

DO PEOPLE HAVE OWNERSHIP OVER THEIR BODY  
PARTS AND IF SO, CAN THE STATE CONTROL THEIR  
ULTIMATE DISPOSITION IN THE INTEREST OF  
PUBLIC HEALTH AND SAFETY?

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What happens to the parts of a person's body once they have been removed? If a person has a surgical procedure to amputate a limb or part of a limb, or perhaps to remove an organ or tissue from the body, who decides what happens to that body part after removal? Several scholarly articles have been written advocating for the position that a person maintains an ownership interest in their body parts even after they have been removed.<sup>1</sup> In order to claim that people should be able to maintain property interests in their body parts after removal, we must first be able to acknowledge that property rights existed when those body parts were still part of the body. This assertion, however, is not a forgone conclusion and some debate exists as to the exact nature of the rights that a person has over their body as a whole.<sup>2</sup> Whether the interests a person has in their own autonomy are better classified as property interests, privacy interests, or a combination of the two has not been conclusively established and can often

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<sup>1</sup> See Elizabeth E. Appel Blue, *Redefining Stewardship Over Body Parts*, 21 J.L. & HEALTH 75 (2007-08) (highlighting several reasons to establish property rights in body parts while discussing the strong objections many people have to such a system, ultimately finding it unlikely that property rights will be the solution); Kimberly Self, *Protecting the Cultural and Religious Privacy of Native Americans Through the Promotion of Property Rights in Biological Materials*, 35 AM. INDIAN L. REV. 729, 764-65 (2010-11) (advocating for the recognition of property rights in body parts and ultimately genetic material to adequately protect the privacy interests of cultures); Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U.L. REV. 359, 460 (2000) (distinguishing between the privacy interests people have in their bodies and body parts while whole and the property interests people should have in body parts once they are removed).

<sup>2</sup> See Rao, *supra* note 1, at 387 (demonstrating that many interests in our bodily autonomy are actually privacy interests that only superficially appear to be property interests. For example, the right to exclude others or even the state from entering your body to retrieve potential evidence is best thought of as a privacy interest).

appear to be contradictory in different situations and cases.<sup>3</sup> When religious freedom and the desires of some individuals and cultures to reclaim their body parts after removal are added in, the waters become even murkier. This is so that the body parts will not be desecrated or incinerated in violation of a religious law or custom.<sup>4</sup> In addition to the analysis of body parts being subject to property and privacy interests, an analysis of the state's interest against the backdrop of the religious interests of the patient must be undertaken.

In this note I consider the historical context of whether to view the body and body parts as property, as well as the evolution of the law surrounding this issue. The cases that follow from this discussion generally involve two separate situations: the body parts that are removed during surgery and used in research afterwards, and the body parts that are removed to be transplanted into another individual. Most courts approach the problem as one of informed consent and fiduciary duty to the patient, rather than one of a property interest that the patient maintains in her body parts after removal.<sup>5</sup> While the courts have not yet determined that there is an absolute property right in one's body parts, the possibility has been left open.<sup>6</sup> The religious and cultural interests that individuals may have in regaining

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<sup>3</sup> *Id.* at 414 (courts have analyzed reproductive material such as frozen eggs, sperm, and embryos in the context of property issues and privacy issues in various cases). *See, e.g.*, *York v. Jones*, 717 F. Supp. 421 (E.D. Va. 1989) (suit between a couple and a fertility clinic to determine control of the couple's last fertilized embryo, decided using property interests); *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992) (dispute between a divorced couple over the disposition of seven frozen embryos in which the court attempted to analyze the privacy interests of the parties to resolve the case).

<sup>4</sup> *See* Stephen H. Resnicoff, *Symposium: Precious Commodities: The Supply and Demand of Body Parts: Supplying Human Body Parts: A Jewish Law Perspective*, 55 DEPAUL L. REV. 851, 856-57 (2006) (Jewish law requires that the body not be subject to any unnecessary indignity and be buried promptly. Amputated body parts and removed organs are disposed of as medical waste and generally incinerated; the incineration of an amputated body part would be seen as violating the requirements of no unnecessary indignity and of prompt burial).

<sup>5</sup> *See Moore v. Regents of Univ. of Cal.*, 51 Cal. 3d 120 (1990); *Greenberg v. Miami Children's Hosp. Research Inst., Inc.*, 264 F. Supp. 2d 1064 (S.D. Fla. 2003); *Wash. Univ. v. Catalona*, 437 F. Supp. 2d 985 (E.D. Mo. 2006) (all discussed *infra* in Section IB).

<sup>6</sup> *See Colavito v. N.Y. Organ Donor Network, Inc.*, 8 N.Y.3d 43 (2006) (Discussed *infra* in Section IB).

possession of their body parts for burial or ceremonies must also be considered.<sup>7</sup>

The applicable laws that this note will address include the Religious Freedom Restoration Act of 1993<sup>8</sup> and various state laws pertaining to the disposition of medical waste. This includes body parts, tissues, and organs, which are generally referred to as pathological waste.<sup>9</sup> This note will also analyze two types of cases: first, those demonstrating the general position of courts toward property interests in body parts in the context of organ transplantation and medical research; second, cases involving the balancing of a person's First Amendment right to religious freedom against the state's interests, specifically the state's interest in public health and safety.

Applying the various interests discussed to the applicable law and cases will show that the government should regulate the disposal of organs and body parts more strictly than it does currently. Even if people have property interests in their organs and body parts after their removal, there are policy reasons for allowing those interests to be set aside for the general good. In the instances where people wish to keep their removed body parts for religious reasons, the state can make and support a claim that the interests it has can be protected with narrowly-tailored laws requiring proper disposal of the body parts or controlled disposition to facilities equipped to bury, cremate, or store the parts for the patient. The benefits to society of having abundant material for biological and medical research, the benefits of having organs transplanted into recipients who have the best chance of utilizing them successfully, and the state's interest in protecting the health and safety of the public by ensuring that potentially hazardous biological materials are disposed of properly all work to

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<sup>7</sup> See Resnicoff, *supra* note 4, at 856-57 (destruction of removed limbs would not be in accord with Jewish law); *Placenta Traditions*, BIRTH TO EARTH, <http://www.birthtoearth.com/FAQs/Placenta+Traditions.html> (last visited Nov. 25, 2013) (outlining many cultural and religious practices from around the world involving ceremonial burial of placentas as well as saving portions of placenta for the creation of "medications").

<sup>8</sup> 42 U.S.C.A. § 2000bb (2014).

<sup>9</sup> See N.J. ADMIN. CODE § 7:26-3A.6(a) (2013) (defining regulated medical waste including pathological waste including tissues, organs, and body parts); N.J. ADMIN. CODE § 7:26-3A.6(b) (2013) (specifically exempting corpses and removed body parts that will be buried or cremated); GA. COMP. R. & REGS. § 391-3-4.15 (2013) (defining Biomedical Waste to be incinerated as including pathological waste including human tissues and body parts removed during surgery, however there is no exemption for parts to be buried or cremated).

minimize the claim of ownership a person may make over their removed body parts.

The first part of the analysis will focus on why individuals should not be granted property interests in body parts and tissues. There will be analogy with the case law from the organ transplantation and medical research cases discussed below. The second part of this analysis will highlight reasons for allowing the state's interest in public health and safety to trump the religious interests and potential property interests that individuals have in their removed body parts and tissues. This will be accomplished by examining the case law related to the Religious Freedom Restoration Act of 1993, focusing on cases where the law was applied to state interests that were deemed either compelling reasons for restricting religious freedom or found to not be a significant restriction of religious freedom. The final part of this analysis will examine the statutory approach that some states have taken and what changes would need to be made in order to ensure that the public health and safety remains protected.

## I. BACKGROUND

For a person to be able to claim any sort of ownership over, or property rights in removed body parts, that person must have had some type of ownership interest in the body part before it was removed. They also must not have either expressly or impliedly given that interest to another. Before they are removed, one's body parts and organs are part of the whole body. The "ownership" of the body is not always clearly demonstrated to be a property interest. Sometimes, the rights that a person has over the autonomy of her own body are better thought of in the realm of privacy rights.<sup>10</sup> The right of a woman to be free from undue state interference in determining whether to terminate a pregnancy was historically framed in the context of the right of an individual to privacy.<sup>11</sup> Individuals are also free from governmental intrusion

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<sup>10</sup> See Rao, *supra* note 1, at 388-89 (the various cases that have dealt with women's reproductive rights, the right to die, and invading the body to remove evidence have generally expressed an individual has a right to privacy that prevents the state from interfering with bodily integrity or relational privacy of an individual).

<sup>11</sup> See *Roe v. Wade*, 410 U.S. 113, 153-54 (1973) (determining that a woman's decision about whether or not to seek an abortion is protected by the right of privacy. Although this privacy right is not absolute and is subject to state interests); *but see* *Planned Parenthood v. Casey*, 505 U.S. 833, 849 (1992) (relying on the concepts of personal dignity and autonomy as central to the liberty

into their bodies for the procurement of evidence, because of the notion that to invade the sanctity of a person's body against their will is an invasion of that person's right to privacy.<sup>12</sup> These important issues involving the sanctity of one's body have been approached from the angle of privacy violations rather than embracing some fundamental right of an individual to "own" their body as property.

*A. Are There Really Any Property Interests in Bodies and Body Parts?*

A person's body, or more appropriately some parts of a person's body, have been considered owned property in some instances. The "sale" of blood and blood products has allowed courts over time to recognize that blood is a commodity and therefore, people do have a recognized property interest.<sup>13</sup> Although blood has been recognized as property, and therefore the person who "makes" the blood can sell it, other organs and tissues cannot be sold.

While transplantable human organs and tissues cannot be sold in this country, the status of property interests in these organs is not exactly clear.<sup>14</sup> The federal law that directly prohibits the sale of organs for transplantation would also seemingly allow the donation of organs for transplantation and the sale of organs and tissues for any purpose other than

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interests of a woman seeking an abortion, rather than framing the liberty interests in the realm of privacy).

<sup>12</sup> Rao, *supra* note 1, at 396-97 (The individual has a right to protect his or her bodily integrity from unwanted intrusion), *see, e.g.*, *Winston v. Lee*, 470 U.S. 753, 759 (1985) (holding that a compelled surgery to procure evidence of a crime would be a violation of an individual's right to privacy); *Rochin v. California*, 342 U.S. 165, 172 (1952) (forcibly removing stomach contents for evidence is a violation of due process); *but see* *Schmerber v. California*, 384 U.S. 757, 772 (1966) (allowing that although the right to privacy is a very important value in our society, the States are allowed to undertake minor intrusions under limited circumstances, such as blood alcohol tests for drunk driving, for the benefit of society as a whole).

<sup>13</sup> Rao, *supra* note 1, at 373 (blood is now recognized as a commodity that is produced by its owner and treated legally as property), *see, e.g.*, *Green v. Commissioner*, 74 T.C. 1229, 1234 (1980) (finding that the sale of human blood is equivalent to the sale of natural raw materials); *Carter v. Inter-Faith Hospital*, 60 Misc. 2d 733, 736 (N.Y. Sup. Ct. 1969) (again finding that blood is a commodity and that the sale of blood invokes the implied warranty of merchantability).

<sup>14</sup> 42 U.S.C. § 274e(a) (2013) (providing that it is unlawful to receive or transfer any human organ for transplantation for valuable consideration).

transplantation.<sup>15</sup> Taking this line of reasoning one step further, it follows that for Congress to choose to regulate the sale of human organs for transplantation, Congress may have believed that the human body and/or its organs were commodities that would be saleable in some market, absent a law prohibiting such sales.<sup>16</sup>

When it comes to cadavers, the law is also not entirely clear or consistent with what future property interests a person has in their own body. Without actually referring to the body or its parts as property, many states have statutes that authorize the giving of one's body for transplantation, education, or research purposes.<sup>17</sup> This conflicts with the common law perception that bodies were not property, and that at best, they could be classified as a form of "quasi-property" that was not able to be sold.<sup>18</sup>

*B. Two Ways to Approach the "Ownership" of Explanted Body Parts, Transplantation Cases and Research Cases.*

The issue of who owns explanted organs and tissues has been handled many times by the courts over the years. These

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<sup>15</sup> Rao, *supra* note 1, at 376 (by explicitly outlawing the sale of organs for transplantation and remaining silent on the issue of sale of organs and tissue for research and the donation of organs for transplantation, these actions are impliedly legal).

<sup>16</sup> *Id.* (by outlawing the sale of organs and tissues, it may be inferred that Congress considered them to be saleable commodities that needed to be regulated).

<sup>17</sup> See N.J. STAT. ANN. § 26:6-85b(1) (2013) (the New Jersey version of the Revised Uniform Anatomical Gift Act allows a person to make a donation of one's own body to another entity, implying that a future interest in the ownership of the body has been created when a person makes that gift); CAL. HEALTH & SAFETY CODE § 7150.20 (Deering 2013) (California law that allows an individual to make a gift of their body or body parts through a variety of means before death, including drivers license, will, on-line registration, and even oral communication that is properly memorialized in writing; implying that a person has a current property interest in the body and has created a future property interest in a separate party at the time of the gift).

<sup>18</sup> Rao, *supra* note 1, at 382-83 (although a body could not be bought or sold, individuals were found to possess several rights that controlled the use of the body, possession of the body for burial, and the right to direct the ultimate disposition of the body), *see, e.g.*, Snyder v. Holy Cross Hosp., 352 A.2d 334, 341 (Md. Ct. Spec. App. 1976) (the court found that a body was not actually material property, but instead one has a qualified property right that manifests as custody, control, and disposition of the body); Pierce v. Swan Point Cemetery, 10 R.I. 227 (1872) (the court opined that rather than having complete property rights in a corpse, a person holds a sacred trust for the benefit of family and friends; this is the quasi-property right a person has to guide the ultimate disposition of the body).

types of cases usually arise in instances relating to the transplantation of an organ or the disposition of organs or tissue to be used in medical research. The first case to examine the ownership of body parts and tissue was *Moore v. Regents of University of California*, in which Moore had his spleen removed during the course of diagnosis of, and treatment for Hairy Cell Leukemia.<sup>19</sup> As the first case to review this question in detail, it is worthwhile to look in-depth at the various avenues the court explored in its determination of whether or not Moore had a property interest in his removed cells and, consequently, whether his claim for conversion should succeed.

### 1. *Moore v. Regents of University of California*

Moore had extensive sampling of his “blood, bone marrow aspirate, and other bodily substances” performed prior to the splenectomy.<sup>20</sup> Moore’s physician determined from these specimens that the clonal cell line of leukemia cells would be valuable in research and could have a high commercial value.<sup>21</sup> After this, Moore’s physician recommended that Moore undergo the splenectomy because it was a necessary procedure “to slow down the progress of his disease.”<sup>22</sup> Prior to the operation, his physicians had made arrangements to send portions of the spleen to a research unit of the UCLA Medical Center, but they had never informed Moore of this plan nor did they seek his permission.<sup>23</sup> After the operation, Moore returned to UCLA for several visits in which samples of his blood, serum, bone marrow and sperm were taken for the continuation of the research.<sup>24</sup> The research yielded a valuable cell line established from Moore’s T-cells, which was subsequently patented by the Regents of University of California and Moore’s physicians.<sup>25</sup>

Moore’s most interesting claim against the defendants was conversion; that he continued to own his cells after they were taken from his body and should have had a right to dictate their use was a novel question for the court in the context of medical

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<sup>19</sup> *Moore v. Regents of Univ. of Calif.*, 51 Cal. 3d 120, 125 (1990).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 126.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Moore*, 51 Cal. 3d at 125.

<sup>25</sup> *Id.* at 127.

research.<sup>26</sup> The Supreme Court of California noted that if it were “to impose a tort duty on scientists to investigate the consensual pedigree of each human cell sample used in research” it would affect the progress of medical research with implications that go far beyond Moore and his physicians and extend to all of society.<sup>27</sup>

The court then analyzed Moore’s conversion claim under the California law that existed at the time of the case. The court determined that for Moore to claim that there was actual interference with the right to own or possess his cells after removal, he must have expected to either retain possession of the cells after removal or retain an ownership interest in the cells after their removal.<sup>28</sup> The court went on to opine that Moore could clearly not have intended to keep possession of cells after they were removed; therefore, his claim rested on the premise that he retained some ownership interest in his cells after removal.<sup>29</sup> The court could not find any case that held that a person retained an ownership interest in removed body parts and tissues that would support a cause of action for a conversion claim.<sup>30</sup> The reason that this had not come up before appears to be that the laws governing the disposition of bodies, body parts, organs, tissues, and bodily fluids were in place to achieve public policy goals rather than allowing the disposition of these things to fall into the realm of personal property law.<sup>31</sup>

The California law relating to public health also stood in the way of Moore’s ownership claim of his cells and thus, his conversion claim by stating that human tissue and parts shall be disposed of in a sanitary matter after the conclusion of scientific use to protect the public health and safety.<sup>32</sup> The court recognized that while the legislature clearly did not envision a case such as this when they authored the law, the practical effect of the law could not be escaped, which was to severely limit a patient’s control over their body parts and tissues after removal by restricting how they may be used and controlling their eventual destruction.<sup>33</sup> Whatever limited rights that may be left over after the statute is not enough to satisfy a conversion claim, however

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<sup>26</sup> *Id.* at 134-35.

<sup>27</sup> *Id.* at 135.

<sup>28</sup> *Id.* at 136.

<sup>29</sup> *Moore*, 51 Cal. 3d at 136-37.

<sup>30</sup> *Id.* at 137.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 140-41; CAL. HEALTH & SAFETY CODE § 7054.4 (Deering 2013).

<sup>33</sup> *Moore*, 51 Cal. 3d at 140-41.



the patient may still have a fiduciary duty claim and an informed consent claim based on use of the tissue in research without the patient's permission.<sup>34</sup>

The final part of Moore's conversion claim was that the cell line and its patents were the property of Moore.<sup>35</sup> The court recognized that scientific products that are the result of tremendous work while facing a low probability of commercial success are to be rewarded by patent law, not discouraged.<sup>36</sup> This aspect of the law requires that we recognize the cell line as a separate product of invention that "is both legally and factually distinct from the cells taken from Moore's body."<sup>37</sup>

After determining that Moore had no conversion claim because he had no property interest in his cells after they were removed, the court went on to analyze whether it should extend the scope of conversion liability to cover cases like this one.<sup>38</sup> The court first focused on the relevant policy considerations by balancing the patient's right to make autonomous decisions about their medical care with the interest in protecting those researchers who engage in socially useful activities from civil liability, especially when those researchers have no way to know that the patient whose cells they are using has not consented to the research.<sup>39</sup> Since biological research specimens are often refined and processed before being distributed to multiple other labs, it would be almost impossible for the end user researcher to know what patient or patients a sample has come from, much less if those parties had given appropriate consent for the research activities to take place.<sup>40</sup> The court also noted that if it were to extend liability by allowing this type of conversion claim, there would be a broad impact on research and ultimately on the development of important new therapies for human disease.<sup>41</sup>

In light of the importance to society of continuing medical research and the importance of patient's rights, the court opined that the legislature would be the best forum to seek to impose this type of liability on research.<sup>42</sup> It was noted that legislatures are better able to handle this type of complex social issue because they

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<sup>34</sup> *Id.* at 141.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 142.

<sup>37</sup> *Id.* at 141.

<sup>38</sup> *Moore*, 51 Cal. 3d at 142.

<sup>39</sup> *Id.* at 143.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 145.

<sup>42</sup> *Id.* at 147.

have the ability to gather evidence, query experts, and hold public hearings on the issue.<sup>43</sup> Finally, the court refused to extend liability of conversion because patients are already protected from this type of harm by the physician's fiduciary duty to the patient and informed consent, so long as the patient is given full disclosure of economic and research interests.<sup>44</sup> Ultimately the court decided that although Moore had no property interest in his cells, he did have claims under fiduciary duty and informed consent.<sup>45</sup> Interestingly, the court did specify that they were not holding "that excised cells can never be property for any purpose whatsoever."<sup>46</sup>

## 2. Cases After *Moore*

The reasoning of the court has held up over time, and has been cited in other cases involving ownership interest of tissue used in research.<sup>47</sup> In *Greenberg v. Miami Children's Hosp. Research Inst., Inc.*, a group of families that had been affected by Canavan disease, a rare genetic disorder with severe neuronal symptoms and early death, banded together with researchers to find a way to screen for the disease.<sup>48</sup> The families had agreed to provide tissue samples in the form of blood, urine, and autopsy tissue to the researchers, as well as financial support and access to a registry of affected families.<sup>49</sup> The plaintiff families contended that there was an understanding that the research was going to benefit the population at large by developing affordable, early testing for the disease.<sup>50</sup> After the defendants received a patent on the research, they began enforcing the patent so they could engage in profitable exclusive licensing agreements.<sup>51</sup> Among the plaintiffs' many claims was a charge that the defendants had converted the property of tissue samples and genetic information.<sup>52</sup>

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<sup>43</sup> *Moore*, 51 Cal. 3d at 147.

<sup>44</sup> *Id.*

<sup>45</sup> Joyce Boyle, *To Pay or not to Pay, That is the Question: Finding an Intermediary Solution Along the Moore Spectrum*, 7 MICH. ST. J. MED. & LAW 55 (2002).

<sup>46</sup> *Moore*, 51 Cal. 3d at 142.

<sup>47</sup> See *Greenberg v. Miami Children's Hosp. Research Inst., Inc.*, 264 F. Supp. 2d 1064 (S.D. Fla. 2003); *Wash. Univ. v. Catalona*, 437 F. Supp. 2d 985 (E.D. Mo. 2006).

<sup>48</sup> *Greenberg*, 264 F. Supp. 2d at 1067.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 1074.

Using the reasoning of *Moore*, the court held that the plaintiffs had no property interest in tissue and genetic material donated for research.<sup>53</sup> The tissue was donated with no expectation that it would ever be returned, thus defeating a claim of conversion.<sup>54</sup> The court went on to reason that even the Florida statute that dealt with genetic testing only allowed for penalties for lack of informed consent, not conversion.<sup>55</sup>

In *Wash. Univ. v. Catalona*, a prostate cancer researcher at Washington University had left to go to Northwestern University and had sought to have the research samples he was using at Washington University transferred to Northwestern University.<sup>56</sup> By way of a newsletter and mailed letters, Catalona informed the patients who had donated tissue samples to Washington University to send letters releasing those samples to him.<sup>57</sup> The issue of whether the patients still own their tissue samples was tested again, this time in the context of whether a patient can dictate who uses the tissue sample or where it goes after it has been received by the original accepting institution. The court went through a similar review of the law as the prior two cases and even references both.<sup>58</sup> The same result was reached after balancing the public interest in efficient research, the state law applicable to biological material donations, and informed consent and patient expectations of donation versus bailment.<sup>59</sup> The patients had no expectation that they would ever get their tissue samples back once they were donated, defeating the bailment argument.<sup>60</sup> The court also touched on the policy implications of allowing the patients to dictate where their samples could go and what types of research would be acceptable.<sup>61</sup>

These cases indicate that, despite a lack of property interests in explanted tissues and organs, researchers would

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<sup>53</sup> *Greenberg*, 264 F. Supp. 2d at 1074.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 1075; FLA. STAT. ANN. § 760.40 (LexisNexis 2013) (providing only that the results of the testing are the exclusive property of the person being tested and that informed consent is required).

<sup>56</sup> *Catalona*, 437 F. Supp. 2d at 993.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 995-97.

<sup>59</sup> *Id.* at 997-1001.

<sup>60</sup> *Id.* at 1001.

<sup>61</sup> *Catalona*, 437 F. Supp. 2d at 1002 (the research samples that institutions rely on would become fragmented and fleeting, preventing any one source from building a statistically significant collection of samples that researchers could use; also the possibility would exist that prejudicial influences could corrupt the value of medical research benefitting all mankind).

benefit from having proper and complete informed consent to cover situations like those raised in the above cases.<sup>62</sup> As the biotechnology field continues to grow and laypeople become more aware of the commercial value of research materials, a new approach to ownership of biological samples may need to be formulated.<sup>63</sup> However, as it stands now people do not have any property interests in their tissue once it is donated for research.

### 3. Transplantation Cases

Not all cases involving ownership claims of organs have arisen in the context of research donations. Several cases have revolved around the donation of organs and tissues for transplantation.<sup>64</sup> In *Colavito v. New York Organ Donor Network, Inc.*, the court addressed whether the intended recipient of an organ donation has a claim for conversion if the organ is transplanted into another person, or if the intended recipient ever had any type of property interest in that organ at all.<sup>65</sup> The plaintiff was set to receive a kidney from his friend who had recently passed away in New York.<sup>66</sup> The decedent's left kidney was sent to Florida to be transplanted into the plaintiff, while the right kidney remained in New York.<sup>67</sup> Before transplanting the left kidney, the surgeon in Florida noticed a renal artery aneurysm that made the kidney unsuitable for transplantation.<sup>68</sup> The

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<sup>62</sup> See Boyle, *supra* note 45, at 65.

<sup>63</sup> *Id.* at 77-78 (the author suggests establishing property rights for patients in their biological specimens in a type of trust system based in the state governments with federal oversight that would allow people to determine which research recipient gets the tissue and grant patients a monetary interest if their contribution leads to a commercially successful product).

<sup>64</sup> See, e.g., *Mansaw v. Midwest Organ Bank*, 1998 U.S. Dist. LEXIS 10307, at \*16 (W.D. Mo. July 8, 1998) (the father of a deceased child claimed to have a property interest in his child's body and claimed his rights were violated when the child's mother gave consent for organ and tissue harvest for transplantation. The court did determine that the father had limited property rights in his son's body; the right to possess for burial, the right to control the disposal, and the right to make a claim for any disturbance to the body); *but see Georgia Lions Eye Bank, Inc. v. Lavant*, 255 Ga. 60 (1985) (the corneas of a recently deceased infant were harvested without the permission of the parents of the child; the court determined that there is no constitutionally protected property rights in a body and that the state's interest in preserving and promoting public health is superior to the minor claim made by the parents).

<sup>65</sup> *Colavito v. N.Y. Organ Donor Network, Inc.*, 8 N.Y.3d 43 (2006).

<sup>66</sup> *Id.* at 47.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

surgeon contacted the New York Organ Donor Network to ask for the right kidney, but was informed that it had already been allocated to another patient.<sup>69</sup>

The plaintiff brought a claim against the New York Organ Donor Network and others for conversion of the right kidney that he claimed had become his property following the donation by the decedent.<sup>70</sup> The court reiterated that there had never been any common law property right in a dead body.<sup>71</sup> Although the court did indicate that it could not be certain that a person would never be able to demonstrate that rights in a deceased body or body parts do exist, this case did not require such an analysis because the kidney in question was subsequently determined to be a poor match to the plaintiff.<sup>72</sup> An intended recipient of an incompatible organ has no common law property rights to that organ.<sup>73</sup>

#### 4. Religion and Retaining Ownership Interest in Body Parts

There are some cultures and religions that have certain requirements for the burial of dead bodies and body parts as well as certain ceremonial uses for body parts that are usually classified as medical waste, such as placentas.<sup>74</sup> Religion and the disposition of body parts may conflict when the law requires a removed body part to be destroyed as medical waste and the

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<sup>69</sup> *Id.*

<sup>70</sup> Colavito, 8 N.Y.3d at 48.

<sup>71</sup> *Id.* at 52-53 (however, the court did note that the common law rule of no property rights in a dead body was formulated long before transplantation and other advanced medical procedures had become available and even commonplace).

<sup>72</sup> *Id.* at 53.

<sup>73</sup> *Id.*

<sup>74</sup> See Resnicoff, *supra* note 4, at 856-57 (denying an individual the right to have all body parts buried, including amputated limbs, could prevent that individual from following the laws of her religion); 'Why Can't We Keep Our Legs?': Amputees' Fury After Hospital Denies Them Chance to be Buried with Removed Limbs, DAILY MAIL (June 16, 2010), <http://www.dailymail.co.uk/news/article-1287014/Amputees-legs-stolen-hospitals-operation.html> (two men who wanted to have their legs preserved and later buried with them were denied that request in the United Kingdom because the diseased limbs posed a public health risk); Nancy Cook Lauer, *Hawaiian Law Now Permits Parents to Keep Placentas*, WENEWS (July 28, 2006), <http://womensenews.org/story/parenting/060728/hawaiian-law-now-permits-parents-keep-placentas> (Hawaiian lawmakers enacted a law to allow parents to leave hospitals with their placentas to perform religious and cultural ceremonies after the state Department of Health classified placentas as medical waste and mandated their destruction beginning in June of 2005).

religion of the patient requires that the body part be buried. Additionally, there are times when cultural or religious practices require body parts, such as placentas, for ceremonies.

Some religions require that the body not be subject to unnecessary indignity and that it be buried promptly.<sup>75</sup> In most cases, parts removed from a body should also be buried if the person is still alive. There is a good argument for exceptions to this, however, when the body part removed would be used to save the life of another.<sup>76</sup> When a person considers incineration of an amputated limb to be an unnecessary indignity, then a conflict can occur as medical waste is destroyed in this manner.<sup>77</sup> Some states have addressed this issue by providing exemptions to the requirement that the amputated limb be destroyed if the patient has it properly interred or cremated.<sup>78</sup>

A recent case that involved the proper burial of loved ones conflicting with the goals of an efficient and economic resolution to a public problem arose from the terrorist attacks in New York City on September 11, 2001.<sup>79</sup> This case centered around the unidentifiable remains of approximately 1,100 people who perished in the attacks on the World Trade Center.<sup>80</sup> The families of those who were lost without a trace claimed that the City of New York did not exercise care when sifting through the debris and removing the debris from the scene that undoubtedly contained the unidentifiable remains of loved ones.<sup>81</sup> Among the claims made by the plaintiffs, one alleged a violation of the religious freedom guaranteed in the First Amendment because the city did not allow the plaintiffs to properly bury loved ones in accordance with their religious beliefs.<sup>82</sup> The court found that the

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<sup>75</sup> See Resnicoff, *supra* note 4, at 856-57.

<sup>76</sup> *Id.* at 873 (however, the removal of organs or body parts for general medical research is not permitted as it is not done with the direct purpose of saving the life of another).

<sup>77</sup> See N.J. ADMIN. CODE 7:26-3A.5 (2014) (defining “Treatment” as including incineration, steam sterilization, chemical disinfection, irradiation, thermal inactivation, or any other effective method approved by the state Department of Health).

<sup>78</sup> See N.J. ADMIN. CODE 7:26-3A.6(b) (2014) (specifically exempting corpses and removed body parts that will be buried or cremated).

<sup>79</sup> *WTC Families for a Proper Burial, Inc. v. City of N.Y.*, 567 F. Supp. 2d 529 (S.D.N.Y. 2008).

<sup>80</sup> *Id.* at 531 (of the 2,749 lost in the World Trade Center that day, the full bodies of 292 people were found, partial remains were found for 1,357 people, and approximately 1,100 people perished without leaving any identifiable remains).

<sup>81</sup> *Id.* at 532.

<sup>82</sup> *Id.* at 539.

City of New York did not act with the intent of violating any person's religious freedom, but rather with the intent to quickly and safely clean the debris away from downtown Manhattan, while minimizing the economic and public health impact.<sup>83</sup> In granting the defendant's motion to dismiss, the court noted that "[t]he governmental interest in clearing the debris of the World Trade Center efficiently and economically was 'compelling,' and the sensitivities evident in the sifting process were praiseworthy."<sup>84</sup>

The issue of patients leaving the hospital with their own removed surgical specimens became an issue for the state government and people of Hawaii in 2005.<sup>85</sup> In Hawaiian culture, the placenta has important symbolic value and was traditionally buried after the birth of a child. The Hawaiian Department of Health classified placentas as infectious medical waste in 2005, which caused native Hawaiians to not be able to take the placentas with them when they left the hospital. The native Hawaiians, along with some African cultures, believe that burying the placenta in the ground binds the child to their homeland.<sup>86</sup> When the public in Hawaii voiced displeasure with the new rules, the state legislature enacted a law that nullified the department of health's rule, allowing placentas to be released to mothers as long as there are no signs of infection.<sup>87</sup>

The state of Oregon has also responded to the demands of some mothers to take their placentas home for ritual burial or consumption by enacting a law in 2013.<sup>88</sup> The law has allowed mothers to take their placentas home for any reason, including religious ceremony and consumption of the placenta.<sup>89</sup> The law allows for the reclassification of placentas so that they are no longer considered medical waste and may be removed from the hospital or birthing center.

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<sup>83</sup> *Id.*

<sup>84</sup> *WTC Families for a Proper Burial, Inc. v. City of N.Y.*, 567 F. Supp. 2d at 541.

<sup>85</sup> *See Lauer, supra* note 74.

<sup>86</sup> *Id.*

<sup>87</sup> HAW. REV. STAT. § 321-30 (2013).

<sup>88</sup> OR. REV. STAT. § 459.400 (2013).

<sup>89</sup> *See Maria L. La Ganga, Oregon Allows Mothers to Take Placentas Home From Hospital*, L.A. TIMES (Dec. 31, 2013), <http://www.latimes.com/nation/la-na-oregon-placenta-20140101,0,4090777.story#axzz2pdkmpQj4>.

## II. THE LAW

The laws and guidelines that are relevant to this discussion include: state laws relating to the regulation of medical waste, laws that grant exemptions to those regulations, the Religious Freedom Restoration Act, and guidelines related to the practice of surgery and pathological examination of human tissue and organs. Most states define human body parts, tissues, and organs as regulated medical waste and require the controlled destruction of such waste for the protection of the public health.<sup>90</sup> New Jersey requires all organs, body parts and tissues that are removed to be destroyed, however there is an exemption for bodies and body parts that are to be buried or cremated.<sup>91</sup> The Council of State Governments issued Model Guidelines for State Medical Waste Management in 1992.<sup>92</sup> The model guidelines are very similar to the New Jersey law, requiring the regulated destruction of organs, body parts, and tissues. There is also an exemption for bodies and body parts that are to be buried or cremated.

The Religious Freedom Restoration Act of 1993 (RFRA) requires that the government must have a compelling interest to substantially burden religious exercise.<sup>93</sup> RFRA restores the compelling interest test set forth in two Supreme Court cases as the test to use when religious exercise is substantially burdened, as well as providing “a claim or defense to persons whose religious exercise is substantially burdened by the government.”<sup>94</sup> The government cannot impose a substantial burden on the free exercise of religion unless there is a compelling government interest in doing so.

The medical profession also has included guidelines and suggestions when it comes to the ownership and possession of human body parts and tissues. Surgical pathologists are advised

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<sup>90</sup> See N.J. ADMIN. CODE 7:26-3A.6(a) (2014) (defining regulated medical waste including tissues, organs, and body parts, and requiring the destruction or disposition of such waste); GA. COMP. R. & REGS. § 391-3-4.15 (defining Biomedical Waste to be incinerated as including pathological waste including human tissues and body parts removed during surgery).

<sup>91</sup> See N.J. ADMIN. CODE 7:26-3A.6(b) (2014) (specifically exempting corpses and removed body parts that will be buried or cremated).

<sup>92</sup> *Where You Live- State Medical Waste Programs and regulations*, EPA, <http://www.epa.gov/osw/nonhaz/industrial/medical/programs.htm> (last updated Dec. 19, 2014).

<sup>93</sup> 42 U.S.C.A. § 2000bb (2014).

<sup>94</sup> See 42 U.S.C. § 2000bb; *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).



that the rights of the patient with regard to legal ownership of tissues removed from the patients are not clear.<sup>95</sup> The textbook that is used as a gross dissection manual at many training hospitals advises pathologists that removed body parts and tissues may be classified as medical waste by state law, and may be required to be disposed of as medical waste.<sup>96</sup> The textbook also advises that if the patient wishes to retain body parts or tissues, that wish should be accommodated as long as doing so would not be problematic in the diagnosis and treatment of the patient, and as long as it would not be in violation of state law.<sup>97</sup>

The Association of Surgical Technologists has also dealt with the issue of patients wishing to retain their removed body parts and organs.<sup>98</sup> Under the first Standard of Practice, the surgical technologist is advised to be aware of the cultural preferences of the patient concerning the specimen disposition, and to communicate any instructions about returning the specimen to the patient on to the pathology department as well as following any applicable policies and procedures.<sup>99</sup>

### III. BALANCING THE RIGHTS OF INDIVIDUALS AGAINST THE INTERESTS OF THE STATE

Since there is a paucity of court cases that deal directly with the rights of patients with regard to retaining possession of removed body parts and organs; the statutes that deal with these issues must be analyzed as well as cases closely related to these issues, such as organ transplantation and medical research cases. The first part of this analysis will focus on why individuals should not be granted property interests in the body parts and tissues that are removed during medical procedures. This will be accomplished through analogy with the case law from organ transplantation and medical research that was highlighted previously in this note. The second part of this analysis will highlight reasons for allowing the state's interest in public health and safety to trump the religious interests and potential property interests that individuals have in their removed body parts and

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<sup>95</sup> SUSAN C. LESTER, *MANUAL OF SURGICAL PATHOLOGY* 5 (3rd ed. 2010).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *AST Standards of Practice for Handling and Care of Surgical Specimens*, AST, [http://www.ast.org/uploadedFiles/Main\\_Site/Content/About\\_Us/Standard\\_Handling\\_Care\\_Surgical\\_Specimens.pdf](http://www.ast.org/uploadedFiles/Main_Site/Content/About_Us/Standard_Handling_Care_Surgical_Specimens.pdf) (last visited Feb. 9, 2015).

<sup>99</sup> *Id.*

tissues. This will be demonstrated by examining case law related to the Religious Freedom Restoration Act of 1993. I focus on cases where the law was applied to state interests that were deemed compelling reasons for restricting religious freedom or found to not be a significant restriction of religious freedom. The final part of this analysis will include examining the statutory approach that some states have taken and what changes would need to be made in order to ensure that the public health and safety remain protected.

### A. Ownership Interest

The ownership interest that a person has in removed body parts and tissues has historically not been recognized and attempts to introduce and expand property rights in bodies and body parts with improvements in medical technology have generally been met with failure in the United States courts.<sup>100</sup> The privacy rights that a person has in their body do not translate to body parts that are removed, nor do they stay with the body after death.<sup>101</sup> The cessation of privacy rights in a person when they die can be traced to a perception that a living person is a separate entity than its deceased body. Furthermore, once a body is declared dead it no longer has privacy rights, though it does gain some type of property rights as discussed in section I(A) of this note.<sup>102</sup> These property rights are not really an ownership interest, but rather represent some type of sacred trust that a person has in the body for the benefit of the relatives and associates of the deceased.<sup>103</sup>

When it comes to body parts, organs, and tissues that are removed from the body, the courts have not been willing to call an

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<sup>100</sup> See Rao, *supra* note 1, at 373 (aside from human blood; other body parts, organs, and tissues are not considered commodities and therefore cannot be traded as such); *Id.* at 382-83 (property interest in human bodies has been recognized as a quasi-property interest whereby next of kin can control the disposition of a body, including use and possession for burial. There are no recognized property rights that go beyond these quasi-property rights, and as such bodies may not be bought or sold).

<sup>101</sup> *Id.* at 446-56.

<sup>102</sup> *Id.* at 448-49 (the privacy interest that a living person had in their own body does not carry over to their dead body, but some degree of property interest is developed that allows for the controlled disposition of one's body or for the reassignment of organs from a dead body to a living one).

<sup>103</sup> *Id.* at 450-51 (however, the Uniform Anatomical Gift Act treats a dead body as property that can be donated before a person's death, and can even be donated by next of kin after a person's death).

interest in these parts a property interest. The most noticeable exception is the case of *Green v. Commissioner*, in which the sale of a rare blood type was allowed.<sup>104</sup> The court in *Green* treated the harvesting of blood just like the harvesting of any other crop or natural resource, and recognized a property right in human blood. Aside from the anomaly of human blood, the courts that have examined the issue of property interests in human body parts have determined that people do not possess such an interest in their own body parts. The line of cases, starting with *Moore v. Regents of the University of California*, that were analyzed in section I(B) of this note show that courts have been unwilling to state that a person has a property right in body parts *in situ*, much less that any such right exists after body parts are removed from the body. Some have noted that the court in *Moore* converts a privacy interest that Moore had in his spleen into a type of *de novo* property interest, treating his spleen almost like communal property that is free to be seized and used for its commercial potential by the doctors and researchers who “found” it.<sup>105</sup>

The property-like characteristics that are attached to an organ or body part once it has been removed from the body cannot be present before the removal. If we considered any type of transferrable ownership interest to exist before the organ or body part is removed, then it would be possible for a person to transfer that interest to a third party while still alive. This would create the uncomfortable situation whereby the owner of the organ or body part would be precluded from “using” their property by virtue of the privacy interests that the “host” has in her own body.<sup>106</sup>

If property interests in organs and body parts do not exist before removal, then the person who has an organ or body part removed cannot claim to have a pre-existing ownership interest. When courts have determined that some type of ownership interest exists after removal, they have tended to find that the patient does not maintain any claim of ownership over the organ or body part.<sup>107</sup> Although the issues of informed consent and

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<sup>104</sup> *Green v. Commissioner*, 74 T.C. 1229, 1234 (1980).

<sup>105</sup> *See Rao, supra* note 1, at 455.

<sup>106</sup> *Id.* at 455-56.

<sup>107</sup> *See Greenberg v. Miami Children's Hosp. Research Inst., Inc.*, 264 F. Supp. 2d 1064 (S.D. Fla. 2003) (discussed above where the court found that patients have no property interest in tissue and body fluid samples that were donated for research); *Wash. Univ. v. Catalona*, 437 F. Supp. 2d 985 (E.D. Mo. 2006) (discussed above where the court found that people maintain no property interest in their explanted organs and tissues, and should not maintain an expectation that they would be able to dictate the disposition and utilization of

contract law have been raised in the research cases, there does not seem to be a clear way to use either of these to establish property interests in organs, body parts, and tissues. The court in *Moore* did discuss that physicians still have the duty to provide informed consent to all patients, especially indicating any reasons they would have for recommending a specific therapy.<sup>108</sup> After informed consent is supplied, there is no recourse for a patient like Moore to claim any ownership of his explanted spleen. Contract law could conceivably provide a way for a patient to assert an ownership interest in a removed body part or organ. The difficulty in utilizing this approach is the lack of a recognized common law property interest in body parts and organs that exists prior to removal. Aside from the statutorily defined process and conditions in the Uniform Anatomical Gift Act authorizing organ donation, there are no other recognized property rights in organs and body parts before they are removed.<sup>109</sup> The recent statutes in states like Hawaii and Oregon that allow mothers to take home the placenta after giving birth seems to create a new property right in these body parts after delivery.<sup>110</sup> These new statutes create a property interest in placentas after delivery, allowing mothers to remove them from the hospital and control their use. As a result of the lack of a common law property right in body parts, including placentas, these state legislatures responded to the desires of the residents of their states and created a property right. Although most states do not create this exception for placentas, it is common for hospitals to allow patients to take home their amputated body parts or placentas.<sup>111</sup> This practice seems to run contrary to most

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such samples); *Colavito v. N.Y. Organ Donor Network, Inc.*, 8 N.Y.3d 43 (2006) (discussed above where the court found no evidence of a common law property interest in bodies or body parts, but did indicate that although no claim for the interest currently exists it is possible that a case for ownership interest of bodies or body parts could be made in the future).

<sup>108</sup> *Moore v. Regents of the Univ. of Cal.* 51 Cal. 3d 120, 133 (1990) (Dr. Golde had a duty to disclose his plan for the cells contained in Moore's spleen before the splenectomy, as well as disclosing to Moore that the splenectomy may not be of any actual therapeutic value).

<sup>109</sup> 42 U.S.C.A. § 274 (2013).

<sup>110</sup> HAW. REV. STAT. § 321-30 (2013) (statute allowing mothers to take placentas home after birth for use in cultural or religious practices as long as there are no signs of infection); OR. REV. STAT. § 459.400 (2013) (statute allowing mothers to take home placentas for any reason).

<sup>111</sup> See LESTER, *supra* note 95; *AST Recommended Standards of Practice for Handling and Care of Surgical Specimens*, AST (April 13, 2008), [http://www.ast.org/pdf/Standards\\_of\\_Practice/RSOP\\_%20Handling\\_Care\\_Surgical\\_Specimens.pdf](http://www.ast.org/pdf/Standards_of_Practice/RSOP_%20Handling_Care_Surgical_Specimens.pdf).

state laws relating to the controlled disposal of medical waste.<sup>112</sup> The next section of this note will examine the interests that the state has in enforcing the hazardous medical waste statutes and how these interests compare with the property interests and religious freedom interests that patients may have.

### *B. Important State Interest*

The reasons for not allowing individuals to leave the hospital with body parts and organs are generally related to the public health risks that such a practice creates. Amputated limbs, including fingers and toes, contain at least some volume of blood. Human placentas are particularly bloody organs. Human pathogens in the blood can be transmitted even after the blood is removed from the body of the host. Patients are not routinely screened for some of the most virulent diseases unless there is a clinical reason to do so.<sup>113</sup> There is also the risk that a patient will present to the hospital in labor or with a medical emergency that requires an amputation or organ removal without any medical history and no access to screening results for infectious diseases.<sup>114</sup> Although the law in Hawaii that allows mothers to take home placentas requires that the mothers and placentas show no evidence of infectious disease, some of the most dangerous diseases, such as HIV and Hepatitis C, produce no external

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<sup>112</sup> See N.J. ADMIN. CODE 7:26-3A.6(a) (2014) (defining regulated medical waste including tissues, organs, and body parts, and requiring the destruction or disposition of such waste); GA. COMP. R. & REGS. § 391-3-4.15 (2013) (defining Biomedical Waste to be incinerated as including pathological waste including human tissues and body parts removed during surgery).

<sup>113</sup> See *USPSTF A-Z Topic Guide*, U.S. PREVENTIVE SERVICES, <http://www.uspreventiveservicestaskforce.org/uspsttopics.htm> (last updated Feb. 2015) (recommending screening for HIV for individuals between ages 15-65 and screening for HIV prenatally; also recommending Hepatitis B screening at the first prenatal visit; but not recommending screening the general population for Hepatitis B or C without clinical suspicion nor screening pregnant women for Hepatitis C).

<sup>114</sup> See U.S. Department of Health and Human Services, Health Resources and Services Administration, Maternal and Child Health Bureau, *Child Health USA 2012*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, <http://mchb.hrsa.gov/chusa12/hsfu/pages/pc.html> (last visited Feb. 8, 2015) (showing that 6.2% of all childbirths in the United States of America are to mothers that have had no prenatal care or present very late in the pregnancy for prenatal care, preventing the clinicians from carrying out the full complement of infectious disease screening that would normally occur with an earlier first prenatal visit).

evidence of infection on the placenta.<sup>115</sup> Thus, allowing potentially infectious material to leave the control of the hospital environment can be dangerous. In particular, in light of some of the potential uses for a placenta that has been removed from the hospital,<sup>116</sup> the risk of accidental transmission of an infectious disease may not be able to be accurately assessed and mitigated against in states that allow mothers to take home placentas.

In addition to the possibility of bringing an infectious disease home from the hospital along with an organ or body part, there is also the possibility that a person may bring back dangerous chemical substances. Most human specimens are treated with formaldehyde as both a tissue fixative and germicide.<sup>117</sup> The short-term effects of formaldehyde exposure are well documented, including skin and eye irritation, wheezing, burning sensation in the nose and throat, coughing and nausea.<sup>118</sup> The federal government has limited the amount of formaldehyde a worker may be exposed to in an 8-hour period to 0.75 parts per million, secondary to the long-term and short-term health effects.<sup>119</sup> The Environmental Protection Agency has labeled formaldehyde as a probable human carcinogen under conditions of high or prolonged exposure.<sup>120</sup> The Department of Health and Human Services has classified formaldehyde as a known human carcinogen.<sup>121</sup> If formaldehyde is so dangerous that the federal government requires monitoring and limiting of the exposure that certain workers experience, why would we risk sending this chemical out into the public environment where controlled exposure and disposal is not practical?

The risk of exposure to formaldehyde or infectious diseases via blood is present if we allow people to leave the hospital with body parts. We can either avoid the threat of formaldehyde exposure by releasing the body parts in an untreated state, or we can minimize the risk of infectious disease transmission by releasing the body parts in a formaldehyde solution. Neither

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<sup>115</sup> HAW. REV. STAT. § 321-30 (2013).

<sup>116</sup> See *Placenta Traditions*, *supra* note 7 (outlining many cultural and religious practices from around the world including ceremonial burial of placentas as well as consumption of the placenta for medicinal purposes).

<sup>117</sup> See *Formaldehyde and Cancer Risk*, NATIONAL CANCER INSTITUTE, <http://www.cancer.gov/cancertopics/factsheet/Risk/formaldehyde> (last updated June 10, 2011).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

option is particularly preferable. Human tissue that has been fixed in formaldehyde can be processed to eliminate the water and formaldehyde present in the tissue by ultimately replacing it with paraffin wax.<sup>122</sup> This procedure is generally performed on small sections of organs and tissue;<sup>123</sup> it would be quite costly to process an entire organ even if a hospital had the equipment to do so.

A state that chooses to regulate the disposition of medical waste<sup>124</sup> has a compelling interest in doing so. Protecting the public health by ensuring the controlled disposal of potentially infectious body parts and organs appears on the surface to be an important state interest. It must be compared to other interests that have been deemed important enough to justify not recognizing an individual's property rights in her own body parts. Courts have determined in the past that the interest in furthering medical research was more important than establishing property rights in explanted organs.<sup>125</sup> The interest that society has in encouraging swift progress in medical research was deemed to outweigh the interest of the individual in controlling the disposition of a removed body part or organ.

The courts and Congress have also provided guidance in the setting of organ transplantation cases.<sup>126</sup> Despite the presence of a general common law approach that there is no property interest in

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<sup>122</sup> See LESTER, *supra* note 95.

<sup>123</sup> *Id.*

<sup>124</sup> N.J. ADMIN. CODE 7:26-3A.6(a) (2014); GA. COMP. R. & REGS. § 391-3-4.15 (2013).

<sup>125</sup> See *Moore v. Regents of the Univ. of Cal.*, 51 Cal. 3d 120, 145 (1990) (the court acknowledged that if it were to extend some sort of conversion liability in this case, there would be detrimental effects on the progress of medical research and ultimately would run counter to the societal goal of improving medical treatment); *Wash. Univ. v. Catalona*, 437 F. Supp. 2d 985, 1002 (E.D. Mo. 2006) (the court determined that allowing patients to maintain control of their samples after removal from the body would prevent medical researchers from amassing a statistically significant source of samples that is free of bias, hampering the progress of medical research).

<sup>126</sup> See *Colavito v. N.Y. Organ Donor Network, Inc.*, 8 N.Y.3d 43, 53 (2006) (the court noted that there is still no common law property right in a dead body beyond the limited possession required for burial or cremation, however the court also noted that this law evolved long before organ transplantation and other advanced medical procedures); N.J. STAT. ANN. § 26:6-85b(1) (2014) (the New Jersey version of the Revised Uniform Anatomical Gift Act allows a person to make a donation of one's own body to another entity, implying that a future interest in the ownership of the body has been created when a person makes that gift); CAL. HEALTH & SAFETY CODE § 7150.20 (Deering 2013) (California law that allows an individual to make a gift of their body or body parts, implying that a person has a current property interest in the body and has created a future property interest in a separate party at the time of the gift).

a dead body and the organs it contains, the Congress and state legislatures have enacted statutes that allow a person to declare organs, body parts, and even entire bodies as the property of another entity, namely organ transplant networks and research organizations. The legislative branches created a type of property interest in body parts and bodies to further a public health goal. The interest that the states had in ensuring a supply of transplantable organs for individuals in need and bodies and body parts for medical research was manifest in the passage of the Revised Uniform Anatomical Gift Act.

The states have passed legislation, like the Revised Uniform Anatomical Gift Act, in order to further public health goals. They have also enacted statutes dictating the disposal of medical waste for slightly different public health goals.<sup>127</sup> The goal of promoting the health and safety of the population by requiring the controlled disposal of potentially infectious medical waste should be just as important as the goal of easing potential restrictions on the progress of medical research and providing organs for transplantation to those who need them. The inquiry into whether the state should regulate the disposition of body parts does not end once the importance of protecting the public health and safety is established. The state's interest must then be weighed against the individual's religious interests in the disposition of body parts or organs.

The interest that the state has in protecting the health and safety of the public can be equated to society's interest in advancing medical research and providing organs for transplantation. Courts have indicated that there are good policy reasons for not allowing a person's potential property rights in organs and body parts to trump the goals of society. Protection of the health and safety of the public does not need to be the only goal that trumps potential property interests, it only needs to join the other goals of furthering medical research and encouraging organ transplantation, which have already been established as important to society.

The framework for determining if a state interest can be allowed to trump the religious interests of an individual has been laid out by the Religious Freedom Restoration Act (RFRA) of 1993<sup>128</sup> and its associated cases. The two variables involved in the RFRA are: (1) how compelling is the government interest and, (2)

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<sup>127</sup> N.J. ADMIN. CODE 7:26-3A.6(a) (2014); GA. COMP. R. & REGS. § 391-3-4.15 (2013).

<sup>128</sup> 42 U.S.C.A. § 2000bb (2014).



how substantial is the burden placed on the religious freedom of the individual.<sup>129</sup> The prototypical cases that established this standard are *Sherbert v. Verner*<sup>130</sup> and *Wisconsin v. Yoder*.<sup>131</sup> In *Yoder*, the respondents were Amish and Mennonite parents that did not want their children to attend school beyond 8th grade.<sup>132</sup> This violated a Wisconsin statute requiring school attendance for all children in the state until they were 16 years of age.<sup>133</sup> The court determined that the law placed a substantial burden on the religious beliefs of the respondents, particularly their desire to remain separate from the outside world and its influences, by not allowing them to educate their children informally after 8th grade.<sup>134</sup> Despite the state's claim that compulsory education is vital to the development of children and was a non-discriminatory law that applied to all children, the court found that even neutral laws could unduly burden the free exercise of religion. Although the state's intended goal was reasonable, it was not compelling enough to justify the burden it placed on the religious freedom of the respondents.<sup>135</sup>

In *Sherbert*, the appellant was a member of the Seventh-day Adventist Church, and was fired because she would not work on her Sabbath Day, which was Saturday.<sup>136</sup> She was denied unemployment benefits under a South Carolina statute that deemed her ineligible for benefits because work was available and she refused to work on Saturdays.<sup>137</sup> The court determined that the statute did place a substantial burden on the free exercise of the appellant's religious beliefs by forcing her to choose between observing her Sabbath Day or receiving unemployment benefits.<sup>138</sup> The state's interest in not having the unemployment fund depleted by malingerers was not compelling enough in the eyes of the court to justify the substantial burden on the appellant's religious freedom.<sup>139</sup>

The above cases highlight the basic conclusions that the court was able to make, applying the two-part analysis that the

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<sup>129</sup> *Id.*

<sup>130</sup> *Sherbert v. Verner*, 374 U.S. 398 (1963).

<sup>131</sup> *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>132</sup> *Id.* at 207.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 216, 219.

<sup>135</sup> *Id.* at 220, 233.

<sup>136</sup> *Sherbert*, 374 U.S. at 399.

<sup>137</sup> *Id.* at 400-01.

<sup>138</sup> *Id.* at 404.

<sup>139</sup> *Id.* at 407.

RFRA has determined is applicable to these types of cases. The courts were willing to find an unfair burden when the law affected a large group generally, as in *Yoder*, or when the state's interest was not compelling enough, as in both *Yoder* and *Sherbert*. In each case, the court did comment on some things that would have caused the outcome of the case to be reversed. In *Sherbert*, the court noted that Sunday closing laws were allowed despite the discriminatory effect they had on some followers of certain religions because the state's interest in providing one day of rest a week for workers was considered compelling enough.<sup>140</sup> In *Yoder*, the court noted that some conduct or actions are regulated despite religious significance because of the substantial threat they pose to the public safety and order.<sup>141</sup> Cases where the court found the state's interference with the religious freedoms of individuals to be compelling will be examined next.

A case that was distinguished from *Yoder* is *Leebaert v. Harrington*.<sup>142</sup> In *Leebaert*, the issue was whether a man could exclude his son from the health curriculum at his middle school.<sup>143</sup> The plaintiff claimed that parts of the school's curriculum for the health class were offensive to his personal religious beliefs.<sup>144</sup> The court determined that this case was not like *Yoder*, as that case involved a state law that substantially burdened an entire community's way of life while this case involved one person's beliefs that run contrary to part of the curriculum of one middle school course.<sup>145</sup> The state's compelling interest in this case was providing a general health education for all children.

One of the cases described in Section I(C) of this paper, arising from the terrorist attacks of September 11, 2001, shows that the government interest in clearing the debris of the World Trade Center towers was compelling enough to justify the intrusion on the religious freedoms of the plaintiffs.<sup>146</sup> In that case, the government's interest in removing the debris in a safe and efficient manner in such a unique situation was determined to be compelling enough as to outweigh the interest that the families of the approximately 1,100 people who perished without

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<sup>140</sup> *Id.* at 408.

<sup>141</sup> *Yoder*, 406 U.S. at 230.

<sup>142</sup> *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003).

<sup>143</sup> *Id.* at 135.

<sup>144</sup> *Id.* at 138.

<sup>145</sup> *Id.* at 144-45.

<sup>146</sup> *WTC Families for a Proper Burial, Inc. v. City of N.Y.*, 567 F. Supp. 2d 529, 541 (S.D.N.Y. 2008).

identifiable remains had in providing a burial. One of the important considerations that the state had was the health and safety of the men and women who were going to be cleaning the debris from the site.<sup>147</sup>

A case in which the state has offered a public health and safety reason for the restriction of the free exercise of religion it imposes is from Florida.<sup>148</sup> In *Dickerson*, the plaintiff advised and helped expectant mothers with the home birth process.<sup>149</sup> Although she was not licensed as a midwife, she was informed that she was being investigated for violating Florida's Midwifery Practice Act.<sup>150</sup> She claimed that she should have been allowed to advise parents about home birth and that she planned to do so in accordance with her religious beliefs.<sup>151</sup> In addition, she claimed that the Florida statute violated her religious freedom.<sup>152</sup> The court first found that the statute did not substantially burden her religious freedoms, noting that the statute did not prevent her from praying for home birth or sharing her beliefs about home birth with others.<sup>153</sup> The statute only prevented her from actually advising on the progress of labor and caring for the mother without first acquiring a midwifery license.<sup>154</sup> Even if the court accepted the plaintiff's claim that her religious freedom was being substantially burdened, it determined that the state's interest in protecting the health of expectant mothers and the safe delivery of newborns was compelling enough to justify the supposed burden.<sup>155</sup> The interest was important enough that the state could regulate midwifery for the protection of the health and safety of the public, and the regulation was deemed tailored narrowly enough so as to not cause any substantial burden to be placed on religious freedom.<sup>156</sup>

The above cases show a tendency of the courts to find that a law creates an unfair burden on the religious freedoms of individuals when a whole community is affected and the state's interest is a general one, like providing high school educations for all children. The courts have been less willing to find an unfair

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<sup>147</sup> *Id.* at 539.

<sup>148</sup> *Dickerson v. Stuart*, 877 F. Supp. 1556 (M.D. Fla. 1995).

<sup>149</sup> *Id.* at 1558.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Dickerson*, 877 F. Supp. at 1559.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 1560.

burden when the religious freedom of a single person is affected or when the state's interest has involved the health of the public. The courts have found that when the health of workers cleaning up after a disaster, the health of expectant mothers, or the health education of children is protected by the state, it is usually a compelling interest.<sup>157</sup> Although one can never be entirely sure how the courts will apply case law to a new situation, the trend of finding that public health is a compelling interest would seem to allow states to create and enforce laws that would not allow people to leave the hospital with body parts and organs. The interest in protecting the health and safety of the public can be carried out by preventing people from taking their body parts and organs outside of the controlled hospital environment. The religious interest that people have in burying body parts and organs can be saved by allowing for the direct removal and processing of body parts and organs by funeral homes. These parts could be treated in the same way as dead bodies, processed and then buried in accordance with state law and religious practice. This would protect the religious interests many have in ensuring that all parts of their bodies are buried while protecting the health and safety of the public.

### *C. How Can States Ensure Public Health and Safety?*

States could modify their current laws to be more inclusive when it comes to defined medical waste rather than less inclusive. The laws of Oregon and Hawaii have made specific exceptions to their regulated medical waste statutes for placentas.<sup>158</sup> To better protect the health and safety of the public, states could craft exemptions that would only allow body parts and organs to be handled in the same way as dead bodies, requiring a funeral home to receive the parts and process them for burial or cremation. The removed body parts and organs could then be buried or cremated in a manner that is consistent with an individual's religious practices. While these types of exemptions would allow some religious practices to still occur, not every religious practice could be saved in this manner. Religious practices that require the handling of organs and tissues outside of the hospital or funeral home environment would not be able to be carried out under state laws modified in this way. This type of exemption would minimize

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<sup>157</sup> *WTC Families for a Proper Burial, Inc. v. City of N.Y.*, 567 F. Supp. 2d 529 (S.D.N.Y. 2008); *Dickerson v. Stuart*, 877 F. Supp. 1556 (M.D. Fla. 1995); *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003).

<sup>158</sup> HAW. REV. STAT. § 321-30 (2013); OR. REV. STAT. § 459.400 (2013).

the impact of the law on religious practices while still working towards preventing any unnecessary health and safety risks by eliminating the handling of human organs and body parts outside of the controlled hospital and funeral home environment. Additionally, exceptions could be made for medical hardware and non-organic material that is removed from the body.<sup>159</sup> These items can be sterilized with high temperature before being returned to the patient.

Whenever body parts and organs are handled in the hospital operating room and laboratory, universal precautions are followed that reduce the risk of exposure to blood borne pathogens.<sup>160</sup> Gloves, masks and gowns are used by employees handling the body parts and organs to minimize contact with blood and fluids that can potentially transmit HIV, Hepatitis A, Hepatitis B, Hepatitis C, *Staphylococcus* bacteria, *Streptococcus* bacteria, Tuberculosis, Herpes, Measles, and Malaria, among other infections.<sup>161</sup> A person who has possession of an organ or body part outside of the hospital would probably not have access to all of the personal protective equipment worn in hospitals, possibly exposing other individuals to infection with the above listed diseases. Since it would be impractical to require individuals outside of an institutional setting to use universal precautions, the goal of maintaining public health and safety would be better served by not allowing body parts and organs to leave the hospital with patients. Additionally, it is not always known if the patient or the body part is infected with a communicable disease. The Hawaii placenta law requires that there be no evidence of an infection in the mother before the placenta will be released.<sup>162</sup> It is not always possible, however, to have a complete infectious disease workup in patients, especially if they have little or no prenatal care.<sup>163</sup> Although the risk of an infectious disease being transmitted by a body part outside of the hospital may be small,

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<sup>159</sup> See LESTER, *supra* note 95.

<sup>160</sup> See *Healthcare Wide Hazards (Lack of) Universal Precautions*, OSHA, <https://www.osha.gov/SLTC/etools/hospital/hazards/univprec/univ.html> (last visited Feb. 8, 2015).

<sup>161</sup> *Id.*

<sup>162</sup> HAW. REV. STAT. § 321-30 (2013).

<sup>163</sup> See U.S. Department of Health and Human Services, Health Resources and Services Administration, Maternal and Child Health Bureau. *Child Health USA 2012*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, <http://mchb.hrsa.gov/chusa12/hsfu/pages/pc.html> (last visited Feb. 8, 2015) (Showing that 6.2% of all childbirths in the United States of America are to mothers that have had little or no prenatal care).

the effect on the health of those exposed could be dire. Given the possibility for unnecessary exposure to infectious agents, states would be justified in altering their medical waste statutes to prevent the removal of body parts and organs from the hospital.

Many states already have well-written statutes that treat organs and body parts as regulated medical waste. New Jersey, for example, has a law that requires the controlled destruction of medical waste, including body parts and organs.<sup>164</sup> There is an exemption already in place for parts that are to be buried or cremated.<sup>165</sup> N.J. Admin. Code 7:26-3A.6(b) (2014) states:

- (b) The following are excluded from the definition of regulated medical waste:
  - 3. Ash from incineration of regulated medical waste once the incineration process has been completed;
  - 4. Residues from treatment and destruction processes once the regulated medical waste has been both treated and destroyed;
  - 5. Human corpses, remains and anatomical parts that are intended for interment or cremation;

This could serve as a model for the type of statute that other states could adopt and enforce to protect the public health and safety, if they desired. Anecdotally, it seems that patients have been able to request and receive their body parts after surgery and delivery, even in states like New Jersey that do not specifically have an exemption for things like placentas. Rather than wait for an unfortunate incident in which a person contracts an infectious disease from another person's body part, perhaps states could preemptively strengthen the enforcement of their medical waste regulations in the interest of public health and safety.

#### IV. CONCLUSION

Currently, individuals do not have recognized property rights in their own body parts. This lack of control over a person's own body parts has developed to further socially desirable goals,

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<sup>164</sup> N.J. ADMIN. CODE 7:26-3A.6(a) (2014) (defining regulated medical waste including pathological waste including tissues, organs, and body parts).

<sup>165</sup> N.J. ADMIN. CODE 7:26-3A.6(b) (2014) (specifically exempting corpses and removed body parts that will be buried or cremated).

including the encouragement of medical research and organ transplantation. In addition to those goals, society has an interest in protecting the public health and safety. Applying the general reasoning of cases like *Moore*, the interests of the individual may be subordinated to the interests of the state or society, such as promoting health and safety, which can be protected by not recognizing property rights in organs or body parts.

The importance of protecting an individual's religious freedoms is paramount in the United States, and these freedoms must not be intruded upon arbitrarily. The state has the ability to burden a person's religious activities only when the burden is either insubstantial or the state's interest is very compelling. When it comes to the health and safety of the public, a good case can usually be made for the interest to be considered compelling. The burdensome nature of a regulation should be minimized as much as possible while still achieving the state's goal. State laws that require the controlled disposition of all medical waste, including body parts and organs, by either destruction or handling by a funeral home for cremation or burial would appear to strike the balance between minimizing burden and protecting the health and safety of the public. Individuals who require that removed body parts be buried or otherwise used in some religious ceremonies could carry out these activities. Additionally, the state could ensure that private individuals with no training or special knowledge of universal precautions and infectious diseases are not bringing potentially infectious organs and body parts outside of the controlled hospital environment.

If a state desired to better control the risk of potentially infectious body parts leaving the hospital, then that goal could be achieved by implementing regulations that require the controlled disposition of all body parts, tissues, and organs. An exemption for body parts sent to funeral homes for processing for burial or cremation, much the same way dead bodies are released from the hospital, would still allow many religious activities to take place without unnecessarily placing the public health and safety at risk.