to ongoing illness.⁴¹ If the donee learns of the organ’s improper disposition *after* she has been prepared for or perhaps even begun undergoing surgery, such as in *Colavito*,⁴² she may also suffer reliance-like damages due to undergoing risky, painful, and expensive procedures without the compensating benefit of the ultimate organ transplantation.

The donee’s greater material stake makes her a better enforcer of the donor’s wishes for three reasons: First, the donee is more likely to sue because she can expect greater monetary recovery. When a statute clearly provides a donee’s cause of action to recover her pecuniary damages due to the lost chance of a fully functioning organ, she may recover more and with greater likelihood than a donor suing for mere emotional distress.⁴³ Second, the donee

on the donor’s behalf, so long as the donation is in the donor’s best interest. *See, e.g.*, *Curran v. Bosze*, 566 N.E.2d 1319, 1331 (Ill. 1990); *Little v. Little*, 576 S.W.2d 493, 498 (Tex. Civ. App. 1979).

41. For example, dialysis costs an average of \$50,000 per year, and the average waiting time for a kidney on the national waiting list is five years. *See* Arthur J. Matas & Mark Schnitzler, *Payment for Living Donor (Vendor) Kidneys: A Cost-Effectiveness Analysis*, 4 AM. J. TRANSPLANTATION 216, 216 (2003) (estimating the expected savings in medical care over twenty years from getting a kidney transplant rather than having dialysis at \$94,579); *see also* Andrew Kusiak et al., *Predicting Survival Time for Kidney Dialysis Patients: A Data Mining Approach*, 35 COMPUTERS IN BIOLOGY & MED. 311, 312 (2005); Rebecca D. Williams, *Living Day-to-Day with Kidney Dialysis*, FDA CONSUMER, Jan.-Feb. 1998, available at http://www.fda.gov/FDAC/features/1998/198_dial.html.

42. 356 F.Supp.2d 237, 239 (E.D.N.Y. 2005) (explaining that *Colavito*’s preparation for surgery included the administration of intravenous fluids).

43. Emotional distress damages are difficult to recover. *See* Diane L. Borden, *Invisible Plaintiffs: A Feminist Critique on the Rights of Private Individuals in the Wake of Hustler Magazine v. Falwell*, 35 GONZ. L. REV. 291, 306 (2000) (explaining that proving intentional infliction of emotional distress poses “tough demands”); Glen Donath, *Curing Cancerphobia Phobia: Reasonableness Redefined*, 62 U. CHI. L. REV. 1113, 1121 (1995) (noting that for negligent infliction of emotional distress, “[m]ost courts require *either* an injury that caused the [emotional distress] *or* physical manifestation of the [emotional distress] as a condition precedent to recovery”); Eugene Kontorovich, Comment, *The Mitigation of Emotional Distress Damages*, 68 U. CHI. L. REV. 491, 515 & n.117 (2001) (reporting that statutory damage limitations have become popular for nonpecuniary damages such as emotional distress, particularly in the area of medical malpractice).

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is more likely to sue because her recovery will more appropriately vindicate her claim. Because the donee's damages are pecuniary in nature, financial remuneration is an appropriate substitute. In contrast, because the donor's harms are intangible, she may not see financial compensation as worthwhile enough to merit bringing suit. Third, a donee's cause of action creates a more credible threat to pressure medical personnel into proper disposition when it is still possible, because the performance the donee seeks would provide her with material, financial benefits that are more fungible with the costs of a lawsuit. Proper organ disposition would not provide any material benefit to the donor that could offset the material costs of initiating a lawsuit, so medical personnel are less likely to be pressured by a donor's threat of lawsuit than if the same threat were made by a donee.

For cadaveric donors who cannot enforce their own wishes, providing the donee with a cause of action may serve an especially important function: ensuring the transplantation takes place. Five percent of Americans claim they would be unlikely to donate a deceased family member's organs even if that family member had explicitly expressed the wish to donate.⁴⁴ This statistic suggests that a substantial number of people would not sue to enforce their family member's donation preference if it contradicted their own preferences. This seems particularly true in light of the fact that legal enforcement poses high litigation costs. Especially when the donor's family members do not approve of the donor's wishes, "hospitals and doctors . . . often fail to honor a deceased's directions to donate."⁴⁵ In these cases, a donee's cause of action could prove necessary for effectively enforcing the donor's wishes.

In other words, these arguments suggest that absent a donee's cause of action, medical personnel may be insufficiently deterred from substituting their own judgment and preferences for those of the donor.⁴⁶ As a result, the argument for an organ donee's cause of action is analogous to an argument supporting an estate's ability to bring a survival claim; in both cases if the substitute party is not granted a cause of action to bring suit, the defendant will be insufficiently deterred from negligent or reckless behavior.⁴⁷

44. The American Public's Attitudes Toward Organ Donation and Transplantation, http://www.transweb.org/reference/articles/gallup_survey/gallup_chap4.html (last visited Mar. 26, 2007).

45. Mark S. Nadel & Carolina A. Nadel, Commentary, *Using Reciprocity To Motivate Organ Donations*, 5 YALE J. HEALTH POL'Y, L. & ETHICS 293, 297 (2005).

46. One might argue that even *with* a donee's cause of action, medical personnel will be insufficiently deterred because malpractice insurance covers the cost of their liability. But "[i]ndividual physicians may now face higher premiums or even coverage rejection" if they commit malpractice. ROBERT A. BERENSON ET AL., CTR. FOR STUDYING HEALTH SYSTEM CHANGE, MEDICAL MALPRACTICE LIABILITY CRISIS MEETS MARKETS: STRESS IN UNEXPECTED PLACES (2003), available at <http://www.hschange.com/CONTENT/605>. Moreover, medical groups and hospitals pay higher premiums if their members or employees commit malpractice. *Id.* Finally, hospitals that self-insure even more directly suffer from their employees' claims experience. *Id.*

47. See *Smith v. Whitaker*, 734 A.2d 243, 252 (N.J. 1999) (arguing that punitive damages should

The reasoning behind providing a donee's cause of action is also analogous to the reasoning underlying third-party beneficiary theory in contract. According to that theory, which is "generally recognized in modern law,"⁴⁸ *A*, the promisee, and *B*, the promisor, may contract for *B* to provide a benefit to *C*, the intended beneficiary. If *B* does not provide *C* with that benefit, *C* may enforce *B*'s duty by lawsuit.⁴⁹ The principles underlying this theory are that "parties to a contract have the power, if they so intend, to create a right in a third person,"⁵⁰ and for "grounds of simplicity and convenience of remedy the beneficiary is allowed a direct action against the promisor."⁵¹ In the case of organ donation, a physician (promisor) enters an agreement with a donor (promisee) to benefit the donee (intended beneficiary) by transferring the organ to her. If the physician breaks her promise, the donee should have a direct cause of action against her based on the same principles that support a direct cause of action for a third-party beneficiary contract.⁵²

C. *A Donee's Cause of Action Might Encourage Organ Supply*

Providing a donee's cause of action could also increase the organ supply. Donors are more comfortable donating organs to familiars (family members or close friends) than to strangers.⁵³ Because donors would prefer to specify their recipients, they would likely be even more inclined to donate if they could be sure their desires would be respected. The Second Circuit acknowledged as

survive the victim's death so that the "defendant should not be freed of responsibility for aggravated conduct"); Ronen Avraham, *Pain-and-Suffering Damages in Tort Law: Revisiting the Theoretical Framework and the Empirical Evidence* 114 n.282 (Univ. of Mich., Working Paper No. 03-001, 2003), available at <http://law.bepress.com/umichlwps/olin/art11/> (arguing that marginal deterrence requires that pain and suffering loss should survive the victim's death, so that it would not be cheaper to kill than to injure).

48. Note, *Intent and Benefit in Third Party Beneficiary Contracts: A Justification for Public Policy*, 26 VA. L. REV. 778, 778 (1940).

49. See RESTATEMENT (SECOND) OF CONTRACTS § 304 (1981).

50. *Id.*, cmt. bc.

51. *Id.*, cmt. bc.

52. This contract theory is strongly analogous to the organ donation situation, so much so that one might argue that it should govern the situation; namely, that courts should find a common law cause of action for organ donees through third-party beneficiary theory. However, because the National Organ Transplant Act forbids the exchange of organs for valuable consideration, 42 U.S.C. § 274e (2000), and because many scholars worry about commodifying organs by subjecting them to property or contract rhetoric, direct application of third-party beneficiary theory might be less wise than a statutorily created cause of action. See *infra* Section II.D for further comparison between creating a statutory cause of action and finding a common law property or contract right to the organ.

53. See Aaron Spital, *Public Attitudes Toward Kidney Donation by Friends and Altruistic Strangers in the United States*, 71 TRANSPLANTATION 1061, 1062 (2001) (noting that Americans report being more than three times as willing to donate a kidney to a close friend with renal failure than to a stranger). In 2006, less than 1% of organ donations for transplantation were made to anonymous recipients. The Organ Procurement and Transplantation Network, Living Donor Transplants by Donor Relation, <http://www.optn.org/data/> (follow "National Data" hyperlink; then select "Transplant" from the Category drop-down menu; then follow "Living Donor Transplants by Donor Relation" hyperlink) (last visited Mar. 26, 2007) [hereinafter OPTN, Living Donor Transplants by Donor Relation].

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much in *Colavito*, noting that without statutory rights preserving personal preference and legal remedies to enforce them, families might refuse to donate organs in the first place—as in *Colavito*, Debra Lucia testified that “if she [knew she] could not have directed the second kidney to Colavito, she would have buried it in the ground along with the rest of Mr. Lucia’s body.”⁵⁴

D. Need To Narrowly Define the Donee's Cause of Action

The policy reasoning discussed in Sections II.B-C justifies only a narrowly defined donee’s cause of action. There are four ways in which the cause of action may need to be constrained: first, the cause of action should exist only against medical personnel assisting in the transplantation process, not against the donor or her agents should they reconsider the choice to donate. Particularly while the organ remains in the donor’s body, threat of suit could exert inappropriate coercive pressure on the donor to go through the risky and invasive transplantation process. Second, the cause of action should be confined to cases in which the organ was intended for transplantation, not research. The arguments in Section II.B regarding the donee’s greater material stake apply with less force to donees receiving the organ for research purposes because an organ’s material value for research is less certain than for transplantation. Third, the cause of action might be better confined to directed donations and not extended to donations through the national organ waiting list. Waiting list donations do not as strongly implicate specific donor wishes. The procedure for determining the list’s order is extremely complex,⁵⁵ and a donee is unlikely to be aware if the organ she should have received went to someone lower on the list. As a result, regulation seems a better form of oversight for waiting list donations. Finally, the cause of action should be confined to a statutory definition, rather than implied from common law property or contract rights. Implying a cause of action from common law rights could upset those who are hesitant to commodify or commercialize body parts.⁵⁶ A statutory

54. 438 F.3d 214, 228 (2d Cir. 2006); see also Abby Harris Maharaj, *A Pink Dot Saved My Life: One Tragic Side-Effect of the St. Vincent Transplant Controversy Could be To Discourage People from Donating Their Organs*, L.A. TIMES, Oct. 8, 2005, at B19 (describing how one newspaper reader reacted to hearing that an organ had been given to the wrong donee by declaring, “I’m not putting my pink dot [designating organ donation] on my driver’s license until [organ transplant centers] clean up their act”).

55. See Organ Transplants.org, *The Gift of a Lifetime: The Transplant Waiting List*, <http://www.organtransplants.org/understanding/unos/> (last visited Mar. 26, 2007) (“General principles such as a patient’s medical urgency, blood, tissue and size match with the donor, time on the waiting list and proximity to the donor, guide the distribution of organs.”).

56. See TASK FORCE ON ORGAN TRANSPLANTATION, U.S. DEP’T OF HEALTH & HUMAN SERVS., *ORGAN TRANSPLANTATION: ISSUES AND RECOMMENDATIONS* 96 (1986) (affirming that “society’s moral values militate against regarding the body as a commodity”); Cain, *supra* note 22, at 475 (“[R]ecognizing property rights in human biological materials . . . could lead to an increase in the international market in human body parts and an exploitation of the poor.”); MaryJoy Ballantyne, Note, *One Man’s Trash is Another Man’s Treasure: Increasing Patient Autonomy Through a Limited Self-Intellectual Property Right*, 3 GEO. J.L. & PUB. POL’Y 567, 593 (2005) (“[T]reating the body as a

cause of action might be more popular, being less likely to create unsavory precedent for conceptualizing organs as commodities.

CONCLUSION

A. *Liability Exceptions*

Colavito illustrates the need for states to define liability exceptions to a donee's cause of action. The first exception should afford "good faith" immunity to medical personnel. Excessive liability could, if unchecked, deter medical personnel from participating in organ transplantations.⁵⁷ For the donor's cause of action, the UAGA incorporated a good faith immunity provision "to help increase the organ supply by encouraging medical professionals to participate in the organ procurement process."⁵⁸ Such a provision should be included with a donee's cause of action, such that medical personnel would be accountable only when their actions go beyond negligence into the realm of bad faith.

Additionally, *Colavito* raises the important issue of medical compatibility of donated organs. For successful organ transplantation, the organ must be compatible with the recipient on several dimensions,⁵⁹ but donated organs are frequently incompatible.⁶⁰ The donee's body will reject an incompatible organ, such that it cannot benefit her, and could even cause harm.⁶¹ When the organ would not benefit the donee, permitting doctors to allocate it to a different individual would ensure that it is put to good use.

commodity is morally repugnant to the sanctity of personhood."); Nancy E. Field, Note, *Evolving Conceptualizations of Property: A Proposal To De-Commercialize the Value of Fetal Tissue*, 99 YALE L.J. 169, 171 (1989) ("The policy rationale behind [prohibiting organ sales is] . . . that impoverished individuals might be induced to sell their organs for profit.").

57. See *Colavito*, 438 F.3d at 228 ("Encouraging private lawsuits . . . may over-deter doctors and hospitals that need to act quickly to preserve life-saving organs."); *Perry v. St. Francis Hosp. & Med. Ctr., Inc.*, 886 F.Supp. 1551, 1557 n.3 (D. Kan. 1995) ("Absent a provision which protects them from liability for anything other than 'bad faith,' hospital personnel would likely avoid involvement in the donation process in almost all cases.").

58. *Colavito v. N.Y. Organ Donor Network, Inc.*, No. 106, 2006 N.Y. LEXIS 3655, at *20 (N.Y. Dec. 14, 2006).

59. Brief of Am. Ass'n of Tissue Banks et al., *supra* note 35, at 20 n.2 (listing blood type, histocompatibility, and organ size as a few of the necessary dimensions of compatibility). Organs must also be generally viable. See *id.*

60. See Michael T. Morley, Note, *Proxy Consent to Organ Donation by Incompetents*, 111 YALE L.J. 1215, 1216 (2002); Brief of Am. Ass'n of Tissue Banks et al., *supra* note 35, at 13 ("In fact, from 2000 to 2005 in the designated service area for the New York Organ Donor Network, there were a total of 147 directed donation requests that resulted in only 28 transplants into intended recipients due to clinical compatibility factors.").

61. Emma Young, *Healing Rays*, NEW SCIENTIST, May 16, 2001, available at <http://www.newscientist.com/article.ns?id=dn739> (explaining that anti-rejection drugs "dampen[] the patient's immune system and increase[] their risk of infection. In extreme cases, rejection can lead to death.").

'Tis Better To Receive: The Case for an Organ Donee's Cause of Action

Finally, states should provide liability exceptions for important state interests. The UAGA and several cases suggest that a coroner should be exempt from liability to the deceased or her agents if their preferred organ disposition would interfere with an effective autopsy in cases of suspected homicide.⁶² The same reasoning justifies a coroner's exemption from liability to a donee. Public health concerns also justify precluding the donee's recovery of the organ or corresponding damages. A number of diseases may be transmitted from donor to donee along with the organ, physically harming the donee and risking contagion to others.⁶³ The importance of preventing the spread of disease necessitates a liability exemption for physicians who decline to transplant diseased organs.⁶⁴

B. *Growing Importance of a Donee's Cause of Action*

Organ donations for transplantation are generally increasing and that trend includes directed donations.⁶⁵ Donors are now capable of donating organs or parts thereof that were impossible to donate before, such as liver sections from living patients.⁶⁶ As living donation becomes even safer and public awareness increases, the number of directed donations can be expected to grow.⁶⁷ Paired organ exchanges⁶⁸ comprise another growing source of directed donations.⁶⁹ The success of early paired exchanges⁷⁰ has led scholars and physicians to

62. UAGA prefatory note (1968) (amended 1987) (listing, as one of the interests underlying the Act, "the need of autopsy to determine the cause of death when private legal rights are dependent upon such cause"); *Martin v. Kim*, No. 2:03cv536, 2005 U.S. Dist. LEXIS 20595, at *14 (N.D. Ind. Sept. 19, 2005); *Huntly v. Zurich Gen. Accident & Liab. Ins. Co.*, 280 P. 163, 168 (Cal. Ct. App. 1929); *Snyder v. Holy Cross Hosp.*, 352 A.2d 334, 342 (Md. Ct. Spec. App. 1976).

63. *See, e.g., Gonzalez v. Katz*, No. 2005-00217, 2006 Mass. Super. LEXIS 358, at *4 (Mass. Super. Ct. July 14, 2006) (rare metastatic cancer transmitted by a liver donation); *Lutz Fischer et al., Transmission of Malaria Tertiana by Multi-Organ Donation*, 13 CLINICAL TRANSPLANTATION 491, 491 (1999); *B. J. Pereira et al., Transmission of Hepatitis C Virus by Organ Transplantation*, 325 NEW ENG. J. MED. 454, 467 (1991).

64. Medical personnel should not be held liable for complying with federal regulations that prohibit the transplantation of diseased organs. *See, e.g.,* 21 C.F.R. § 1270.21(h) (2007).

65. *See* OPTN, *Living Donor Transplants by Donor Relation*, *supra* note 53.

66. Gina Kolata, *First U.S. Liver Transplant From Live Donor Is Set*, N.Y. TIMES, Nov. 27, 1989, at A1.

67. W. H. Marks et al., *Organ Donation and Utilization, 1995-2004: Entering the Collaborative Era*, AM. J. TRANSPLANTATION 1101, 1108-09 (2006) (claiming that less invasive transplantation surgery and greater public awareness of the need for kidneys increased the number of living kidney donors).

68. *See* Faith McLellan, *US Surgeons Do First "Triple-Swap" Kidney Transplantation*, 362 THE LANCET 456, 456 (2003); Alvin E. Roth et al., *Kidney Exchange*, 119 Q. J. ECON. 457, 459 (2004); Associated Press, *5 Receive Kidneys in Marathon Organ Swap*, MSNBC.COM, Nov. 20, 2006, <http://www.msnbc.msn.com/id/15817751/>.

69. Press Release, Johns Hopkins Medical Institute, *Hopkins Starts Paired Kidney Exchange Program* (Aug. 16, 2001) [hereinafter *Hopkins Press Release*], *available at* <http://www.hopkinsmedicine.org/press/2001/august/010816.htm> ("[P]aired exchanges could benefit about 3% of patients on the national organ waiting list, yielding about 1,500 additional transplants.")

70. Robert A. Montgomery et al., *Clinical Results From Transplanting Incompatible Live Kidney Donor/Recipient Pairs Using Kidney Paired Donation*, 294 J. AM. MED. ASSOC. 1655, 1661 (2005).

promote their use.⁷¹ These directed donations comprise situations meriting a donee's cause of action, as described in Part II.⁷²

As a result of these trends in organ transplantation, a donee's cause of action is increasingly relevant. As the number of directed donations rises, it becomes even more important to ensure that organs are allocated as donors specify, both to respect donor wishes and to sustain their willingness to donate. Given the policy reasoning in Part II, a donee's cause of action is likely to be more effective at enforcing proper organ disposition than a donor's cause of action, and so states should consider statutorily creating a cause of action for the donee. However, for reasons discussed in Part II and this Conclusion, legislatures should narrowly define the cause of action, and provide certain liability exceptions. In so doing, states can transform the troubling facts of *Colavito* into a positive scheme that protects the interests of organ donors, donees, and society in proper and effective organ transplantation.

71. See Phyllis Coleman, "Brother, Can You Spare a Liver?" *Five Ways To Increase Organ Donation*, 31 VAL. U. L. REV. 1, 17 (1996); Michael T. Morley, Note, *Increasing the Supply of Organs for Transplantation Through Paired Organ Exchanges*, 21 YALE L. & POL'Y REV. 221, 223 (2003); Susan Hankin Denise, Note, *Regulating the Sale of Human Organs*, 71 VA. L. REV. 1015, 1036-37 (1985); see also Hopkins Press Release, *supra* note 69 (explaining that a transplant center established a formal paired kidney exchange program in 2001).

72. Some organ technology developments, such as transplantation of animal body parts or mechanical organ prostheses, could slightly offset the growing need for a donee's cause of action. However, these technologies are expensive and have lower success rates than human organ donation, so they are unlikely to comprise many organ transplantations in the near future. See, e.g., MassGeneral Hospital for Children, Organ Donation, http://www.massgeneral.org/children/adolescenthealth/articles/aa_organ_donation.aspx (last visited Mar. 26, 2007) ("[T]he xenotransplantation [of animal body parts] success rate has been dismal.").