Retailing Human Organs under the Uniform Commercial Code, 16 J. Marshall L. Rev. 393 (1983)

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RETAILING HUMAN ORGANS UNDER THE
UNIFORM COMMERCIAL CODE

There exists a severe shortage of human organs\(^1\) for transplantation, research and education. Satisfying the demand for organs was one reason for drafting the Uniform Anatomical Gift Act\(^2\) (Gift Act); despite widespread adoption of the Gift Act, the shortage persists. If the sale of organs were allowed, the incentive of payment would increase the supply of available organs and reduce, or even eliminate, the deficiency. This proposal would, however, require legislative support and legal guidelines. Application of the Uniform Commercial Code (UCC) and appropriate amendments to the Gift Act would provide an effective framework within which the market system could operate. These proposals are discussed with the intent to stimulate thought in an area requiring change.

The human body and its parts may be used in many ways, but the demand for human parts is most significant in transplant operations.\(^3\) Although drugs have been developed to prevent, control and cure diseases,\(^4\) the treatments often fail. The quality of the patient’s life may then be improved only by replacing a diseased organ. Numerous parts of the human body may be

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1. An organ is a part of the body that performs a special function or functions. See Dorland’s Illustrated Medical Dictionary 1095 (25th ed. 1974). In this Comment, the term “organ” refers to those organs which the body cannot regenerate, such as the heart or kidneys, in contrast to blood, which might be viewed as an organ.


3. Medical research has focused on allotransplants, which involve a donor and a recipient who are genetically dissimilar, but of the same species. Experimental transplantations involve the pituitary, thyroid, parathyroid, gonads, and most other major body tissues of both human and animal subjects. See generally Note, The Sale of Human Body Parts, 72 Mich. L. Rev. 1182, 1184 (1974) (citing Human Organ Support and Replacement (J. Hardy ed. 1971) and Human Transplantation (F. Rapaport & J. Dausset ed. 1968)) [hereinafter cited as Sale of Body Parts].

4. For example, a new series of heart drugs has been developed. The most effective are the beta-blocking drugs, first made available in the late 1960’s to treat abnormal heart rhythm. The beta-blocking drugs are also effective in preventing second heart attacks, high blood pressure and angina (a lack of oxygen to the heart). A recent government study indicated that beta-blocker propranol reduced mortality in heart-attack survivors by 26 percent. America’s $39 Billion Heart Business, U.S. News & World Rep. Mar. 15, 1982, at 53.
transplanted; successful transplants of the cornea,\textsuperscript{5} kidney,\textsuperscript{6} bone marrow\textsuperscript{7} and heart\textsuperscript{8} are common, while other transplants have had limited success.\textsuperscript{9} As medical research continues to

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5. The first successful corneal transplant was completed in 1905 when the cornea of a deceased boy was grafted onto a man whose eyes had sustained lime burns. \textit{Sale of Body Parts, supra} note 3, at 1183 (citing P. TREVOR-ROPER, \textit{CORNEAL GRAFTING} 5 (1972)).


The development of more sophisticated drugs has led to the continuing expansion of the kidney transplant, and the operation is now a widely practiced form of corrective surgery. Between 1951 and 1972, 12,389 kidney transplants took place. Follow-up studies involving 10,357 of the patients indicated that 47.6 percent were living with a successful transplant, 18.2 percent were alive despite an unsuccessful transplant, and 34.2 percent were deceased. \textit{Sale of Body Parts, supra} note 3, at 1183 (citing \textit{The 11th Report of the Human Renal Transplant Registry}, 226 \textit{J.A.M.A.} 1197 (1973)). Each year, more than 3,000 Americans receive kidney transplants. \textit{A New Look at Transplants}, \textit{NEWSWEEK}, July 31, 1978, at 63.

7. Bone marrow transplants are, in many ways, the easiest to perform; meticulous surgery is unnecessary and live donors are plentiful. Donating bone marrow is not painful, and, because live donors are used, storage of the marrow is not necessary. The graft is removed from the sternum (breastbone) and hipbones of the donor and then injected through a plastic tube into the recipient's abdomen. Such transplants are effective in treating leukemia. Researchers are also experimenting with the use of marrow transplants in treating sickle-cell anemia. J. DEATON, \textit{NEW PARTS FOR OLD: THE AGE OF ORGAN TRANSPLANTS} 143 (1974).


concentrate on disease prevention and organ transplantation, the demand for human parts will increase. Furthermore, as the percentage of successful transplants increases, more patients suffering from organ failure will seek transplants to cure their problems.

THE ENACTMENT OF THE UNIFORM ANATOMICAL GIFT ACT

State legislatures began to enact donation statutes in the late 1950's. The legislation was intended to take advantage of the public's apparent willingness to donate organs. By 1968, a majority of American jurisdictions had promulgated anatomical donation statutes. These statutes, however, were frequently ineffective. Poor drafting and jurisdictional variations led to uncertainty over a gift's effect when a donor authorized his gift donors and lymphocyte genetic-compatibility matching. Deaton, supra note 7, at 133-42.

The rarest and most expensive surgery is the heart-lung transplant. During 1981, six people received the double transplant at the Stanford University Medical Center. Each of the patients had severe disease of both the heart and lungs. Two patients have died, but the remaining recipients are doing well. America's $39 Billion Heart Business, U.S. News & World Report, Mar. 15, 1982, at 56. See generally Sale of Body Parts, supra note 3.

10. See Dukeminier, Supplying Organs for Transplantation, 68 Mich. L. Rev. 811, 813 (1970) (more surgeons will be trained in transplantation techniques as various operations become more successful).

11. The effect of a successful operation is illustrated by the fact that within one year of the first human heart transplant, thirty-five persons awaited heart transplants in two Houston hospitals; dozens more were waiting in hospitals throughout the world. N.Y. Times, Oct. 29, 1968, at 1, col. 1 (city ed.).

12. See generally Dukeminier, supra note 10, at 825.

13. A Gallup poll indicated that 70-percent of those surveyed would be willing to donate all or part of their bodies. See N. Y. Times, Jan. 17, 1968, § 1, at 18, col. 4.

14. "[E]xisting 'anatomical' statutes . . . are inadequate and the need for appropriate statutory provision to implement the desires of the dying to aid the living is increasingly urgent." Holland v. Metalious, 105 N.H. 290, 293, 198 A.2d 654, 656 (1964). Most statutes failed to recognize the medical and legal complexities involved. For example, the gift must be authorized before the donor's death to ensure a fresh organ. Also, to avoid delay, a donor's gift must be delivered before his estate is probated. Dukeminier, supra note 10, at 825. The statutes had one or more of the following weaknesses: (1) failure to deal adequately with conflicts between surviving relatives; (2) inadequate protection of physicians operating under apparently valid gift instruments; and (3) cumbersome filing and delivery requirements. Sale of Body Parts, supra note 3, at 1185 n.26.

15. State provisions differ as to: (1) competency of the persons authorized to consent to an organ or tissue donation; (2) right of survivors to make a gift of organs from a dead body in their possession; (3) permissible donees; (4) purposes for which the gift could be made; and (5) the degree of formality required to validate consent. Id. at 1185-86 n.27.
in one state, but died in another.\textsuperscript{16} As a result, this framework failed to provide an adequate guideline for anatomical gifts.

In response to this problem, a special committee studied the desirability of a uniform donation act.\textsuperscript{17} The committee's recommendations\textsuperscript{18} resulted in the Uniform Anatomical Gift Act.\textsuperscript{19} Immediately following the Gift Act's approval by the National Conference of Commissioners on Uniform State Laws, twenty-four states adopted it.\textsuperscript{20} The American Bar Association and the...
American Medical Association also gave their support. All fifty states and the District of Columbia have since adopted the Gift Act, in one form or another.

The Gift Act provides some simple guidelines for human tissue and organ donations. It permits "any individual of sound mind and eighteen years of age or more" to donate all or part of his body to certain specified institutions or individuals for many varied purposes. Members of the decedent's family, in accordance with a priority schedule, may donate all or part of the decedent's body, provided that the decedent did not prohibit such donation.

One of the major benefits provided by the Gift Act was the additional protection conferred upon the donee. The older statutes often required the donee to wait during probate or other delays before he could claim the donated body part. Determining who was authorized to make a donation and the formalities of validating the donor's consent increased the delay and often prevented a successful transplant. Under the provisions of the Gift Act, acceptable donees are given the right to accept or reject any gift and to have the donated part transferred immediately after the donor's death. In addition, the Gift Act protects

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22. See generally Louisell, supra note 20, at 627.
23. See Gift Act, supra note 2, at § 2(a).
24. The gift may be made to any appropriate medical institution, accredited medical or dental school, medical bank or storage facility, hospital, or college or university. The gift may also be donated to any surgeon, physician, or specified individual. The donated organ may be used for medical or dental education, research, therapy, advancement of medical or dental science, or transplantation. Id. at § 3.
25. The following priorities were established by the Gift Act:
   (1) the spouse;
   (2) an adult son or daughter;
   (3) either parent;
   (4) an adult brother or sister;
   (5) a guardian of the person of the decedent at the time of his death;
   (6) any other person authorized or under obligation to dispose of the body.

Id. at § 2(b).

A surviving relative, having no notice of a decedent's contrary intent, may donate the decedent's body parts, provided no member of a higher priority class is available at the time of death. Id.

27. A physician may accept the gift if the specified donee is unavailable, or, if there is no specified donee, the physician may accept the gift on behalf of a potential recipient. Gift Act, supra note 2, at § 4(c). Revocation of a delivered gift instrument is only effective if "communicated" to the donee, or found on the decedent or in his personal effects at death. Id. at §§ 6(a), 6(b). A donee may accept any gift unless he has actual notice of the decedent's objection or of the objection of a surviving relative of a priority
a donee from incurring liability when acting in accordance with its provisions.\textsuperscript{28}

Despite these improvements, the Gift Act failed to address several important issues. The Gift Act made no attempt to discuss \textit{inter vivos} gifts,\textsuperscript{29} \textit{post mortem} autopsies,\textsuperscript{30} or the delivery and disposition of unclaimed bodies.\textsuperscript{31} The Gift Act provided neither guidance for determining when death has occurred,\textsuperscript{32} nor criteria for determining who should receive available but scarce organs.\textsuperscript{33} Furthermore, the question of payment for body higher than or equal to the donee. \textit{Id.} at § 2(c). If the gift is made by will, it is effective immediately upon the death of the decedent, even if the will is invalidated by probate, "to the extent that [the gift] has been acted upon in good faith. . ." \textit{Id.} at § 4(a).

\textsuperscript{28} See Gift Act, \textit{supra} note 2, at § 7(c).

\textsuperscript{29} One state modified the Gift Act to expressly include coverage of \textit{inter vivos} gifts of kidneys. \textit{See Mass. Ann. Laws ch. 113, § 8(a) (1975)}. The Act's definitions imply that \textit{inter vivos} gifts were not meant to be covered. \textit{See Gift Act, \textit{supra} note 2, at §§ 2(a), 2(b)}. Apparently believing that the problem of \textit{inter vivos} gifts was fairly well resolved, the commissioners stated: "Transplantations may be effected within narrow limits from one living person to another living person. In such case, all that is required is an appropriate 'informed consent' authorizing the surgical removal on the one hand, and the implantation on the other." \textit{Handbook, \textit{supra} note 18}, at 182.

\textsuperscript{30} The Gift Act's failure to address this issue is attributed to deference to religious beliefs and the spiritual importance given the dead. \textit{See generally \textit{Sale of Body Parts, \textit{supra} note 3}, at 1222-23.}

\textsuperscript{31} \textit{Cf. Vestal, Taber & Shoemaker, \textit{Medico-Legal Aspects of Tissue Homotransplantation, 18 U. Det. LJ. 271}, 283-84 (1955).}

\textsuperscript{32} The commissioners felt that defining death was best left to the judgment and integrity of the medical profession:

This point is not subject to clear cut definition and medical authorities are currently working toward a consensus on the matter. . . The real question is when have irreversible changes taken place that preclude return to normal brain activity and self sustaining bodily functions. No reasonable statutory definition is possible. . . Reliance must be placed upon the judgment of the physician in attendance. \textit{Gift Act, \textit{supra} note 2, at § 7.}

For a discussion of the definition of death and an analysis of varying views, see \textit{G. Grisez & J. Boyle, Jr., \textit{Life and Death With Liberty and Justice}} (1979).

\textsuperscript{33} The commissioners had no solution for this problem. "It is most unlikely that legal standards could make much sense in this complex area of scientific development." \textit{Stason, \textit{The Uniform Anatomical Gift Act, 23 Bus. Law. 919, 929 (1968)}.}

The purpose of an organ transplant is the long term restoration of a critically ill patient to a productive and personally enjoyable life. The first task is determining who is medically qualified to receive a transplant. First, the patient should be in critical need of a transplant organ. Second, although the patient should be critically ill to qualify for a transplant, he should not be so critically ill that he would not be likely to survive the transplant procedure. Third, due consideration must be given to any complicating factors of the patient's condition. Fourth, there must be due consideration of the disease that caused the destruction of the organ in the first place and which might destroy the transplant organ as well. How does
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parts was also left for future resolution.\textsuperscript{34}

THE SHORTAGE OF ORGANS

The greatest problem with the Gift Act is its inability to solve the organ deficiency. For example, a serious shortage of viable kidneys existed before the Gift Act's approval in 1968. A 1967 report to the Surgeon General\textsuperscript{35} estimated that 8,000 American patients per year developed chronic kidney failure and were ideally suited for transplantation, but only 300 of these were being treated through dialysis\textsuperscript{36} or transplantation. One study estimated that only 450 patients were being treated a year after the Gift Act's implementation.\textsuperscript{37} Patients who do not receive dialysis or transplants must rely on less effective alternative treatments, such as medication. The number of kidney transplants presently performed represents only one-tenth of the number that could be undertaken if more facilities and kidneys were available.\textsuperscript{38} The scarcity is not limited to kidneys. While a federal panel estimated that 12,000 heart transplants are needed annually,\textsuperscript{39} statistics indicate that only one hundred are actually performed.\textsuperscript{40} These figures illustrate the severe shortages still

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\textsuperscript{34} See infra notes 85-86 and accompanying text.


\textsuperscript{36} Dialysis involves filtration of the blood by circulation through an external artificial kidney. The treatment is usually required once or twice a week, and the patient's physical state—especially immediately before treatment—is impaired. Family and patient stress over the patient's dependence on the machine has been noted, and patient suicide rates have led to intensive screening for psychological adjustment. Sale of Body Parts, supra note 3, at 1202 (citing Cramond, Renal Transplantations—Experiences with Recipients and Donors, Psychiatric Aspects of Organ Transplantation 116, 119-23 (1971)).

\textsuperscript{37} Sale of Body Parts, supra note 3, at 1202 (citing D. Lesour, M. Fogel & D. Johnston, Benefit-Cost Analysis of Kidney Disease Programs 37 (Public Health Service Pub. No. 1941, 1968)).

\textsuperscript{38} See Sale of Body Parts, supra note 3, at 1202. Various studies show that all patients with kidney failure could be given kidneys if all victims of irreversible brain injury became donors. Yet, donations from all sources have failed to satisfy present needs. See Couch, Supply and Demand in Kidney and Liver Transplantation, 4 Transplantation 587, 595 (1967); Fox, Faela, Kaufman & Darin, The Cadaver Donor: Logistics of Supply and Demand in an Urban Population, 227 J.A.M.A. 162 (1972).

\textsuperscript{39} See Sale of Body Parts, supra note 3, at 1203.

\textsuperscript{40} America's $39 Billion Heart Business, U.S. News & World Report, Mar. 15, 1982, at 56. Around the world each year 75,000 persons are potential heart recipients, but only 400 heart transplant operations took place be-
faced by the medical profession. In addition to the lack of human organs, human skin is also in short supply.\textsuperscript{41} Forty percent of the people who receive third-degree burns die; this high mortality could be drastically reduced if enough human skin were available for grafting. The shortage of organ and tissue donors has also affected medical education and research.\textsuperscript{42} Medical institutions must now spend large sums of money to obtain cadavers. The Gift Act has not sufficiently increased the number of donors necessary to alleviate any of these problems.

The basic premise supporting the Act is a general belief in altruism.\textsuperscript{43} The donor agrees to relinquish his body or organs solely out of concern for the welfare of the potential recipients. This concern may reflect a general benevolence toward others when the donor does not know the donee, or it may reflect love and affection when the donor and donee have personal ties. Whatever the motivation of a donor's gift, the altruistic system of organ transfer has failed to produce an adequate supply of body parts.\textsuperscript{44}

The system's failure to fulfill the organ demand can be attributed primarily to two causes: (1) the public's lack of knowledge about the donor program, and (2) a general unwillingness by many people to voluntarily relinquish their organs. It is understandable that a person would not want to donate a kidney while he remains alive and healthy; fear of serious pain or injury from the removal procedure and the fear of losing the remaining kidney through subsequent injury or disease are legitimate concerns. A person's reluctance to donate his body upon death is more difficult to understand. Two factors may contribute to this reluctance: first, a deep-rooted concern about the integrity of one's body;\textsuperscript{45} and second, a general lack of concern for the needs...
of potential donees.\textsuperscript{46}

Much has been done within the existing system to minimize this reluctance and the other principal causes of the organ shortage. The National Kidney Foundation and the American Kidney Fund conduct national programs to publicize and promote organ donation, and these programs are supported by local, state, and regional kidney foundations and by government agencies.\textsuperscript{47} The development of computer systems which match available organs with waiting recipients has helped the transplant process dramatically.\textsuperscript{48} Despite these efforts, however, enactment of the present Gift Act has not generated enough organ donations.

\textbf{The Sale of Organs}

Analysis of the interaction between economics and human behavior shows that many people who would not donate their organs would sell them.\textsuperscript{49} Supplementing the Gift Act's altruistic principles with a market system would substantially alleviate the shortage of organs by providing a monetary incentive. The wide gap between acknowledging one's finitude, understanding the need others have for tissue gifts, and actually making the gift.\textsuperscript{46} Raible, \textit{Accelerating Life-sustaining Gifts: The Case for Uniform Organ Donor Driver's Licenses}, MEDICOLEGAL NEWS, October 1975, at 3. Religious factors may also play a role. See supra note 30.

\textsuperscript{46} Brams, \textit{supra} note 43, at 186. This factor alone illustrates the weakness of the altruistic system.

\textsuperscript{47} Most states provide information concerning the Gift Act to people who apply for a driver's license or for a license renewal. The driver is offered the opportunity to become a donor by filling out appropriate forms.

\textsuperscript{48} In 1968, Dr. Jon J. Van Rood, a Dutch immunologist, founded Eurotransplant, a computerized service matching some 3,000 potential kidney donors with over 1,000 patients in need of a kidney transplant. The computer files contain the donor's and the recipient's lymphocyte types. When the donor dies, the computer will locate the recipient with the best possible lymphocyte match. A perfect match between an unrelated donor and recipient is very rare, but most matches are acceptable and successful. Today, the Eurotransplant network includes almost all of western Europe. Cooperation is especially active among the citizens of the Netherlands, West Germany, Austria, Belgium, Switzerland, France, and Italy.

A few years after Eurotransplant was established, Dr. Paul I. Terasaki of Los Angeles founded The National Transplant Communications Network. This donor/host matching system is now used by over 100 transplant centers in the U.S. and Canada. Deaton, \textit{supra} note 7, at 75-77.

\textsuperscript{49} \textit{Kidneys and Eyes for Sale as Well as Parts of Blood}, Evening Journal (Wilmington, Delaware) April 14, 1975, at 10, col. 1. Financial compensation would provide a strong incentive for some individuals to relinquish an organ, and evidence indicates that patients would be willing to pay for organs. The United Press International once gave an account of several individuals offering one of their kidneys or corneas for sale; one person offered to sell a kidney for $4,700, and another offered a cornea or kidney for $10,000. Some offers drew responses from potential purchasers, but the physicians in charge reportedly refused to consider such exchanges.
existing system of blood collection,\textsuperscript{50} using both donations and purchases, is evidence that such a program can work. Optimistically, the supply and price of organs would be self-regulating. As the need for human body parts increases, the price of parts in short supply would rise, providing an incentive to individuals to sell those parts.\textsuperscript{51} Likewise, the price for organs in abundant supply would decrease.

It would not be difficult to implement a market system for the transfer of organs after a donor's death.\textsuperscript{52} Agencies which engage in the collection, processing, storage and distribution of organs\textsuperscript{53} could pay the donor's estate,\textsuperscript{54} or the seller and buyer could execute a personal contract. Also, remuneration could be of some form other than money,\textsuperscript{55} such as free medical care,\textsuperscript{56} hospital and funeral expenses, or priority for any family member requiring a transplant in the future. The present blood insurance program operates in a similar manner.\textsuperscript{57} Regardless of the type of payment, the remuneration must fairly compensate the donor for the possible consequences of removing the or-


\textsuperscript{51} \textit{Sale of Body Parts, supra} note 3, at 1216. If this pure open market approach failed to work effectively, a standard price for each organ could be established. See \textit{infra} note 148 and accompanying text.

\textsuperscript{52} While the sale and removal of organs could take place with live donors, removal should be restricted to cadavers. This will diminish objections to the sale of organs because people will not be tempted to risk their lives for monetary gain. Furthermore, if the seller revokes the sales contract, no money will have to be returned as the seller will not have received any compensation because the contract would provide for payment after the death of the donor. \textit{Id.} at 1218-19.

\textsuperscript{53} It is presumed that the separate storage facilities similar to blood banks and cornea storage centers will be developed.

\textsuperscript{54} Dukeminier, \textit{supra} note 10, at 848.

\textsuperscript{55} Cf. \textit{Blood Money}, Time, Oct. 1, 1973, at 113, col. 3. A judge in Lexington, Kentucky, gave traffic violators an option to pay their fines in blood, and 15 out of 190 defendants rolled up their sleeves for the local blood bank. If the offender's blood was rejected because of a disease or other factor, the fine had to be paid. \textit{Id.}

\textsuperscript{56} See Dukeminier, \textit{supra} note 10, at 848.

\textsuperscript{57} There are a number of "family credit" blood donor systems in the United States under which the eligible donor deposits some fixed amount of blood each year, ensuring that his and his family's yearly blood needs will be met. \textit{Sale of Body Parts, supra} note 3, at 1216 n.248. Blood insurance companies provide indemnity insurance against blood transfusion costs. Premiums may be paid in cash or through a donation of a pint of blood. Blood Serv. Plan Ins. Co. v. Roddis, 259 Cal. App. 2d 807, 66 Cal. Rptr. 649 (1968).
gan. If compensation may take a variety of forms besides a cash payment, objections to the sale of organs may be diminished.

The market system has several advantages over a purely altruistic program. The sale of cadavers would: (1) increase the supply of human parts without sacrificing the seller's ability to control the disposition of his body; (2) eliminate the friction between doctor and patient or doctor and relative at the time of death because the seller would be encouraged to sell his body in advance; (3) raise the success rate of organ transplants; and (4) eliminate the risk involved in removing organs from living donors.

**Personal Objections**

The sale of human parts raises several objections. These objections, based on pragmatic and ethical principles, have been a major reason why the sale of organs has not been legislatively supported. Some contend that the sale of organs would diminish the number of organs which are charitably donated, forcing many donees to pay for an organ which they might have received without charge. Assuming that the incentive of compensation would reduce the number of people who would relinquish organs altruistically, a decrease in the supply of free organs is a reasonable price to pay for an overall increase in the total supply of available organs. Although some individuals will be un-

58. *See Sale of Body Parts, supra* note 3, at 1218-19. For many people, the removal of an organ upon death could not be compensated for at any cost. However, there are individuals who, having considered donation, would take affirmative action if remuneration was available.

59. *See Dukeminier, supra* note 10, at 829-31. The previously executed contract would enable the transfer to be accomplished at death with no further questioning of the patient or his relatives. Even those who decide not to enter into a sales contract would benefit; if the scarcity problem is eliminated by organs provided by people who do contract, those who have not contracted would not be pressured by agents of purchasers.

60. One problem that frequently arises with kidney transplants is rejection of the organ by its new host. Among living donors, the probability of rejection is highest when the donor is unrelated to the donee and lowest when the donor is an identical twin to the donee. A larger supply of organs would provide doctors with greater choice, thereby enhancing the possibility of obtaining organs which would not be rejected.

61. The living kidney donor must undergo the risks of major surgery. If the remaining kidney suffers irreparable damage in the future, the donor would also require a transplant.


63. *Id.* at 191.

64. *Id.*
able to buy an organ,\textsuperscript{65} it is absurd to dismiss a market system capable of helping so many simply because some cannot participate. The few individuals who could not afford to purchase organs could be given first opportunity to receive organs donated charitably.

A second objection to organ sales is that inferior or diseased organs will enter the market.\textsuperscript{66} Donors in need of money might lie about their health, resulting in an increase in the number of available organs which are not suitable for transplantation. This result may be minimized by a careful physical examination of the seller prior to organ removal and of the organ itself after removal.\textsuperscript{67} Similar precautions have minimized, although not eliminated, the risk of receiving blood contaminated with hepatitis.\textsuperscript{68} The fear of receiving contaminated blood has not prevented its use,\textsuperscript{69} however, and fear should not prevent the sale and use of organs.

A third objection is the concern that people will be pressured by financial need into selling organs during their lifetime.\textsuperscript{70} If the sale of body parts was restricted to transfers

\textsuperscript{65} The cost of a transplant alone may be prohibitive. Statistics indicate that a heart transplant costs $50,000 for the first year and an average of $2,300 for each year following the operation. \textit{Transplant Technology Today: A Scorecard + the Outlook}, \textsc{Science Digest}, Dec. 1979, at 55. A kidney transplant will cost the donee $18,000. Medical supervision following the operation can cost $15,000 per year. \textit{Organ Transplants: What We Know Now}, \textsc{Mccalls}, Feb. 1979, at 182.

\textsuperscript{66} \textit{See} Brams, \textit{supra} note 43, at 192.

\textsuperscript{67} Section 2-513 of the UCC would be applicable here. \textit{See infra} note 128 and accompanying text.

\textsuperscript{68} Monetary incentive may lead to concealment by the donor of his past and present maladies; significantly more hepatitis attacks are reported among recipients of blood from paid donors. \textit{See Sale of Body Parts, supra} note 3, at 1225. \textit{But see generally} Stewart, \textit{The Battle Over Blood Collection}, 3 \textsc{Am. J. L. \\& Med.} 77, 80 (1977) (paid blood donors not higher risk for giving "bad" blood than volunteer donors).

\textsuperscript{69} R. Titmuss considered the commercial blood market undesirable: [T]he commercialization of blood and donor relationships represses the expression of altruism, erodes the sense of community, lowers scientific standards, limits both personal and professional freedoms, sanctions the making of profits in hospitals and clinical laboratories, legalizes hostility between doctor and patient, subjects critical areas of medicine to the laws of the marketplace, places immense social costs on those least able to bear them—the poor, the sick and the inept—increases the danger of unethical behavior in various sectors of medical science and practice, and results in a situation in which proportionately more and more blood is supplied by the poor, the unskilled, the unemployed, Negroes and other low income groups and categories of exploited human populations of high blood yielders. \textit{Sale of Body Parts, supra} note 3, at 1218 (citing Titmuss, \textit{supra} note 50, at 245-46).

\textsuperscript{70} \textit{See} Dukeminier, \textit{supra} note 10, at 857. Religious concerns may also be involved. \textit{See supra} note 30.
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occurring after death, both society in general and the medical profession in particular would have fewer objections to the system. The fear that people would jeopardize their health for monetary gain would be diminished if purchased organs could be removed only upon the seller's death.\footnote{1}

Three additional concepts illustrate why the sale of organs should be permitted: (1) a mixed altruistic-market system is ethically superior—not inferior—to a purely altruistic system because more organs will be available to help needy donees; (2) relinquishment of an organ may be motivated by both a desire for compensation and altruism; and (3) society should not view the sale of human organs any differently than the sale of other necessary commodities, such as food, shelter, and medication.\footnote{2}

\textit{Legislative Objections}

Some states have enacted legislation which bars the sale of organs. Prior to the drafting of the Gift Act, six states expressly prohibited any payment for the transfer of organs.\footnote{3} Following nationwide adoption of the Gift Act, however, five of these states repealed their restrictions on organ sales.\footnote{4} One writer suggested that those states believed that the Gift Act authorized only organ donations and that their statutes would therefore be redundant.\footnote{5} The Gift Act, however, does not expressly prohibit the sale of organs,\footnote{6} and the chairman of the drafting committee for the Gift Act stated that it was the committee’s intent to leave the issue of payment to the states.\footnote{7} Therefore, it is equally likely that the five states repealed their laws prohibiting organ sales because they were satisfied that the Gift Act provided sufficient safeguards for the sale of organs, and the fear of unrestrained organ sale\footnote{8} diminished when the Gift Act was adopted.

\footnote{1. If the sale and removal of organs were permitted with live donors, an appointed committee could determine which organs could be removed. The sale of some specific organs during the donor’s life should be prohibited. If the organ’s absence would result in death or a legally specified decrease in the donor’s physical functioning, the sale would not occur.}
\footnote{2. See Brans, supra note 43, at 192.}
\footnote{3. See Sale of Body Parts, supra note 3, at 1248.}
\footnote{4. Id.}
\footnote{5. Id.}
\footnote{6. See Gift Act, supra note 2.}
\footnote{7. See infra note 86 and accompanying text.}
\footnote{8. Fear of unrestrained sales gave rise to the common-law prohibition on the sale of cadavers; the sale of a dead body was a common-law crime. For a discussion of the common law governing cadavers, see Sideman & Rosenfeld, Legal Aspects of Tissue Donations From Cadavers, 21 Syracuse L. Rev. 825 (1970).}
Delaware's retention of specific legislation which prohibits the sale of organs strengthens this view. By maintaining its law, Delaware expressed its belief that organ sales were not prohibited by the Gift Act, and it wished to maintain its prior ban. The revocation of laws against organ sales may be interpreted as a shift in public policy, a policy that should continue in order to insure that a sufficient supply of organs is available.

Some state versions of the UCC\textsuperscript{79} prohibit the sale of organs. In states which permit remuneration, the transfer of the organ is considered a service,\textsuperscript{80} not a sale. This approach is used because of the fear that liability without fault in a sales setting would inhibit medical treatment.\textsuperscript{81} Furthermore, legislators did not want hospitals to become insurers of the commodities they use to furnish medical aid.\textsuperscript{82} Such strict liability would be impractical because of the difficulty in detecting defects in some human organs.\textsuperscript{83} When the transfer of an organ constitutes a

\textsuperscript{79} The Illinois statute is typical.

The procuring, furnishing, donating, processing, distributing or using human whole blood, plasma, blood products, blood derivatives and products, corneas, bones, or organs or other human tissue for the purpose of injecting, transfusing or transplanting any of them in the human body is declared for purposes of liability in tort or contract to be the rendition of a service by every person, firm or corporation participating therein, whether or not any remuneration is paid therefor, and is declared not to be a sale of any kind or description nor strict liability shall be applicable thereto. . . .

\textbf{ILL. REV. STAT.} ch. 111-1/2, \textsection 5102 (1981). \textit{See also} \textbf{ALA. CODE} \textsection 7-2-314 (4) (Supp. 1975); \textbf{MASS. ANN. LAWS} ch. 106, \textsection 2-316 (1975); \textbf{S. D. COMP. LAWS ANN.} \textsection 57-4-33.1 (Supp. 1973).

\textsuperscript{80} The Internal Revenue Service has ruled that a transfer of a human body part is the rendition of a service. \textit{See generally} \textit{Note, Tax Consequences of Transfers of Bodily Parts}, 73 \textbf{COLUM. L. REV.} 842 (1973).

\textsuperscript{81} \textit{See ILL. REV. STAT.} ch. 111-1/2, \textsection 5101 (Supp. 1981):

The availability of scientific knowledge, skills and materials for the purpose of injecting, transfusing or transplanting human whole blood, plasma, blood products, blood derivatives and products, corneas, bones, or organs or other human tissue is important to the health and welfare of the people of this State. The imposition of legal liability without fault upon the persons and organizations engaged in such scientific procedures inhibits the exercise of sound medical judgment and restricts the availability of important scientific knowledge, skills and materials. It is therefore the public policy of this State to promote the health and welfare of the people by limiting the legal liability arising out of such scientific procedures to instances of negligence or willful misconduct.

\textsuperscript{82} If the transfer of an organ were considered a sale, warranties would immediately attach. The applicable warranties would result in a hospital guaranteeing the organ as functional. If the organ were defective, the hospital would be liable for the resulting loss.

\textsuperscript{83} For example, hepatitis is difficult to detect in blood, but research has greatly improved the inspection process. Dr. L. Sarett has discovered a human vaccine against hepatitis B which will be widely available beginning in 1982. \textit{N. Y. TIMES}, April 28, 1980, at 2, col. 6 (city ed.).
service, a hospital which transplants a defective human part could be liable only for negligence or willful misconduct.\textsuperscript{84}

While the Gift Act gave new statutory force to organ donation, it did not prohibit organ sales.\textsuperscript{85} The committee noted:

It is possible, of course, that abuses may occur if payment should customarily be demanded; but every payment is not necessarily unethical . . . . On the other hand, drafting a statutory provision to preclude payment will not be easy. Until the matter of payment becomes a problem of some dimensions, the matter should be left to the decency of intelligent human beings.\textsuperscript{86}

The growing shortage of available organs is a substantial problem. Unless a market system is devised and supported by appropriate legislation, a black market in organs is inevitable.\textsuperscript{87} Offers to sell organs have appeared in newspapers,\textsuperscript{88} and surreptitious sales have occurred.\textsuperscript{89} Organ transfers of this type do not provide protection for the parties involved in the exchange. To avoid such problems, the sale of organs should be authorized.

THE NEED FOR LEGISLATIVE AUTHORIZATION

To ensure that a market system for organs will work effectively, legal guidelines are essential. State laws permitting the sale of organs\textsuperscript{90} could be integrated into an amended version of the Gift Act or enacted separately. Regardless of its form, statutory authorization should permit the removal and sale of organs only after the seller's death.\textsuperscript{91} Sale of organs also requires appropriate standards for transfer. UCC provisions could provide

\textsuperscript{84} See infra notes 135-36 and accompanying text.

\textsuperscript{85} "[W]ords such as 'gift,' 'donation,' and 'donor' strongly imply a non-profit transaction . . . however, the draftsmen of the Uniform Act believed it improper to include an absolute bar to commercial relationships and concluded that this would best be handled at the local level, by the medical community." Sadler & Sadler, \textit{supra} note 20, at 30.

\textsuperscript{86} Stason, \textit{supra} note 33, at 928. A justification for payment of cash may be found within the Gift Act itself. The Gift Act implies that the donee of an entire body assumes the obligation to dispose of the body; responsibility for that obligation could be regarded as consideration for the use of the body. It may therefore be asserted that, since such consideration is authorized by the Gift Act, the Gift Act also implicitly allows payment of cash.

\textsuperscript{87} See Dukeminier, \textit{supra} note 10, at 811.

\textsuperscript{88} The following advertisement appeared in the Los Angeles Times on May 24, 1969: "Young man badly needs money for surgical operation. Avail. for medical experiments or what-have-you? Call SY 6-8191 (24 hr. ans. serv.)." \textit{L.A. Times}, May 24, 1969, pt. IV col. 1, at 2.

\textsuperscript{89} See Sale of Body Parts, \textit{supra} note 3, at 1217.

\textsuperscript{90} See Brams, \textit{supra} note 43, at 188. He suggests that "[c]ommerce in human organs inevitably would, in certain situations, take place across state lines or otherwise affect interstate commerce, raising the question of regulation of such sale by the federal government." \textit{Id}.

\textsuperscript{91} See \textit{supra} note 52. Restriction of the market to only those organs removed after death might decrease the overall need for organ removal from living donors.
the guidelines essential to such a program. Specific problems of organ sale and transfer for which the UCC is inappropriate would require special legislative attention. An amendment to the Gift Act could satisfy this requirement.

Additional legislative guidelines are essential for several reasons. Once statutes which prohibit the sale of organs are repealed, legislation permitting organ sales would prevent any criminal liability from attaching. Second, although the Gift Act does not specifically prohibit organ sales, its failure to expressly authorize such transfers may lead some to believe that payment is unlawful. Third, progressive statutes would be useful in changing social attitudes toward remuneration for the transfer of organs. Fourth, use of the UCC would provide a clear and judicially interpreted procedure for the transfer between the parties. Finally, because the sale of human organs embodies some issues not involved in the transfer of ordinary fungible goods, some specific standards for transfer must be defined.

APPLICABILITY OF THE UCC

Article Two of the UCC states in part: “Unless the context otherwise requires, this Article applies to transactions in goods . . . .” The UCC does not define “transaction,” but commentators have defined it as “the sum of all the words and writings passing between the parties” which result in a sale. The UCC defines “sale” as the passage of title from the seller to the buyer for consideration. Although Article Two of the UCC encompasses many forms of transactions, the performance of a service is not within its scope. When the rendition of a service involves a transfer of property, a difficult question emerges: is the transaction a sale or a service? The test that is usually ap-

92. See supra note 73 and accompanying text.
93. See supra note 86 and accompanying text.
94. See Brams, supra note 43, at 189.
95. See infra notes 127-28 and accompanying text.
96. See infra notes 145-48 and accompanying text.
101. 1 S. Williston, supra note 98, at 103-04.
plied is predominance.\textsuperscript{102} If the transaction is predominately a service and the sale of goods is incidental to the transaction, the UCC will not apply; if a service is incidental to the sale of goods, the UCC will apply.\textsuperscript{103}

The landmark case on the "sale or service" issue is \textit{Perlmutter v. Beth David Hospital}.\textsuperscript{104} In \textit{Perlmutter}, the plaintiff sued a hospital for injuries resulting from the transfusion of "bad" blood. Recovery was sought on the theory that furnishing the blood was a sale within the Sales Act\textsuperscript{105} and that, as a consequence, implied warranties of fitness attached. The New York Court of Appeals, in a four-to-three decision,\textsuperscript{106} held that the transaction was not a sale\textsuperscript{107} because a hospital contracts with a patient to provide a service. The court reasoned that the transaction between a hospital and a patient, viewed in its entirety, was actually an agreement for care and treatment.\textsuperscript{108} The sale of blood and other commodities were incidental to the services rendered. Since "service" predominated, the Sales Act and accompanying warranties did not apply. It is clear, however, that another reason lay behind the court's decision. The court stated:

If, however, the court were to stamp as a sale the supplying of blood—or the furnishing of other medical aid—it would mean that the hospital, no matter how careful, no matter that the disease-producing potential in the blood could not be discovered, would be held responsible, virtually as an insurer, if anything were to happen to the patient as a result of "bad" blood.\textsuperscript{109}

The \textit{Perlmutter} sales-service theory has been applied in a number of different jurisdictions,\textsuperscript{110} and a few states provide by

\textsuperscript{102}Another test is to examine the portion of the contract from which the breach arose. \textit{See generally} W. Hawkland, \textit{Sales and Bulk Sales} 6 (1958).

\textsuperscript{103}\textit{See} 1 S. Williston, supra note 98, at 103-104.

\textsuperscript{104}308 N.Y. 100, 123 N.E.2d 792, \textit{reh'g denied}, 308 N.Y. 812, 125 N.E.2d 869 (1954).

\textsuperscript{105}The complaint contained no allegation of negligence. \textit{Id.} at 101, 123 N.E.2d at 793.

\textsuperscript{106}In a strongly worded dissent, Judge Froessel stated that the plaintiff was not suing the defendant "for the service of injecting the blood into her bloodstream, but simply for the sale of 'bad' blood for a separate valuable consideration, over and above the consideration she was paying for room and board and the usual hospital facilities . . . and services." \textit{Id.} at 105, 123 N.E.2d at 796 (Froessel, J., dissenting) (emphasis in original).

\textsuperscript{107}The New York Court of Appeals' decision reversed the two lower courts' opinions.

\textsuperscript{108}\textit{Id.} at 104, 123 N.E.2d at 794.

\textsuperscript{109}\textit{Id.} at 106, 123 N.E.2d at 795.

\textsuperscript{110}\textit{See, e.g.,} Stoneker v. St. Joseph's Hosp., 233 F. Supp. 105 (D. Colo. 1964) (hospital not liable for blood defects); Whitehurst v. American Nat. Red Cross, 1 Ariz. App. 326, 402 P.2d 584 (1965) (blood bank not liable); Russell v. Community Blood Bank, 196 So. 2d 115 (Fla. 1967) (hospital not lia-
law that the transfer of human blood constitutes a service and not a sale.111

Until courts began to recognize a distinction between a hospital and a commercial blood bank, the *Perlmutter* decision predominated.112 An example of how a court distinguished between the actual sale of blood and the service of transfusion may be found in *Carter v. Inter-Faith Hospital of Queens*.113 In *Carter*, the court followed *Perlmutter* in dismissing an implied-warranty action against a hospital because the hospital was rendering a service in transfusing blood to the plaintiff. The court held, however, that the plaintiff's complaint against the blood bank from which the hospital purchased the blood stated a cause of action under a breach of implied warranties.114 The court distinguished the action against the blood bank on the grounds that the storage facility performed no services, but merely completed a transfer of blood for consideration. In *Cunningham v. MacNeal Memorial Hospital*,115 the Illinois Supreme Court held a hospital strictly liable for providing defective blood to a patient as part of the services for which it charged. The court said, "It seems to us a distortion to take what is, at least arguably, a sale, twist it into the shape of a service, and then employ this transformed material in erecting the framework of a major policy decision."116 Other jurisdictions have reached similar results.117 The *Cunningham* rationale, while correct when applied to the sale of blood by blood banks, should be limited to

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111. See supra notes 79-81 and accompanying text.


114. Id. at 736, 304 N.Y.S.2d at 101.

115. 47 Ill. 2d 443, 266 N.E.2d 897 (1970). The plaintiff in *Cunningham* based her cause of action on a theory of strict liability and the case may be distinguished from *Perlmutter*, which dealt with implied warranties. While the *Cunningham* decision established Illinois' policy on the sale of blood, it was quickly changed; seven months later, the state legislature enacted several statutes making the transfer of an organ a service. See supra notes 79 & 81.

116. 47 Ill. 2d at 445, 266 N.E.2d at 899 (quoting *Russell v. Community Blood Bank*, 185 So. 2d 749, 752 (Fla. Ct. App. 1966)).

such sales. Blood transfusions are a service and should not be confused with sales transactions. The sale-service distinction is also applicable to the sale and transplantation of human organs. The transfer of the organ by the owner to the storage facility\(^\text{118}\) is a sale, while the activities performed by the hospital, including the preparation of the organ and the ultimate transplantation, would constitute a service, and the UCC would not apply.

Perhaps the biggest advantage in applying the UCC to the sale of human organs is consumer protection. Storage facilities which sell organs to hospitals would have to provide the recipient of the organ with a wide range of warranties.

**Warranties**

*Express Warranties*

An express warranty exists if the seller makes any statement of fact about the goods to the buyer or if the seller describes the goods in a particular fashion.\(^\text{119}\) When the warranty is part of the basis of the bargain, the goods must conform to the statement of description. An express warranty would attach to the sale of an organ if the storage facility explicitly promised that the organ would conform to expected standards.\(^\text{120}\) Under this protective warranty, a buyer could rely on a storage facility's promise that an organ had been diagnosed as normal and had been properly serviced. If the organ failed to conform to the storage facility's representation, the buyer could sue for breach of warranty.

*Implied Warranties*

An implied warranty of merchantability\(^\text{121}\) attaches to goods sold by a merchant. Storage facilities clearly fall within the scope of this warranty because they are merchants\(^\text{122}\) under Section 2-104(1); a storage facility which sells organs to buyers deals in goods of that kind and holds itself out as having special knowledge in the goods sold. For goods to be merchantable, at

\(^{118}\) While the organ sale could occur directly between the seller and recipient, to ensure that adequate safeguards are present in the exchange, storage facilities should act as brokers.

\(^{119}\) U.C.C. § 2-313 (1980).

\(^{120}\) Quality standards are required to evaluate whether a particular organ should be purchased. These standards could be established by a qualified committee and inserted into an amended Gift Act.

\(^{121}\) U.C.C. § 2-314 (1980).

least six factors must be satisfied.\textsuperscript{123} Two of the six factors are of special importance to the sale of organs: (1) the goods must pass without objection in the trade under the contract description and (2) must be adequately packaged and labeled as the agreement requires. The storage facilities would have to meet trade standards of quality, perhaps established by the medical profession. Furthermore, a storage facility's procedure for organ preservation and delivery would have to satisfy the buyer's specifications, as expressed in the sales contract.

An implied warranty also attaches to a good when: (1) the seller has reason to know the particular purpose for which the goods are required; and (2) the buyer is relying on the seller's skill and judgment in selecting a suitable good.\textsuperscript{124} In a transaction involving the sale of an organ, a storage facility would certainly know the purpose for which the organ was to be used, and the buyer would be relying upon the storage facility's skill in determining the organ's quality. Under these circumstances, an implied warranty of fitness for a particular purpose would apply.

\section*{Limitations}

Warranties may be negated or limited by a seller prior to the sale of a good.\textsuperscript{125} An express warranty will not attach unless the seller explicitly provides the warranty. Implied warranties may be excluded or modified when the seller so provides in a conspicuous writing. Despite a storage facility's ability to do so, negation or limitation of warranties would make it uncompetitive in a market system. Buyers would purchase organs from facilities that offer warranties rather than from facilities offering no protection. For this reason, it is likely that storage facilities would offer various types of warranties to an organ purchaser, and the presence of these warranties would provide other safeguards. Because the storage facility purchases the organ and would be held responsible for any breach of warranty, its procedure for accepting organs would become more stringent.\textsuperscript{126}

\begin{itemize}
  \item For goods to be merchantable, they must at least:
    \begin{enumerate}
      \item pass without objection in the trade;
      \item be of average quality;
      \item be fit for their ordinary purpose;
      \item be of similar kind, quality and quantity within each unit;
      \item be adequately packaged and labeled; and
      \item conform to promises made on the label and container.
    \end{enumerate}
  \end{itemize}

\textsuperscript{123} U.C.C. § 2-314 (1980).
\textsuperscript{124} U.C.C. § 2-315 (1980).
\textsuperscript{125} U.C.C. § 2-316 (1980).
\textsuperscript{126} U.C.C. § 2-316 (1980).

Only organs in good condition would be purchased and special care during storage would ensure that the human body parts sold to consumers were of the finest quality.
Guidelines for the seller's and buyer's performances are provided by the UCC. Various provisions could be used to make the transfer of a purchased organ free from legal uncertainty. The following is a short list of some of these provisions.

**Shipment by Seller**

Section 2-504 requires the seller (unless otherwise agreed) to place the good in a carrier's possession and to ensure that the good is transported in a reasonable fashion with regard to the nature of the good. Furthermore, the seller must send the buyer the bill of lading, and he must notify the buyer of the shipment. This procedure would be of particular importance in the shipment of organs. The seller would be responsible for having the organ shipped in a climate-controlled container and for ensuring that the buyer receives the organ in good condition. The organ must be in good condition upon delivery or the buyer, following inspection by the buyer or his agent, may demand a cure or reject the organ.

**Buyer's Right to Inspect Goods**

Unless the parties agree otherwise, the buyer may inspect the goods in a reasonable place and time before tendering payment or accepting the organ. The right to inspect is crucial to the sale of an organ. Prior to transplantation, the buyer's doctor, as his agent, could examine the organ for defects and genetic compatibility. Close scrutiny of an organ's quality and suitability would increase the likelihood of a successful transplant.

**Cure by Seller—Replacement**

The UCC entitles the buyer to receive a replacement when the delivered good is nonconforming. If the time for performance has not expired, the seller may cure within the contract time if he seasonably notifies the buyer. If the seller had reasonable grounds to believe that the good as delivered was acceptable and he seasonably notifies the buyer, he may provide a replacement within a reasonable time beyond the contract date. Under the time restrictions involved in a transplant, a storage facility would have to supply a substitute organ very quickly,

129. U.C.C. § 2-508 (1980). There would be little chance to cure the defective organ.
but presumably, the storage facility would have a number of organs available, making replacement possible.

**Remedies**

The UCC also provides a series of remedies to the buyer and seller. Judicially interpreted remedies would be an important settling factor in the introduction of a market system for organs.

**Seller's Remedies**

When the buyer fails to perform under the contract for sale, the seller becomes entitled to damages.\(^{130}\) The UCC provides the seller with a formula to determine his recovery;\(^{131}\) a storage facility could recover the market price of the organ and expenses incurred in preserving and maintaining the organ. Furthermore, the buyer is given incentive to perform his contractual obligations so as to avoid the payment of damages.

**Buyer's Remedies**

Upon the seller's breach, the buyer may select a remedy.\(^{132}\) The most beneficial remedy to a purchaser of an organ would be "cover."\(^{133}\) The buyer, requiring an organ immediately, would have to locate another storage facility to supply the organ. Recovery against the breaching seller would be the difference between the cover price and the contract price plus any consequential damages.

If the UCC were used, a donee who received a defective organ would not have to sue on a theory of negligence. A cause of action in negligence generally requires the plaintiff to show the existence of a duty owed to him by the defendant, a breach of that duty, and a resulting injury to one within the foreseeable zone of danger.\(^ {134}\) Most of the blood transfusion cases which have proceeded on the negligence theory have met with little success;\(^ {135}\) proving the failure to act reasonably on the part of the hospital or storage facility is difficult. In contrast, strict lia-

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131. U.C.C. § 2-708 (1980). Under § 2-708, the seller is entitled to "the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages . . . but less expenses saved in consequence of the buyer's breach." *Id.*
bility generally attaches in an implied warranty action. The seller of a product intended for human consumption is strictly liable for injuries resulting from the use of a defective product. This applies even if the product’s defect, at the time of sale and consumption, could not be discovered. This factor has led many courts to find that the sale and transfusion of blood was a service. Courts were reluctant to hold any party strictly liable for the infusion of “bad” blood because of the demonstrated inability to detect defects.

Unlike negligence actions, breach of implied warranty does not allow a showing of due care on the defendant’s part as a defense. A breach charge will not lie, however, when a product, essential to human health and prescribed by a physician who is aware of the risks, cannot be made absolutely safe. If this rule were extended to the sale of organs by a storage facility, proof that the defect in the organ is undetectable and unremovable would be a defense to breach of implied warranty. The burden of proof on this issue would be on the storage facility, and this shift of burden would benefit both parties; the donee no longer has the harsh burden of proving negligence, and the donor is not faced with strict liability. Because Article Two is inapplicable to services, the donee would still have to prove negligence against the physician and hospital which provided services to the donee. This solution to the problem of liability is more equitable than the present system’s reliance on tort law.

Use of the UCC presents some problems of construction in the area of transplants. If the terms of the sale are unconscionable due to the donor’s impaired bargaining position, a court may refuse to enforce the contract. In practical terms, however, such refusal would have little effect if the transplant had already taken place. Rescission of the sale is not possible, nor will the court usually reform the price terms to conform to its notions of equity. The UCC would also be inappropriate in other areas.

137. Id. at 231.
138. See supra note 110 and accompanying text.
141. Restatement (Second) of Torts § 402A, comment k (1965).
142. See supra notes 101-03 and accompanying text.
144. See, e.g., Olson v. Rasmussen, 304 Mich. 639, 8 N.W.2d 668 (1943); Mandel v. Liebman, 303 N.Y. 88, 100 N.E.2d 149 (1951).
To implement organ sales effectively, a legislative amendment to the Gift Act is required.

**Suggested Amendments to the Uniform Anatomical Gift Act**

The sale of organs raises peculiar issues. The most effective and manageable means of solving the inherent problems in organ transfer is to supplement the present Gift Act's provisions. Identification of the type of organs that could be removed from live donors—permitted removal only after death—would lessen public objection. Also, a standard of quality could be established to determine which organs are acceptable.

If the open market system proves ineffective as a means of establishing a stable price for organs, an alternative pricing system could be designed and inserted in the Gift Act. Each of these suggestions requires detailed research and planning, but they are essential to an operative system of organ sales.

**Conclusion**

Principles of altruism have proven to be an ineffective means of satisfying the growing demand for human organs. The shortage of human body parts will continue under the existing system of charitable donation, but potential donors might respond to a monetary incentive. This principle should be used in the procurement of organs. An open market system, operated correctly, would be the most effective means of obtaining a sufficient number of transplantable organs. To implement such a system, the sale of organs must first be authorized by law, and UCC provisions could then provide effective guidelines for such sales. The UCC would not, however, provide a solution to all the unique problems inherent in organ sales. Special rules regarding the removal and transfer of organs are required to avoid the

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145. Restricting the removal of organs from living donors to bone marrow, blood, and skin will defuse the moral objections. No donor would be permitted to sell parts of his body that would significantly diminish his ability to function. Identification of those organs could be done by a special committee knowledgeable in such matters.

146. Restricting the removal of purchased organs to cadavers would be the most effective means of diminishing public objection to the sale of organs. Furthermore, if this source of supply sufficiently increased the number of organs, removal from live donors would not be required.

147. See supra note 120.

148. A special committee (perhaps the same one appointed to establish quality standards) could be assigned the task of setting a price for each organ. A number of factors would have to be considered, such as the organ's importance, the difficulty of removal and maintenance, and the number of available organs.
difficulties involved in the system. Special guidelines, incorpo-
rated into the Gift Act, would help create a uniform system of
organ sales. The sale of organs is essential, and it is managea-
ble. Legislative authorization for such sales is required if the
supply of organs is to meet the demand.

David E. Chapman