LIMITING THE LEGACY: *EVANSTON V. LEGACY OF LIFE*

Comment

by Michael Economidis

I. INTRODUCTION

Although there are many upsides to an estate planner's job, the downside is that so much of their good work is only apparent after their clients die: wills are probated; trusts take effect; and property is distributed. In short, they honor clients' wishes to the extent of the law and of the estate planner's own abilities.[1] Estate planners must make provisions even for their clients' bodies, but laws that set them apart from every other item of a client's possession control those bodies; therefore, options are severely limited, particularly when clients want to make gifts of their bodies.[2]

Texas's Revised Uniform Anatomical Gifts Act (TAGA) governs anatomical gifts.[3] In the words of the Texas Supreme Court in its 2012 decision in *Evanston Ins. Co. v. Legacy of Life, Inc*., neither the next of kin nor the estate have "right[s] to transfer [the] tissue[] other than as set forth in the Anatomical Gift Act."[4] That decision serves as the spring-board for the following comment.[5]

After discussing *Evanston*, this comment traces the lineage of the *res nullius* rule concerning human tissues through its British roots to its American acceptance.[6] From there, this comment provides an analysis of Texas's incorporation of *res nullius* and its application of the quasi-property doctrine, with emphasis on the TAGA.[7] Next, the comment deals with the rationale underlying the *res nullius* rule, as well as discusses various views concerning the desirability and practicality of a recognition of property rights in human tissues.[8] Finally, this comment suggests a practical proposal for human organ sales as a solution to the U.S. transplant organ shortage problem, which entails a recognition of property rights in human tissues.[9]

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1. *See* TEX. HEALTH & SAFETY CODE ANN. § 629A.008 (West 2009).
2. *See id.*; *see also* Evanston Ins. Co. v. Legacy of Life, Inc., 370 S.W.3d 377, 385 (Tex. 2012) (holding that the next-of-kin has no right to gifted human remains other than as set forth in Texas's Revised Uniform Anatomical Gift Act).
3. *See Evanston*, 370 S.W.3d at 385.
4. *Id.*
5. *See infra* Part I.
6. *See infra* Part II.
7. *See infra* Part III.
8. *See infra* Part IV.A–B.
9. *See infra* Part V.C.

Neither U.S. law in general nor Texas law specifically has kept up with the advances of technology and the need for organs.[10] While estate planners may present several options to their clients concerning disposition of their remains, the time has come for the law to allow at least one more.[11]

II. THE TEXAS SUPREME COURT IN *EVANSTON INS. CO. V. LEGACY OF LIFE, INC.*

A. Evanston*'s History*

On December 14, 2006, Debra Alvarez's mother, Alicia Garza, lay dying in a hospital in Hidalgo County.[12] A non-profit company named Legacy of Life approached Alvarez, and, as Alvarez claimed, informed her that if she would consent to the donation of her mother's organs, they would distribute the organs on a not-for-profit basis.[13] As it turned out, though, Legacy transferred Garza's organs to a for-profit organization, which later sold them to hospitals.[14] Alvarez later alleged that Legacy had some institutional connection to the for-profit organization, but the cause of action was Legacy's alleged breach of contract regarding the use and distribution of Garza's organs.[15]

Due to Alvarez's pending suit against it, Legacy made a policy demand of its liability insurance company, Evanston.[16] Under the terms of that policy, Evanston agreed to insure Legacy in the events of "Personal Injury and Property Damage," with "property damage" defined as "physical injury to or destruction of tangible property, including consequential loss of use thereof, or loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an Occurrence."[17]

Evanston, however, denied coverage for the suit and sought a declaratory judgment that no duty existed on its part to defend Legacy against Alvarez's claims.[18] Among Evanston's stated grounds for denying coverage were Alvarez's claims themselves, some of which the Fifth Circuit quoted as follows in its first decision concerning the case:

> 2. "The Estate of Alicia Garza is the rightful and legal owner of her remains."
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> 3. "Although the remains of Alicia Garza are the sole and exclusive property of the Estate of Alicia Garza, Defendants have effectively

10. *See infra* Part V.
11. *See infra* Parts V–VI.
12. *See* Evanston v. Legacy of Life, Inc., 645 F.3d 739, 741 (5th Cir. 2011).
13. *Id.*
14. *Id.*
15. *Id.* at 741–42.
16. *Id.* at 741.
17. *Id.* at 742.
18. *Id.*

> taken the remains including tissue and bones without consent or license from the Estate of Alicia Garza."
> 4. "[Legacy] took Alicia Garza's remains including tissue and bones with the intent to deprive the Estate of Alicia Garza of its rightful ownership of the remains of Alicia Garza including tissue and bones and to capitalize on the potential commercial value of the remains including tissue and bones, which embodies the Estate of Alicia Garza's property."
> 5. "Plaintiffs seek the reasonable value of the benefits of the tissue and bones provided to Defendants."[19]

Evanston's basic claim concerning the alleged property damage was that Alvarez's underlying complaint failed to state a property damage claim that the policy at issue would cover.[20] In other words, Alvarez's organs were not property; therefore, there was no property damage, and the key policy provision remained untriggered.[21]

When the case reached the Fifth Circuit, that court certified two questions to the Texas Supreme Court.[22] The second certified question was:

> Does the insurance policy provision for coverage of "property damage," defined therein as "physical injury to or destruction of tangible property, including consequential loss of use thereof, or loss of use of tangible property which has not been physically injured or destroyed," include coverage for the underlying plaintiff's loss of use of her deceased mother's tissues, organs, bones, and body parts?[23]

The court of appeals's stated reason for certifying the question was that "if the Texas Supreme Court determines that Evanston did have a duty to defend based on either the 'personal injury' or 'property damage' provisions of the insurance policy," the court would find in favor of Legacy; "[c]onversely, if the Texas Supreme Court determines that Evanston did *not* have a duty to defend, [no] relief will be awarded Legacy."[24] The court of appeals found two possible ambiguities in Texas law concerning the body parts of decedents.[25] The court found it unclear (1) whether Texas's "quasi-property" doctrine would trigger an insurance policy's "tangible property" provision, and (2) "whether the Texas Supreme Court intended its refusal of property rights in dead human bodies to apply with equal force to body parts and organs in an organ donation context."[26]

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19. *Id.* at 743.
20. *Id.* at 744.
21. *Id.*
22. *Id.* at 751.
23. *Id.*
24. *Id.*
25. *Id.* at 747–48.
26. *Id.*

B. Human Remains Are Not "Property" Within the Traditional Definition of the Term

In answering the Fifth Circuit's question as to property rights in human remains, the Texas Supreme Court began its analysis with the recognition that Texas common law has defined "property" as a "bundle of rights."[27] Rather than as some sort of objectification, the court pointed out that property does not refer to the object of the idea in question.[28] Rather, it refers to the nature of the relationships between the putative owner, others, and the government, such that one or several proprietary rights arise.[29] Furthermore, to qualify as tangible property so as to trigger the insurance policy provision, the rights involving human remains must have "acquired sufficient rights to be recognized as property under the law."[30] Such rights would include the following: (1) possession; (2) personal use and enjoyment; (3) management of others' use; (4) income from others' use; (5) rights to the capital value; (6) immunity from expropriation; (7) transmissibility; (8) lack of any term on these rights; (9) liability for debts; (10) residual right of reversion; and (11) a duty to refrain from harm.[31] The court went on to say that Texas has never required the full gamut of rights to be present in order to constitute property and that the four key proprietary rights under American law are "the rights to possess, use, transfer and exclude others."[32]

In applying Texas's conception of proprietary rights to human remains, the Texas Supreme Court began by explaining the purpose of the quasi-property doctrine as it has been accepted in the United States—Anglo-American common law has never recognized any proprietary rights in connection with human remains; thus, courts created the quasi-property doctrine in order to ease recovery in cases with mishandled corpses.[33] Prior to the adoption of the doctrine, a complainant had to prove emotional distress by physical injury resulting from the mishandling.[34] With the doctrine in place, the next-of-kin had the right to possess the decedent's remains free from mutilation in order to dispose of them.[35] The right to dispose of the corpse is significant because it is the sole substance of the quasi property right—once the body is in the ground (or any analogous place), the right

27. Evanston Ins. Co. v. Legacy of Life, Inc., 370 S.W.3d 377, 382–83 (Tex. 2012).
28. *Id.* at 383.
29. *Id.*
30. *Id.*
31. *Id.* (citing Michael A. Heller, *The Tragedy of the Anticommons: Property in Transition from Marx to Markets*, 111 HARV. L. REV. 621, 666–67).
32. *Id.*
33. *Id.* at 383–84.
34. *Id.* at 384.
35. *Id.* (quoting Culpepper v. Pearl St. Bldg., Inc., 877 P.2d 877, 880 (Colo. 1984)).

expires.[36] Beyond that, the quasi-property right is equal parts right and duty, and the next-of-kin has a corresponding duty to dispose of the body in a timely, sanitary fashion.[37]

With that explanation of the quasi-property doctrine in mind, the next-of-kin's right to possess a decedent's remains falls short of a proper property right.[38] Recognizing that fact, the Texas legislature adapted and adopted the Uniform Anatomical Gift Act (TAGA) in order to expand the next-of-kin's rights so as to accommodate the advancement of medical science in the area of transplantation and human tissue research.[39] The TAGA grants the next of kin the right to make "an anatomical gift of a decedent's body or part for the purpose of transplantation, therapy, research, or education."[40] Yet, in conjunction with the Texas Penal Code, it is still illegal to sell a human body part for valuable consideration.[41] In other words, Texans have a limited right to possess, a right to transfer, and, interestingly, a right to reversion but not a right to value connected with a decedent's remains.[42] The bottom line is for Texans and for Alvarez, the TAGA offers neither the next-of-kin nor the estate a right to the value of the decedent's tissue; therefore, no cause of action for misuse arises.[43] Although the Texas Supreme Court called the TAGA an expansion of proprietary rights in human remains, the only thing that it really did was create an alternate means of exercising the pre-existing right and of fulfilling the pre-existing duty to dispose of those remains, which leaves the status quo unchanged.[44]

III. THE EVOLUTION OF THE PROPRIETARY RIGHTS INVOLVING HUMAN REMAINS, HEIRS, AND ESTATES

In as much as the *Evanston* court merely clarified Texas's position vis-à-vis property rights and human remains, one might ask why the case merits comment.[45] Why should estate planners, lawyers, or people in general pay attention to a case that failed to make any significant change in law or practice? The answer to that question lies in the archaic irrelevance of the ancient common law analysis of the issue as well as in the prescience of the Fifth Circuit's reason for certifying the second question in the first place.[46]

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36. *See id.* at 383; *see also* Foster v. Foster, 220 S.W. 215, 218 (Tex. Civ. App.—Texarkana 1920, no writ).

37. *Foster*, 220 S.W. at 218.

38. *Evanston*, 370 S.W.3d at 384.

39. *Id.*

40. 8 TEX. HEALTH & SAFETY CODE ANN. § 692A.009(a) (West 2009).

41. *See generally* 10 TEX. PENAL CODE ANN. § 48.02 (West 2001) (criminalizing trade in human tissues for consideration).

42. *Id.*

43. *Evanston*, 370 S.W.3d at 386–87.

44. *See id.* at 384.

45. *See* Evanston v. Legacy of Life, Inc., 645 F.3d 739, 748 (5th Cir. 2011).

46. *See infra* Part II; *see also Evanston*, 645 F.3d at 748.

Because the *Evanston* court grounded its decision in the ancient view of human bodies as *nullius in bonis*, without any analysis as to why a court should accept such a view in a modern context such as anatomical gifts, it completely overlooked both the underpinnings of the ancient view and the significant applicational gap that prompted the Fifth Circuit to observe the following:

> [T]he Texas cases addressing the property status of dead bodies date from the pre-World War II era, long before advances in organ transplants and medical research began to challenge the common law view of refusing property rights in bodily organs, tissues, and cells. Some recent developments in Texas law may suggest that body organs, tissues, and cells do have some attributes of property.[47]

Of course, the *Evanston* court distinguished the case to which the Fifth Circuit referred, but the overall power of the observation remains that with the advancement of medical science comes the need for human tissue; therefore, *Evanston* notwithstanding, the questions continue to multiply.[48] Applying archaic precedent to situations unimaginable to the parties only ignores the problem; accordingly, the complexities and problems inherent to absolute denials of proprietary interests in human tissues will overwhelm the paradigm and inevitably change.[49] First, this comment will flesh out the common law in order to discern its foundation.[50] Next, this comment will trace the view from its English roots through to its American evolution and then to its Texan expansion.[51]

A. English Common Law Afforded No Property Rights in Relation to Dead Bodies

In dealing with the common law view of human remains, it seems best to take the doctrine back to its origins.[52] The earliest extant treatment of proprietary rights dealing with human remains comes from Lord Coke's venerable *Institutes of the Laws of England*:

> It is to be observed that in every [s]epulchre, that hath a monument, two things are to be considered, viz. the monument, and the [s]epulture or

47. *Evanston*, 645 F.3d at 748.

48. *Evanston*, 370 S.W.3d at 386 (distinguishing Roman v. Roman, 193 S.W.3d 30 (Tex. App.—Houston [1st Dist.] 2006, pet. denied), by noting that the court in *Roman* "only decided that agreements regarding the disposition of frozen embryos before cryopreservation [did] not violate public policy," not that "embryos [were] in fact property.").

49. *See, e.g.*, R. v. Haynes, [1613] 77 Eng. Rep. 1389, discussed *infra*, Part II (denying any kind of proprietary status cognizable by the court of law to human remains).

50. *See infra* Part II.

51. *See infra* Parts II–III.

52. *See infra* Parts III-IV.

> burial [sic] of the dead, [t]he burial [sic] of the cadaver . . . is *nullius in bonis*, and belongs to eccle[s]ia[s]ticall cognizance [sic], but as to the monument, action is given . . . at the common law for defacing thereof.[53]

Three notable issues address themselves to the reader at this point: (1) Lord Coke's actual focal point for the comment; (2) the lack of interest with which he treats the cadaver; and (3) the assignment of jurisdiction as to the cadaver.[54]

First, Lord Coke's comment comes in the context of his discussion on building laws and on the building of grave monuments or sepulchers in particular.[55] Furthermore, he prefaced the comment by discussing the defacing of those sorts of monuments to point out that desecration, defacement, or other sorts of damage to sepulchers was actionable under the laws of the crown.[56]

Second, Coke was relatively uninterested in the cadaver itself in that the body constituted *nullius in bonis*, or "no one's property."[57] In the context of his discussion of building structures in general and of sepulchers and monuments specifically, Coke's characterization of cadavers as lacking in property interest amounts to a throw-away comment.[58] In fact, his other mention of the desecration of bodies, paired with the fact that his work contains no pointed treatment of the bodies' proprietary characteristics, shows that he cared little about them.[59] The important thing for him was that someone might vandalize grave monuments, and a cause of action would arise for such defacement.[60]

Third, Coke assigned jurisdiction of the body to the Church, recognizing that cognizance belonged to the ecclesiastical authorities.[61] As the Minnesota Supreme Court pointed out in 1891:

> [F]rom a very early date in [England] the ecclesiastical courts assumed exclusive jurisdiction of such matters [as the disposition of human remains] . . . . The repudiation of the ecclesiastical law and of ecclesiastical courts by the American colonies left the temporal courts the sole protector of the dead and of the living in their dead. Inclined to follow the precedents of the English common law, these courts were at first slow to realize the changed condition of things, and the consequent necessity that they should take

53. 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND, 203 (4th ed. 1669).
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* at 45.
59. *Id.*
60. *Id.* at 203.
61. *Id.*

> cognizance of these matters and administer remedies as in other analogous cases.[62]

Therefore, English common law was not terribly helpful in establishing precedent; however, English common law was the only source, besides specific statutes, available for decisions concerning the disposition or disturbance of human remains.[63] The English courts had no concern for dead bodies because human remains were the business of the Church, not the secular courts.[64] So, when the American courts were in need of guidance as to the proper disposition of bodies, they relied upon English cases, such as those below, which showed little concern for the bodies themselves as compared to the more traditional causes of action.[65]

1. The Haynes *Case (1613)*

One of the first English cases to deal with causes of action arising in relation to human remains was that of William Haynes.[66] Authorities arrested Haynes for stealing winding sheets from bodies which he dug up and thereafter reburied, seemingly with the intention to re-sell the sheets.[67] The court convicted him of petty larceny.[68] According to the *Haynes* court, a human body was "a lump of earth" with no capacity to constitute property.[69] On the other hand, burial shrouds were gifts for human dignity "to express the hope of resurrection."[70] Thus, while Haynes's taking of the shroud was larceny, the disturbance of the body was not.[71]

2. R. v. Lynn *(1788)*

A second important English case involving human remains was *The King v. Lynn*.[72] In that case, authorities arrested the defendant for stealing bodies from a cemetery in order to dissect them.[73] However, the court noted that the taking of human bodies for the purpose of dissection was not

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62. Larson v. Chase, 50 N.W. 238, 238 (Minn. 1891).
63. *Id.* at 238–39.
64. Body-snatchers could be indicted for that crime, but it seems there was still some reticence to indict when the only crime was theft of the body. *See, e.g.*, Pierce v. Proprietors of Swan Point Cemetery, 10 R.I. 227, 237 n.1 (noting "that under English law, the only protection of the grave, independent of ecclesiastical authority, was by indictment.").
65. *See, e.g., id.*
66. Haynes Case, [1613] 77 Eng. Rep. 1389.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. R. v. Lynn, [1788] 100 Eng. Rep. 394.
73. *Id.*

"cognizable in any Court of Criminal Jurisdiction."[74] The problem that the court faced was that no court, other than an ecclesiastical court, had ever decided a case on these facts; taking a body for the purpose of dissecting it had not theretofore given rise to either civil or criminal causes of action.[75] In fact, the legal system had no statute criminalizing body-snatching alone.[76]

The fact that no criminal court had ever heard such a case before failed to stop the *Lynn* court from holding Lynn accountable for disinterring the corpse; instead, they fined him five marks.[77] The court distinguished between the present case, the taking of the shroud in the *Haynes* case, and the taking of a body for purposes other than witchcraft.[78] Referencing Coke's *Institutes*, the court further noted that in cases of witchcraft, which had already been criminally prosecuted, the charge preferred was sorcery, not larceny.[79] The court tried and sentenced the defendant only for the crime of sorcery; therefore, he received the same punishment as one who simply prayed for the aid of the devil.[80] In other words, the possession of human remains had absolutely no bearing on the disposition of the case.[81]

The *Lynn* case marked the first time in English jurisprudence that a criminal court recognized body-snatching as a crime.[82] The court said, "common decency required that the practice should be put a stop to. That the offence was cognizable in a Criminal Court, as being highly indecent, and *contra bonos mores*; at the bare idea alone of which nature revolted."[83] In other words, the court recognized the crime solely because it offended their conception of natural morality, given that they offered no further reason for their decision.[84]

B. United States Common Law Has Largely Tracked English Common Law

Following in the footsteps of the English common law, courts in the United States refuse to recognize a property right in human remains, except they have carved out a single exception.[85] The United States courts have allowed the next-of-kin a limited right and duty to possess the body in order

74. *Id.*
75. *Id.* at 395.
76. *Id.* at 394.
77. *Id.* at 395; a little over £3.
78. *Id.* at 394 (noting that the only act of Parliament that approached the subject matter of the *Lynn* case was the statute dealing with theft of a body for the purpose of witchcraft).
79. COKE, *supra* note 53, at 45.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Lynn*, [1788] 100 Eng. Rep. at 395.
84. *Id.*
85. *See infra* Part III.B.1–2.

to dispose of it inhering to the next-of-kin.[86] The following cases illustrate how American courts have followed and altered the English rule.[87]

1. Pierce v. Proprietors of Swan Point Cemetery *(1872)*

In *Pierce*, a widow, Almira Metcalf, moved her husband's, Whiting Metcalf, body from one cemetery plot to another, assuming that such an action was her right as her husband's next-of-kin.[88] An issue arose, however, when the deceased's child, Almira Pierce, the legal next-of-kin, objected and brought suit claiming that her father consented to the first burial, that he wished to be buried in his original plot, and that Almira Metcalf lacked authority to move the body.[89] The deceased had purchased a cemetery plot and was buried in it, and about thirteen years later Metcalf secured a second plot and moved the body without gaining Pierce's permission.[90] Because Metcalf demurred, no question remained as to the fact that the deceased was buried as desired.[91]

The court held that because ancient common law brought cases involving human remains under ecclesiastical cognizance, which disallowed removal of such remains without ecclesiastical or governmental permission, a next-of-kin has no proprietary rights to the remains beyond the right and duty to bury them.[92] Justice Potter said,

> Yet the burial of the dead is a subject which interests the feelings of mankind to a much greater degree than many matters of actual property. There is a duty imposed by the universal feelings of mankind to be discharged by some one [*sic*] towards the dead; a duty, and we may also say a right, to protect from violation; and a duty on the part of others to abstain from violation; it may therefore be considered as a sort of *quasi* property, and it would be discreditable to any system of law not to provide a remedy in such a case.[93]

He went on to coin the term "quasi-property" to classify the right and duty of the next-of-kin to dispose of human remains.[94]

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86. *See infra* Part III.B.1–2.
87. *See infra* Part III.B.1–2.
88. Pierce v. Proprietors of Swan Point Cemetery, 10 R.I. 227, 227–28 (1872).
89. *Id.*
90. *Id.*
91. *Id.* at 228.
92. *Id.* at 235–36, 242–43.
93. *Id.* at 237–38.
94. *Id.* at 238.

2. Kyles v. Southern Ry. Co. *(1908)*

Kyles v. Southern Ry. Co. was the next step in the establishment of the quasi-property doctrine in the United States because it was the first case to deal with the next-of-kin's right to possess their decedent's body unmolested.[95] Apparently, a train struck Kyles, an employee of the train company, and his body remained on the train tracks for hours while the defendant's trains repeatedly ran over it—sometimes in daylight.[96] The complaint alleged that even after the defendant was made aware of the body on the tracks, none of defendant's employees attempted either to stop the trains or to remove the body.[97] The body was torn to pieces with parts strewn over a large area.[98] In fact, relatives of the victim had to gather his remains after they had lain beside the tracks for four days.[99]

The court noted that quasi-property rights are inherent to human remains and are the product of natural human relations and "divine and human laws."[100] The court continued that "[r]espect for the dead is an instinct that none may violate."[101] Because the decedent's next-of-kin had the right to possess the body for burial unmaimed, the court found that the deceased's widow had a cause-of-action against the defendant railroad for mental anguish over the mutilation of her husband's remains.[102] Interestingly enough, Justice Hoke's concurrence pointed out that the railroad company allowed the body to be mutilated, but it did so without any intent to create or exacerbate harm.[103] In other words, it was actually trying to do the right thing.[104] Nevertheless, Kyles's right to her husband's unmutilated remains was the pressing consideration.[105] No matter how good the company's intentions were in forbidding its employees to touch the body, it had a duty to Kyles not to harm the body.[106]

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95. Kyles v. Southern Ry. Co., 61 S.E. 278 (N.C. 1908).
96. *Id.* at 279.
97. *Id.* at 279.
98. *Id.*
99. *Id.*
100. *Id.* at 280.
101. *Id.* at 281.
102. *Id.*
103. *Id.* at 281–83 (Hoke, J., concurring).
104. *Id.*
105. *Id.*
106. *Id.*

IV. TEXAS COMMON LAW HAS REMAINED FAITHFUL TO ITS ANCIENT HERITAGE

A. Texas Common Law Has Only Slightly Expanded on the English Tradition

1. Gray v. State *(1908)*

One of Texas's first run-ins with the quasi-property doctrine occurred in the criminal context.[107] The defendant desired to have the body of a murder victim disinterred in order to gain information that should have already been ascertained as to the victim's actual wounds.[108] The district attorney objected on the grounds that the court lacked the authority to order the disinterment; beyond that, he argued that the defense was simply trying to delay the proceedings.[109] Furthermore, the district attorney claimed that Llano County officials had already sufficiently examined the body, and that no more needed to be done.[110]

As one might guess, the court had a somewhat broader concept of its jurisdiction than did the district attorney: "[N]either the right of sepulture, nor the right to have the body remain untouched and unmolested, is an absolute and fixed right, but these rights must and should yield when they conflict with the public good or where the demands of justice require such subordination."[111] Because the rights to sepulture and non-molestation inhere to human remains are unfixed, the state may violate those rights without harm when necessary; therefore, the court allowed the disinterment.[112]

2. Foster v. Foster *(1920)*

In October of 1918, Amanda Foster's husband, G.W., died of pneumonia, leaving his wife and three children.[113] Apparently, Foster's father and uncle buried his body in the absence of Foster and without her knowledge.[114] Foster and her children brought suit for damages incurred by her deceased husband's father and uncle.[115] The widow was not on good terms with her late husband at the time of his death and delayed his burial for various reasons.[116] The uncle knew that Foster wished to bury her husband's

107. Gray v. State, 114 S.W. 635 (Tex. Crim. App. 1908).
108. *Id.* at 637–38.
109. *Id.* at 638.
110. *Id.*
111. *Id.* at 642.
112. *Id.*
113. Foster v. Foster, 220 S.W. 215, 215–16 (Tex. Civ. App.—Texarkana 1920, no writ).
114. *Id.* at 216.
115. *Id.* at 215–16.
116. *Id.* at 216.

body close to her home, but he failed to relay this information to the deceased's father.[117] W.T., the deceased's father, upon hearing of both the delayed burial and Foster's failure to make any burial arrangements, arranged for his son to be buried in the family plot.[118] After this burial, Foster brought suit to remove her husband's body and rebury it in her own place of choosing.[119]

The court held that, although burial is the right and duty of the next-of-kin, there is no residual right to disinter and reinter when the body is already in the ground; therefore, the widow had no right to recover.[120] The court said:

> The burial of the dead with reasonable promptness is a duty which society has a right to say shall not be neglected. While the surviving spouse has the prior right to designate the place and manner of burial, and is legally charged with the duty of performing that service, the next of kin also have some right and owe some duties under certain conditions. . . . The appellant had no property right in the body of her husband. The law accords her the privilege of controlling the place and manner of burial in deference to the sentiments which are presumed to attend the relations of husband and wife. But she is not entitled to claim that privilege when she has abandoned the duties due upon such occasions (emphasis added).[121]

The gist of the decision was that the right to bury one's loved one—a quasi-property right otherwise known as the "right to sepulture"—may be alternately construed as a *duty* to bury, and that duty is what makes the burial decision a *quasi*-property right.[122] Particularly interesting is the court's characterization of the right as a "privilege" inhering primarily to the spouse, but transferable upon abandonment to the next-of-kin.[123]

Although the court declined to use the phrase and failed to cite any of the foregoing cases specifically, Justice Hodges utilized, and thereby tacitly approved, the quasi-property analysis of human remains.[124] Foster "had no property right in the body of her husband," but she did have the right to bury him as long as she did not abandon that right by failing to exercise it.[125] By failing to exercise that right, Foster failed to fulfill her duty to inter W.T.'s remains.[126]

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117. *Id.* at 216–17.
118. *Id.* at 216.
119. *Id.*
120. *Id.* at 218.
121. *Id.*
122. *Id.*
123. *Id.*
124. *See generally id.* (discussing the quasi-property right by referring to the right as a privilege).
125. *Id.*
126. *Id.*

3. Burnett v. Suratt *(1934)*

The next step in Texas's appropriation of the common law quasi-property doctrine occurred in the 1934 case of *Burnett v. Suratt*.[127] W.A. Burnett was married twice; after his first wife died, he then remarried.[128] Burnett's second marriage was not a happy one though; he claimed that his second wife, Zudie, the appellant, abused him by slapping him, cursing him, and calling him names.[129] Even after his second marriage, Burnett expressed his desire to be buried next to his first wife in St. Louis, Missouri.[130] In his will he expressly disinherited Zudie, and appointed the respondents, " E. M. Shinall, C. P. Surratt and Andrew J. Priest[, as] joint executors" of his estate.[131]

Upon Burnett's death, though, Zudie arranged for him to be embalmed and buried in a cemetery in Dallas.[132] His estate sought an injunction, claiming that his executors, by right of their executorship, had the right to dispose of Burnett's remains.[133]

The lower court issued an injunction restraining Zudie from having the body buried, so she appealed, citing the general rule that a surviving spouse has paramount right to dispose of her decedent's remains.[134] The Dallas Court of Appeals held, and the Texas Supreme Court declined to review, that although a decedent's spouse indeed has paramount rights concerning their spouse's remains, no case in equity is decided on the same facts.[135] Justice Bond said:

> There is no property in a dead man's body, in the usually recognized sense of the word, yet it may be considered as a sort of quasi property, in which certain persons have rights therein, and have duties to perform. The right to bury a corpse and preserve its remains is a legal right recognized, controlled, and directed only by courts of equity. . . . [W]here, as in this case, an estrangement exists, the parties separated, and hard feelings engendered by the survivor, or where the sentimental ties of human emotions are stronger to others than to the surviving spouse, the wishes of the decedent strongly impel a court of equity in holding that the decedent's wishes should prevail.[136]

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127. Burnett v. Suratt, 67 S.W.2d 1041 (Tex. Civ. App.—Dallas 1934, writ ref'd).
128. *Id.* at 1042.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *See id.* "There is no established rule alike to all cases, but each must be considered on its own merits." *Id.*
136. *Id.*

As to disposition of human remains, the decedent's expressed wishes may be paramount, especially in cases of a separated husband and wife.[137] There is a quasi-property right inherent to human remains, but the right is assignable to the extent that a decedent may choose a testamentary-like declaration of his wish to disinherit his spouse.[138] When the interests of the estate explicitly diverge from the erstwhile next-of-kin's, a court sitting in equity may restrain the next-of-kin from disposing of the remains.[139]

4. Terrill v. Harbin *(1964)*

Terrill v. Harbin embodied the final link in Texas's chain of cases adopting the quasi-property doctrine.[140] In *Terrell*, the plaintiff, Lanelle Harbin, alleged that Dr. Bruce Terrill performed an unauthorized autopsy on her deceased husband.[141] The evidence showed that when Harbin's husband died, she authorized Terrill "to open the site of a previous operative incision and to look and see what had happened at the site of the previous operations."[142] However, Terrill apparently failed to abide by Harbin's instructions, and he eventually denied ever agreeing with Harbin to access her husband's organs through the old incision.[143] He removed Harbin's "heart, the aorta and all surrounding structures, including a portion of the lungs, the trachea, and the esophagus."[144] He sent the removed tissues to the Stephenville Hospital & Clinic and then on to Houston, "where they remained for a considerable time, almost two years before a final report was made."[145]

The issue before the court was the extent to which the law entitled Harbin to sue for damages, and whether the alleged injury was truly a trespass against her right to possess her husband's body unmolested for burial.[146] The court held that Terrill's interference with a next-of-kin's right of possession was actionable as a trespass.[147] When Terrill disregarded Harbin's instructions and limitations by performing what amounted to an in depth autopsy, he trespassed her right.[148]

Furthermore, dissection, even for ostensibly scientific or forensic purposes such as Terrill's, is a trespass under Texas law.[149] Contrast this

137. *Id.*
138. *Id.*
139. *Id.* at 1043.
140. Terrill v. Harbin, 376 S.W.2d 945 (Tex. Civ. App.—Eastland 1964, writ dism'd w.o.j.).
141. *Id.* at 945.
142. *Id.* at 946.
143. *Id.*
144. *Id.* at 947.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*

holding with the Texas Court of Criminal Appeals's holding in *Gray v. State*, which held that "neither the right of sepulture, nor the right to [possess] the body . . . untouched and unmolested, is an absolute . . . right."[150] The difference in *Terrill* seems to be two-fold: (1) *Gray* dealt with disinterment, and (2) the motivation behind the disinterment in *Gray* was to perform measurements of the wounds on the body in the interest of justice.[151] Although *Terrill* involved mutilation as opposed to disinterment, *Gray* addressed the right to possess for disposition as well.[152] More importantly, though, the ability of a court to order the disinterment of a corpse for the purposes of justice is qualitatively different from a physician's ability to perform an autopsy for the purpose of determining a cause of death in the absence of criminal circumstances.[153] A private citizen, even if he is a doctor, cannot trespass a next-of-kin's right to possess her decedent's body unmutilated for burial; therefore, Harbin was entitled to recompense for her damages.[154]

B. Texas Has Codified the Common Law to an Extent in the Texas Anatomical Gifts Act

When Texas enacted the Texas Anatomical Gift Act in 2009, it incorporated aspects of the common law quasi-property doctrine described above.[155] Section 692A.009 provides that a donor's agent; his spouse; or his adult children; his parents; his adult siblings; his adult grandchildren; his grandparents; an adult that "exhibited special care and concern for the [donor];" his guardian; or any other person authorized to dispose of his remains may make a gift of the donor's organs after his death.[156] In other words, whoever is reasonably available at the time and related to the deceased in those ways may make the gift.[157]

Beyond that, § 692A.011 allows donors to select the following individuals and entities as donees: (1) organ procurement organizations; (2) hospitals for research; (3) individuals in whom the gift will transplanted; (4) eye or tissue banks or the Anatomical Board; (5) forensic science educational institutions; (6) the Anatomical Board.[158] Although § 692A.011(k) provides a reversion of possession of the tissues to the next-of-kin or to whoever has the authority to dispose of them, the other provisions of

150. Gray v. State, 114 S.W. 635, 642 (Tex. Crim. App. 1908).
151. *Compare id.* at 640–41, *with Terrill*, 376 S.W.2d at 945–46.
152. *Compare Gray*, 114 S.W.2d at 640-41, *with Terrill*, 376 S.W.2d at 946.
153. *Compare Gray*, 114 S.W. at 642, *with Terrill*, 376 S.W.2d at 946.
154. *Terrill*, 376 S.W.2d at 947.
155. *See* TEX. HEALTH & SAFETY CODE ANN. § 692A (West 2009), *supra* Parts II–III.
156. TEX. HEALTH & SAFETY CODE § 692A.009 (hereinafter "TAGA" or "the Act").
157. *Id.*
158. *Id.* § 692A.011.

§ 692A.011 provide a comprehensive scheme of passage to deal with the tissues.[159]

For example, if an individual were to donate his eyes for transplantation without designating a recipient, then the eyes would pass to an authorized eye bank.[160] As section 692.011(k) indicates, were the gift to go unused, it would then pass to the next-of-kin to dispose of it properly.[161] The result is similar when individuals donate other organs for transplantation—any unused gift reverts to the person authorized to dispose of the body.[162] In effect, any time a donated organ goes untransplanted, unstudied, or unused according to the donor's donative purpose, such as when a named donee refuses the gift, the gifted tissues revert.[163]

The *Evanston* court noted that anatomical gifts pass solely in accordance with the TAGA.[164] That is to say, the TAGA is the sole exception to the next-of-kin's quasi-property right to possess the remains unmolested for burial.[165] However, the exception lies solely in the option for disposition, and it does not affect the next-of-kin's duty to dispose.[166] As Justice Guzman pointed out in *Evanston*, "Next of kin have no right to possess a body other than *for burial or final disposition*."[167] In other words, the limit to the next-of-kin's right to possess the deceased's remains unmolested for burial or final disposition terminates upon that actual disposition.[168] Therefore, the *Evanston* court held that once Legacy of Life disposed of Alvarez's mother's tissues, Alvarez had no remaining right to possess or dispose her mother's body.[169] Alvarez's claim that Legacy's agents fraudulently obtained her mother's organs fraudulently was irrelevant, thus leaving Alvarez without a cause of action.[170]

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159. *Compare id.* § 692A.011(k), *with id.* at § 692A.011(a)–(j), (l)–(n).

160. *Id.* § 692A.011(e)(1).

161. *See id.* § 692A.011(k).

162. *See, e.g.*, *id.* §§ 692A.011(e)(2), (k).

163. *See id.* § 692A.011(k). Any donee can refuse a gift. *Id.* § 692A.011(n).

164. *See* TEX. HEALTH & SAFETY CODE ANN. § 692A.011; *see also* Evanston Ins. Co. v. Legacy of Life, Inc., 370 S.W.3d 377, 386–87 (Tex. 2012) (discussing the passage of anatomical gifts under the TAGA).

165. *See* Evanston Ins. Co. v. Legacy of Life, Inc., 370 S.W.3d 377, 386–87 (Tex. 2012).

166. *Compare* TEX. HEALTH & SAFETY CODE ANN. § 692A.011, *with* Foster v. Foster, 220 S.W. 215, 218 (Tex. Civ. App—Texarkana 1920, no writ).

167. *Evanston Ins. Co.*, 370 S.W.3d at 385 (emphasis added).

168. *See id.*

169. *See id.*

170. *See id.*; *see also* Evanston Ins. Co. v. Legacy of Life, Inc., 645 F.3d 739, 741 (5th Cir. 2011) (addressing insurance companies' claims against one another, but not specifically Alvarez's fraud claims).

V. THE QUASI-PROPERTY CONCEPT CONFLICTS PHILOSOPHICALLY AND PRACTICALLY WITH CURRENT TECHNOLOGY AND OTHER AREAS OF LAW

A. The Current Quasi-Property Right Is Based on Religious and Philosophical Convictions as to the Sanctity of the Human Body

The remaining question, then, is in what sense are anatomical gifts, "gifts"? In other words, if the only rights attached to bodies consist of disposition without remuneration, how could such a disposition be a gift? Furthermore, what interest of justice does such a limited consistency serve?

The legal mores against selling or profiting from the sale of human body parts originated in Christian philosophy.[171] Christian philosophy gave rise to the objections against commodification of body parts.[172] George Miller notes the connection between religion and medical ethics:

> Ethics is of great concern not only to those in medicine, but also to those in theology. . . . There not only is a deep respect [on the part of theologians] for the physician, but anciently, there was a direct association between the fields of medicine and theology. The healer and the spiritual leader were one.[173]

Indeed, the conception of the "healer" would seem to apply readily to ancient conceptions of the spiritual and the physical.[174] The historical relation of these two conceptual fields renders their mutual interest in ethics understandable.[175]

Subsequently, though, Kantian categorical imperatives forbade such commodification.[176] Christianity has long considered the human body indivisible and sacrosanct; only if an organ were irretrievably injured or ill would any recognized reason exist for its removal.[177] Kant, on the other hand, believed that human beings were under a categorical imperative not to use their bodies as a means.[178] Beyond that, both donation and commodification constituted partial suicide and were thus impermissible.[179]

With modern secular philosophy in mind, and despite the overwhelming official rejection of organ markets, Cherry, nevertheless, argues that people may recast all philosophical arguments to allow for some sort of

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171. *See* MARK J. CHERRY, KIDNEY FOR SALE BY OWNER: HUMAN ORGANS, TRANSPLANTATION, AND THE MARKET, 114–19, 144–46 (2005).

172. *See id.*

173. GEORGE W. MILLER, MORAL AND ETHICAL IMPLICATIONS OF HUMAN ORGAN TRANSPLANTS, 36–37 (1971).

174. *See id.*

175. *See id.*

176. *See* CHERRY, *supra* note 171, at 144–46.

177. *Id.* at 120–21.

178. *Id.* at 133.

179. *Id.*

commodification.[180] While a thorough explanation of his argument is beyond the scope of this paper, it will suffice to say that the charitable context and the consensual, contractual nature of the exchange would mollify the prevailing religious and philosophical forces that led to the current situation.[181] Thus, no reason for the continued ban would exist.[182]

B. Although Ostensibly Denying Property Status to Human Tissue, Modern Law Can and Many Times Does Treat Such Tissue as Property in Effect

It should be clear at this point that Anglo-American property law has refused cognizance of human tissues.[183] Furthermore, one may find the basis of this refusal in a grey area in jurisprudence—a place where secular law historically gave way to religious law.[184] That being said, as modern law has developed, the rationale for the law's refusal of property status to human tissues has largely dissipated.[185] Indeed, some have suggested that legislators should bring the laws up-to-date to reflect modern notions of personhood, and that such a change could be made while still disallowing the objectionable practice of the sale of human tissue for consideration.[186]

Modern British law, although still denying property status to human tissues, in many cases grants property status in effect.[187] For instance, in cases in which tissues used for research or for in vitro fertilization was mishandled or stolen, British law has allowed for a legal exception to the no-property rule called the "work and skill" exception.[188] This exception is different from the Texas Supreme Court's distinction in *Evanston*, between the human tissues at issue in that case and those at issue in *Roman*, in that even in those cases the courts declined to recognize a property right.[189] Nevertheless, the essence of the "work and skill" exception is that when people, such as researchers or laboratory technicians, utilize or expend their expertise in possession of human tissue, such use would legally render the tissue a *res* for legal purposes.[190]

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180. *Id.*

181. *Id.* at 144–45.

182. *Id.* at 145.

183. *See supra* Parts I–III.

184. *See supra* Part II.

185. *See* Muireann Quigley, *Property in Human Biomaterials—Separating Persons and Things?*," 32 OXFORD J. LEGAL STUD. 659 (2012).

186. *See, e.g.*, Erik S. Jaffe, *"She's Got Bette Davis[']s Eyes": Assessing the Nonconsensual Removal of Cadaver Organs Under the Takings and Due Process Clauses*, 90 COLUM. L. REV. 528, 572 (1990).

187. *See* Quigley, *supra* note 185, at 660.

188. *Id.* at 660–64.

189. Evanston Ins. Co. v. Legacy of Life, Inc., 370 S.W.3d 377, 386–87 (Tex. 2012); Roman v. Roman, 193 S.W.3d 40, 54–55 (Tex. App.—Houston [1st Dist.] Feb. 9, 2006, pet. denied).

190. *Evanston Ins. Co.*, 370 S.W.3d at 386.

Such a legal transformation opens debate on several questions:

> The work and skill exception . . . gives rise to other questions that seem to be problematic, philosophically at least. In being an exception to the supposed general 'no property' rule, it would appear to rest on the assumption that the tissue was, prior to work and skill being applied, always unowned. Yet, such a view . . . has implications for organ donation and research involving human tissue. If a person's organs and tissues do not belong to them, how can they legitimately donate them? An alternative view is that the tissue in question was abandoned, but implicit in the notion of abandonment is that of prior ownership. Furthermore, . . . it is far from clear *why* we would presume abandonment in these cases. Questions also arise over *how* the application of work and skill brings about the transformation of tissue from *res nullius* to a *res* which is the subject of property rights, what the exact nature of the transformation is, and, indeed, if any transformation at all must take place.[191]

In short, the exception in effect questions the rule's rationale: how can *res* come from *res nullius*?[192]

Quigley argues that current law requires tissue to be "outwith" the person in order to be considered property.[193] Such a situation leads ineluctably to the conclusion that, if current law remains unchanged, "the only person who could *not* come to own human biomaterials [is] their source; that is, the person themselves."[194] She goes on to note that it would better to conceive of property rights not as inherent to the relationship between persons and things, but as inherent in the relationship of persons to others.[195] Several modern theorists hold that property must be at least separable, and that human tissues cannot, therefore, be property because they are inseparable from the person.[196] However, Quigley would argue that much of the body is separable from the person, and death makes such a separation especially evident.[197]

Under British and Australian law, almost every right in the bundle has been applied to human tissues in one way or another.[198] The way the law treats human tissues in many cases tracks property law—many of the rights associated with such parts are identical to property rights.[199] The rationale

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191. Quigley, *supra* note 185, at 663.
192. *Id.* at 663.
193. *Id.* at 667.
194. *Id.* at 661.
195. *Id.* at 666 n.57.
196. *Id.* at 669.
197. *Id.*
198. *See generally*, Imogen Goold, *Sounds Suspiciously Like Property Treatment: Does Human Tissue Fit Within the Common Law Concept of Property?*, 7 U. TECH. SYDNEY L. REV. 62 (2005) (discussing the feasibility of recognizing human tissue as property in Australia).
199. *See id*. at 67–74.

for recognition of a property right in human tissues fits the Texas context well.[200] Specifically, with the goal of avoiding broad commodification of human bodies, recognition and adjustment of proprietary rights would bring honesty and clarity to an increasingly complex and anachronistic area of law.[201]

Furthermore, as Erik Jaffe states, "Because the human body has acquired the de facto characteristics of property, though not the name, it is time for the law to catch up with reality."[202] Jaffe argues that in the particular case when the coroner presumes consent for the removal of organs, such consent fails to pass constitutional muster.[203] He states the takings clause as well as the due process clause should disallow appropriation and removal of organs without compensation.[204] Obviously, Jaffe's comments apply to an American context (unlike Quigley and Goold, who were writing in British and Australian contexts respectively), and, in light of the fact that biotechnology seems destined to further outstrip the law, his recommendation that the law afford human tissues property status makes sense.[205] "Applying constitutional protections in both circumstances would ensure that if 'she's got Bette Davis['s] eyes,' at least they've been paid for."[206]

The same type of usurpation of rights may occur in cases in which the decedent has some expressed wish or, more to the point, religious objection to donation.[207] O'Keeffe says:

> [F]or the various Jews, Christians, Muslims, Buddhists, Confucians, and others who oppose organ donation on religious grounds, presumed consent severely burdens their free exercise of religion by precluding quintessentially religious burial rites. Freedom of religion would be quite farcical if it did not include the right of families to bury their dead whole, without the state picking over the remains of their loved ones.[208]

O'Keeffe goes on to question the bases for the current law's allowance of inheritance of wealth and of copyright protection for technology such as prescription drugs, especially given that one may not always do with one's body what one wills.[209] Her analysis leads her to postulate that these contradictions stem from viewing the body as other than sacred, although the

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200. *Id.*
201. *Id.*
202. Jaffe, *supra* note 186, at 572.
203. *See id.*
204. *Id.* at 567.
205. *See id.* at 528; Quigley, *supra* note 185; Goold, *supra* note 198.
206. *See* Jaffe, *supra* note 186, at 572.
207. *See* Carrie Parsons O'Keeffe, *When an Anatomical "Gift" Isn't a Gift: Presumed Consent Laws as an Affront to Religious Liberty*, 7 TEX. F. ON C.L. & C.R. 287 (2002).
208. *Id.* at 288–89.
209. *Id.* at 316.

history of Anglo-American law would contradict that conclusion.[210] Nevertheless, the point is well taken, as current law leaves somewhat to be desired when it comes to coherence in dealing with human tissues.[211] In cases when neither the decedent nor the next-of-kin have any desire to make a "gift" of human tissues, the government may make a gift on their behalf, transferring tangible material, that otherwise consider property, to organ procurement organizations.[212] One would remain hard-pressed to believe that such a transfer would be equitable, but the law allows it.[213]

In the context of human tissue samples from live individuals (such as those donated for research or for storage for reproductive purposes in the United States), much like the work-and-skill exception in Britain, American researchers and research facilities have property interests in the cell lines they maintain.[214] That property right includes the ability to earn money based on the use of that cell line.[215] Conversely, the human being in whose body those cells originated has no such right either at common law or the current statutory scheme.[216]

> It defies common sense to say that an individual lab can hold property rights in the tangible cells removed from a person's body while the person whose body supplied the cells cannot. If cells are treated as tangible property for the purposes of material transfer agreements among labs, they should also be treated as tangible property for the purposes of a transfer from the human whose body is supplying the cells.[217]

In other words, what logic exists in denying the producer of what the law ultimately considers property rights commensurate with production, but affording such rights to researchers or whomever?[218] "Whatever else I might own in this world, it would seem intuitively obvious that I own the cells of my body."[219]

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210. *Compare id.* (arguing for a secular rationale undergirding the *res nullius* rule), *with supra* Part IV.A (arguing for a religious rationale undergirding the *res nullius* rule).

211. *See* O'Keeffe, *supra* note 207, at 316.

212. *See* HEALTH & SAFETY CODE § 693.003; *see also* Jennifer Rutherford-McClure, *To Donate or Not to Donate Your Organs: Texas Can Decide for You When You Cannot Decide for Yourself*, 6 TEX. WESLEYAN L. REV. 241 (2000) (noting that Texas's statute is in some ways more and in some ways less restrictive than other states' statutes or the Uniform Anatomical Gifts Act).

213. *See supra* note 212.

214. Robin Feldman, *Whose Body Is it Anyway? Human Cells and the Strange Effects of Property and Intellectual Property Law*, 63 STAN. L. REV. 1377, 1378–79 (2011).

215. *Id.* at 1379.

216. *Id.*

217. *Id.* at 1384.

218. *Id.*

219. *Id.* at 1377.

Michelle Bray agrees overall with Jaffe's recommendation, but differs in that she would disallow a right to sell organs.[220] She argues, "Complete alienability over one's body, however, may negatively affect personhood. An individual's integrity is affected negatively by being discussed in market rhetoric as a fungible commodity, because such terminology ignores the unique qualities and differences between individuals."[221] Yet, such an argument relies on nomenclature alone, and she fails to explain what negative consequences would befall a willing seller.[222] In fact, she says:

> If body parts are fully alienable, a real risk exists that people will sell parts of their bodies for compensation—a type of economic coercion. . . . Because of both the physical and emotional risks involved, individuals should never be coerced to assume them merely by the prospect of compensation. A market-inalienable property right would obviate this concern.[223]

One wonders at the logic that would label an offer of payment as "coercion."[224] Furthermore, the entire point of making human tissues fully alienable would be to allow the owners of the tissues to sell them; however, Bray has failed to explain the inherent evil she apparently perceives.[225] Coercion would seem unlikely when a willing seller is matched with a willing buyer.[226]

C. Researchers Have Proposed at Least One Workable Organ Marketing Scheme

In 2002, David Kaserman and A.H. Barnett proposed a solution to the organ shortage problem in the U.S. and addressed the issue of cadaveric organs, although they declined to address the legal issue of property rights.[227] Kaserman and Barnett's proposal is to set up organ markets for cadaveric organs.[228] For-profit entities, having already received orders from transplant centers and hospitality, would broker either pre- or postmortem agreements with potential donors or those donors' respective nexts-of-kin.[229] Notably,

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220. Michelle Bourianoff Bray, *Personalizing Personalty: Toward a Property Right in Human Bodies*, 69 TEX. L. REV. 209, 221 n.85 (1990).

221. *Id.* at 240.

222. *See id*.

223. *Id.*

224. *See id*.

225. *See id*.

226. *See* Andrew H. Barnett, Roger D. Blair, & David L. Kaserman, *Improving Organ Donation: Compensation versus Markets*, *in* THE ETHICS OF ORGAN TRANSPLANTS: THE CURRENT DEBATE 208, 212–13 (Arthur L. Caplan & Daniel H. Coelho eds., 1998).

227. DAVID L. KASERMAN & A.H. BARNETT, THE U.S. ORGAN PROCUREMENT SYSTEM: A PRESCRIPTION FOR REFORM 122–32 (The Am. Enter. Inst. Press, 1st ed. 2002).

228. *See id*. at 123–24.

229. *See id*.

Kaserman and Barnett's plan would disallow brokerage of living-donor organs, but their reasoning for doing so rests on economics rather than on perceptions of the moral or ethical undesirability of paying living donors for their organs.[230] The price of living-donor organs would most likely be higher than cadaveric organs due to the likely higher functionality of the organ.[231]

While Kaserman and Barnett's market-system proposal seems practical—and without delving too much further into its specifics—it should be evident that current law, particularly as illustrated in the *Evanston* decision, would flatly condemn its implementation as criminal.[232] The law's current position seems at odds with two facts: (1) recognizing an individuals' proprietary rights in their respective bodies, such that they could sell their organs, would likely increase the supply of viable transplant organs and eventually lower the cost of transplants due to the increase in supply, thus benefitting society as a whole; and (2) allowing a market-system approach would possibly increase the number of donated organs in that highly altruistic survivors would know that their respective decedents' organs have market value that they, the survivors, could donate.[233] Beyond that, though, "if markets can procure more organs than . . . donation, . . . the cost of allowing some persons the satisfaction of a noble act is to deny other persons their very lives."[234] Thus, neither potential donors, potential donees, nor society-at-large really benefits from the current scheme, which discourages potential donors from becoming actual donors by declining to recognize their property rights in their body—a recognition that would bring current law up-to-date with modern technology and mores.[235]

VI. CONCLUSION: DEALING WITH THE PRESENT

The denial of property rights of individuals to their bodies stems from ancient, Anglo common law that viewed the human body as worthless in the legal sense and remanded all cognizance claims concerning them to the ecclesiastical authorities.[236] American law largely tracked its British forebearers' logic in denying such rights.[237] It is within the last 150 years that the law took some cognizance of this area, but only to a very slight degree.[238]

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230. *See id*. at 127.
231. *See id*. at 127–28.
232. *See* Evanston Ins. Co. v. Legacy of Life, Inc., 370 S.W.3d 377, 384 n.12 (Tex. 2012); *see also* TEX. PENAL CODE ANN. § 48.02(b).
233. *See* KASERMAN & BARNETT, *supra* note 227, at 74.
234. *Id.*
235. *Id.*
236. *See supra* Part II.A.
237. *See supra* Part II.B.
238. *See supra* Part II.B.

Today, estate planners may assure their clients that they, the clients, have the right to dispose of their houses, lands, possessions, and other sorts of interests in a variety of ways, but with their own bodies they have only the right to dispose or to donate.[239] The Texas Supreme Court reiterated this limitation in *Evanston*.[240] Yet, as technology increases, the demand for some sort of change in that situation is ever more likely.[241] When researchers and technicians can earn money from human tissues and when plans already exist to afford individuals more options in this regard, it seems only a matter of time before estate planners can inform their clients that they can opt to sell their organs because the organs belong to them.[242]

239. *See supra* Part III.A–B.
240. *See* Evanston Ins. Co. v. Legacy of Life, Inc., 370 S.W.3d 377, 382–87 (Tex. 2012).
241. *See supra* Part IV.
242. *See Evanston*, 370 S.W.3d at 384; *see also supra* Part V.C.