Trading Kidneys for Prison Time: When Two Contradictory Legal Traditions Intersect, Which One Has the Right-of-Way?

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Introduction

America has a proud and long-standing tradition of honoring the aphorism, "Necessity is the mother of invention." Throughout this nation's history, its citizens have engineered ingenious solutions for previously unmet needs by manipulating available resources in creative new ways. The reaches of this innovative problem-solving spirit have even extended beyond manufacturing companies and research institutions, into legislative chambers. In early 2007, lawmakers in South Carolina introduced Senate Bill 480 ("SB 480"), designed to increase the volume of donated kidneys in order to meet a grave and growing need for human organs.1

In the United States, the demand for kidney donations is significantly higher than that of other organs such as the liver, pancreas, or heart.2 As of April 2009, over 79,000 individuals were waiting for a kidney transplant in the United States,3 but only approximately 10,551

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3. Id.
kidneys were donated by nonliving donors in 2008.4 Because the demand for kidney donations greatly exceeds the supply, the average waiting time for a kidney is 1,121 days, or slightly over three years.5 Therefore, patients in need of kidney transplants inevitably face an extended period of urgent anxiety as they wait for the life-saving kidneys to become available. Unfortunately, many die waiting—in 2006, almost four thousand Americans finally succumbed because they never found an organ match.6

In March 2007, state senators in South Carolina concocted a statutory scheme in response to this great need. Had it passed, SB 480 would have given state prisoners the opportunity to shave 180 days off of their prison sentences by donating a kidney.7 Democratic Senator Ralph Anderson, a primary sponsor of the bill, made it clear that the proposal was designed to address the great shortage of organs available for donation.8 “We have a lot of people dying as they wait for organs, so I thought about the prison population,” Senator Anderson announced. “I believe we have to do something to motivate them. If they get some good time off, if they get out early, that’s motivation.”9

Although the proposed bill hardly progressed beyond the introduction stage,10 it nonetheless deserves critical examination because it represents an unprecedented intersection of two well-established American legal traditions. In this Article, I characterize both of these traditions in terms of “markets,” since exchanges between parties are central to each. The first tradition involves the “criminal justice market,” which has at its core the oft-employed practice of plea bargain-

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8. Id.


Because this market is open for trade, criminal defendants can barter their reputations, rights, and freedoms, in exchange for reduced criminal charges or shorter prison sentences. The second tradition is the "human body market," which encompasses both sales and rentals of the body. State and federal laws have promulgated a complex patchwork of rules to govern this market; subcategories within the market are open, closed, or regulated, depending on what part of the human body is sold or rented, and for what purpose.

The design of SB 480 creates a fascinating collision between the rules that control these two markets, which do not otherwise interact. The bill proposes a bargaining away of criminal punishment in exchange for the contribution of bodily organs to meet the increasing national need for kidney donations. The long-standing tradition of an open market in criminal justice suggests that prisoners should be allowed to engage in the type of bargain that SB 480 contemplates. Simultaneously, a deep-rooted federal law governing the human body market staunchly prohibits the exchange of human organs "for valuable consideration" of any kind. The impasse that results from this intersection of contradictory rules seems resolvable only by allowing the rules that govern one market to take precedence over those of the other market. This Article analyzes both markets and their respective rules, theorizes on the assumptions underlying each, and applies the rules and assumptions to SB 480 to determine which long-standing tradition, as a legal matter, should have the right-of-way at this intersection.

Parts I and II introduce the geography of the legal landscape in each market. Part I discusses in greater detail the criminal justice market, explains the prevalence of plea bargaining, and explores the extent to which criminal defendants have freedom to use their constitutional rights as currency for trades in the justice system. In


12. See infra Part II (discussion of the market for sale of body parts, including current government regulation).

13. 42 U.S.C. § 274e(a) (2006) ("It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce."); see also id. § 274e(c)(2) ("The term 'valuable consideration' does not include the reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ or the expenses of travel, housing, and lost wages incurred by the donor of a human organ in connection with the donation of the organ.").
addition, Part I closely studies coercion, the primary boundary that determines whether certain exchanges are permissible in the criminal justice market. Part II divides the human body market into several subcategories and surveys the wide spectrum of rules governing sales and rentals of the human body. Part III offers two rationales—public supervision and governmental participation—that help explain the rules that control the two markets. Part IV evaluates the South Carolina bill proposal by integrating the discussions of Parts I–III and by comparing SB 480 to the practice of chemical castration of sex offenders, the closest contemporary example of the intersection of criminal justice and human body markets. Part IV then offers an analysis and conclusion as to why, based purely on the current legal framework, the rules of the criminal justice market would prevail and earn the right-of-way over those of the human body market.

I. The Criminal Justice Market

Thanks to political rhetoric, news media influences, and some help from Hollywood, the word "justice" often evokes notions of absolute rights and wrongs, exonerations of innocent accused persons, and guilty convictions inspired by flaming speeches avenging victims' lives.14 Those images of justice often presume that when individuals are found guilty of a crime, their punishments match the crime committed. A closer look at the criminal justice system in practice reveals, however, that justice outside of campaign speeches, sensationalized

14. Superman, the classic American superhero, boldly stated, "I'm here to fight for truth, justice, and the American way." See Eric Lundegaard, Truth, Justice and (Fill in the Blank), N.Y TIMES, Mar. 22, 2009, at A23. The rhetoric pervades reality as well. During the trial of Oklahoma City bomber Timothy McVeigh, prosecutor Larry D. Mackey ended his closing argument by stating:

When Tim McVeigh blew up that truck bomb and brought down the Murrah Building, he did more than simply create the emotional wreckage that you exhibited—or that we saw during the course of this trial. He did more than kill innocent men, women, and children. What he did was he created a new grievance. A new grievance. A grievance against the victims and against the United States of America. And for myself and each member of this prosecution team, it has been our pleasure to represent those victims and the United States in settling that grievance. We have done so in a way that Tim McVeigh would not choose. We have done so through the due process system; but the process is over now. The process over. Tim McVeigh has received his due process, and it is now time to render judgment. And your job as jurors, your privilege, your duty, as well as your job, is to do justice. And on behalf of the United States, I ask that you return a verdict of guilty as charged against Timothy McVeigh.

newsflashes, and the occasional box office blockbuster is not so clear-
cut. Thanks to the open market of criminal justice that permits plea
bargaining, prosecutors do not always charge suspects to the full ex-
tent permitted by the law, and convicted criminals do not always serve
the full sentence terms dictated by the law.\footnote{15}

In 1984, Congress tried to address the issue of sentencing dispar-
ity by creating the Sentencing Commission,\footnote{16} which drafted a set of
guidelines designed to "avoid[ ] unwarranted sentencing disparities
among defendants with similar records who have been found guilty of
similar criminal conduct."\footnote{17} After a defendant is found guilty of a
crime, the Sentencing Guidelines first match the crime with one of
forty-three "base offense level[s]."\footnote{18} Then, if there are aggravating
"upward departure" factors, such as threatening to obstruct justice,\footnote{19}
committing a hate crime,\footnote{20} or organizing a criminal activity involving
more than five participants,\footnote{21} levels are added to the base offense
level. Correlatively, levels may be subtracted where mitigating "down-
ward departure" factors such as elderly age, infirmity, or extraordinary
physical impairment of the offender apply.\footnote{22} The defendant's crimi-
nal history is also factored in with the final offense level to yield a pre-
assigned range of possible prison sentence lengths.\footnote{23} The Sentencing
Commission designed these strictures to promote uniformity in sen-
tencing and to avoid the injustice of disparate treatment.\footnote{24}

A. An Introduction to Plea Bargaining

Despite the reforms that the Sentencing Guidelines intended to
effectuate, however, considerable disparities in sentences remain due

\footnote{15. See infra Part I.A (discussing the costs, benefits, and legitimacy of plea bargaining).
18. Higher levels are assigned to more serious crimes. See U.S. SENTENCING GUIDELINES
MANUAL § 1B1.1(b) (2007).
19. See id. § 2J1.2.
20. See id. § 3A1.1.
21. See id. § 3B1.1(b).
22. See id. § 5K2.22(1), (2), (3).
23. See id. § 1B.1.
Sentencing Reform Act of 1984 was intended to eliminate unwarranted sentencing disparity by establishing a comprehensive and consistent statement of the Federal law of sentenc-
ing, setting forth the purposes to be served. . . . The United States Sentencing Commission
was created to develop the Guidelines." (citing S. Rep. No. 98-225, at 39, 59 (1983) (internal quotation marks omitted))).}
to the impregnable power of plea bargaining. Two common types of plea bargaining include sentence bargaining and charge bargaining.  

Sentence bargaining occurs when prosecutors offer to recommend a shorter prison term at the sentencing hearing, in exchange for the defendant’s guilty plea. At the federal level, the Sentencing Guidelines restrict the degree to which prosecutors may offer seductively low prison terms; federal prosecutors may offer a recommendation at the lower end of the sentencing range in exchange for a plea, but they may not offer to recommend a sentence length outside the applicable guideline. In states that have not adopted correlates to the Federal Sentencing Guidelines, however, local prosecutors are not so restricted when they engage in sentence bargaining; this creates more opportunity and risk for disparities as defendants and prosecutors trade jail time for guilty pleas.

The other bargaining tactic that prosecutors use is charge bargaining; under this scheme, officials who have probable cause to prosecute on multiple charges offer to dismiss one or more charges in exchange for a guilty plea. Such an offer implies a reduction in incarceration time, since a defendant who never stands trial for a crime cannot be convicted or subsequently sentenced for it. Therefore, federal prosecutors can effectively use charge bargaining to circumvent the restrictive effects of the Sentencing Guidelines on plea bargaining.

Plea bargaining was not always a fixture in the American criminal justice system. It, too, was the result of the inventive American spirit, and arose over a century ago largely in response to a mounting load of criminal cases that understaffed prosecutors' offices could not process through the ordinary course of trials, which were complex and time-consuming. It has since remained, firmly grounded in American court systems, undoubtedly because it ostensibly offers some benefit to every major party in the criminal justice system.

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30. Id. at 987, 1039.
In today's clogged court system, judges are more desperate now than ever to keep their dockets as clear as possible. Because plea bargaining renders a full trial unnecessary, judges can move cases resolved by guilty plea through their dockets much more efficiently. In addition, judges need not fear reversal on appeal for convictions procured through plea bargaining. Prosecutors likewise benefit because they can obtain sure convictions without bearing the costs of time and resources that trials would otherwise demand. They can also protect their reputations because guilty pleas equal sure convictions; therefore, prosecutors can “win” more cases with a zero percent risk of losing. Furthermore, guilty pleas discharge prosecutors from their burden of proving a defendant’s guilt beyond a reasonable doubt.

Arguably, plea bargaining also benefits society at large because it promotes the objectives of economically bringing wrongdoers to justice and keeping the community safe. Moreover, taxpayer-generated resources are expended much less rapidly as fewer cases go to trial. In addition, plea bargaining may benefit victims, who otherwise might have to testify and recount potentially horrific memories of their victimization, and publicly confront the defendant in open court.

Finally, plea bargaining theoretically benefits defendants, who thus forego a grueling trial process, which is often mentally and emotionally taxing. Furthermore, by avoiding trial and pleading guilty, defendants can choose a sure outcome, instead of betting on the whims of a jury. Decreased exposure to charges filed by the prosecutor or

31. F. Andrew Hessick III & Reshma Saujani, Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge, 16 BYU J. PUB. L. 189, 227 (2002) (“[J]udges may face more severe injury to reputation than prosecutors in the face of reversal. Plea bargaining forecloses this possibility because without a trial, a judge cannot commit a reversible trial error.”).
33. See David Wippman, The Costs of International Justice, 100 AM. J. INT’L L. 861, 864 (2008) (“The Administrative Office of the U.S. Courts, after considerable prodding, provided a one-page summary of the administrative costs of a criminal jury trial in U.S. federal courts for fiscal year 2002. Factoring in the trial judge’s salary and benefits, those of the judge’s staff and the courtroom deputy, miscellaneous expenses, space and facilities costs, and court security, the Administrative Office reaches an hourly cost of $409.76; at an average of five hours spent per day on trial, it finds a daily trial cost (excluding prosecution, defense, U.S. marshal, jury, and jury clerk costs) of $2049. Jury costs amount to $1000 per day except for the first day of trial when costs of prospective jurors must be included. Accordingly, total administrative trial costs (excluding first-day juror costs) come to $3049 per five-hour day, or $4278 per eight-hour day.”). At its greatest extremes, criminal trials can cost taxpayers millions. Californians paid approximately $9 million for the high-profile 1995 criminal trial of O.J. Simpson. See Laurie Nicole Robinson, Note, Professional Athletes— Held to a Higher Standard and Above the Law: A Comment on High-Profile Criminal Defendants and the Need for States to Establish High-Profile Courts, 73 IND. L.J. 1313, 1313 (1998).
reduced jail time additionally benefit defendants. And, as will be dis-
cussed later in this Article, defendants can sometimes even use their
power to accept plea bargains to protect family members or other per-
sons who otherwise might face criminal liability.\(^{34}\)

Lest plea bargaining be viewed as a flawless panacea, however, it
is critical to note that plea bargaining also comes at a significant cost
to the defendant, who waives federal constitutional rights with any
guilty plea. In *Boykin v. Alabama*,\(^{35}\) the United States Supreme Court
explicitly identified three federal constitutional rights that anyone
convicted by plea foregoes. "First, is the privilege against compulsory
self-incrimination guaranteed by the Fifth Amendment and applicable
to the States by reason of the Fourteenth."\(^{36}\) Whenever a defendant
pleads guilty, he must admit in open court that he committed the
crime charged against him.\(^{37}\) In contrast, if the defendant instead
goes to trial, he can remain silent and offer nothing in the way of
evidence, charging the government to bear to its burden to prove be-
yond a reasonable doubt that he is indeed guilty of the crime
charged.\(^{38}\)

Second, defendants give up their right to a trial by jury.\(^{39}\) The
Sixth Amendment gives every criminal defendant the right to demand
that his guilt be determined by a jury comprised of randomly selected
members from a cross-section of the community.\(^{40}\) By admitting guilt
by a plea before an open court, a defendant waives that trial right
entirely.

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34. See *Miles v. Dorsey*, 61 F.3d 1459, 1468 (10th Cir. 1995); see also infra Part I.B.2.d (discussing the voluntariness of a plea bargain when a prosecutor threatens to incarcerate members of the defendant's family).


36. Id. at 243.

37. *Brady v. United States*, 397 U.S. 742, 748 (1970) ("Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment.").

38. See *In re Winship*, 397 U.S. 358, 363-64 (1969) ("The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt."); see also Fed. R. Crim. P. 11(b)(2).


40. *Teague v. Lane*, 489 U.S. 288, 292 (1989) ("[T]he Sixth Amendment required that the jury venire be drawn from a fair cross section of the community.").
Third, the *Boykin* Court acknowledged that anyone who pleads guilty relinquishes his right to confront his accusers.\(^{41}\) In the absence of a plea, the government must present evidence of the defendant’s guilt beyond a reasonable doubt, and the defendant has a right to challenge the prosecution’s witnesses through cross-examination.\(^{42}\)

Each of the foregoing rights is considered fundamental to American criminal jurisprudence. The rights are regarded as critical safeguards against government oppression, and as hallmarks that historically revolutionized the American legal system and protected citizens from tyrannical rule. Despite the great import of these rights, the modern American judicial system allows prosecutors to make offers that entice defendants to barter away their constitutional rights. In this open market, prosecutors trade the state’s right to impose a maximum prison sentence or to pursue the full panoply of criminal charges, and the defendant, in turn, trades a set of constitutional rights. History has shown that this criminal justice market is widely active. In 2004, ninety-five percent of all felons in state courts were convicted by guilty pleas, whereas only two percent were convicted by juries, and three percent were convicted in a bench trial.\(^ {43}\)

B. The Law Governing Plea Bargaining

The growing popularity of plea bargaining, viewed by many prosecutors as an efficient tool for case disposal, has been fueled in recent decades by a stream of legal precedents that endorse its use. Judicially created standards concerning the voluntariness of a defendant’s decision to plead guilty form boundaries to fence in the wide expanse of permissible plea bargaining.\(^ {44}\) As a general rule, courts have determined that coerced pleas are not permissible, while all others are valid.\(^ {45}\) As the Supreme Court clearly declared, “A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void.”\(^ {46}\)

42. Defendants generally have a right under the Sixth Amendment to cross-examine witnesses who testify against them. See *Giles v. California*, 128 S. Ct. 2678, 2682 (2008) (citing *Crawford v. Washington*, 541 U.S. 36, 68 (2004)).
44. See generally *Brady v. United States*, 397 U.S. 742 (1970) (finding that the defendant’s guilty plea was voluntary even though the plea may have been influenced by a desire to avoid the death penalty).
45. Id. at 747 n.4.
Because courts have had difficulty applying this rule—however unambiguous in theory—to real cases, the doctrine of voluntariness has evolved such that courts now rely on a "checklist" of requirements to determine whether the defendant's plea was voluntary. The "checklist" closely tracks the language of Rule 11 of the Federal Rules of Criminal Procedure, which governs plea bargains. The most frequently cited Rule 11 requirements are: (a) the judge must personally address the defendant personally in open court before accepting a guilty plea; (b) the judge must personally inform the defendant of the constitutional rights that the defendant waives by pleading guilty; (c) the judge must "determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement)"; and (d) the court must determine a "factual basis" for the guilty plea. In practice, these factors leave little room for defendants to successfully protest the voluntariness of their guilty pleas. The following study of seminal cases from the past five decades illuminates the way that judges expanded the realm of prosecutorial discretion while narrowing available coercion claims to an almost imperceptible sliver.

1. Coercion Is Functionally Determined by Objective Analysis

In Ford v. United States, the Eighth Circuit concluded that a defendant's guilty plea was in fact voluntary after conducting a two-part

47. See Gonzalez v. United States, 128 S. Ct. 1765, 1768 (2008) ([Under Fed. R. Crim. P. 11(b),] the district court is required, as a precondition to acceptance of a guilty plea, to inform the defendant in person of the specified rights he or she may claim in a full criminal trial and then verify that the plea is voluntary by addressing the defendant. The requirement is satisfied by a colloquy between judge and defendant, reviewing all of the rights listed in Rule 11."); see also United States v. Ward, 518 F.3d 75, 83 (1st Cir. 2008) (declaring that an adequate record for a reviewing court regarding the constitutionality of a plea "may consist of a defendant's explicit answers during the plea colloquy to inquiries concerning the defendant's understanding of the nature of the charges, the consequences of pleading guilty to the charges, and the rights being waived"); United States v. Sura, 511 F.3d 654, 656 (7th Cir. 2007) (discussing how the trial court laid out specific rights that the defendant would be "giving up" by signing a plea agreement, but also stating that by failing to mention the waiver of defendant's appellate rights, the court omitted a point specified in Fed. R. Crim. P. 11(b)(1)(N)); United States v. Lessner, 498 F.3d 185, 193 (3d Cir. 2007) (stating that "[a] district court may not accept a plea of guilty without first personally addressing the defendant, under oath and in open court, and ascertaining that the plea is voluntary"); United States v. Benz, 472 F.3d 657, 661 (9th Cir. 2006) (noting that a failure to comply with Rule 11, by not informing the defendant of the mandatory minimum sentence, was reversible error).


49. 418 F.2d 855 (8th Cir. 1969).
analysis involving both subjective and objective factors. The Eighth Circuit stated that the subjective analysis should be based on the defendant's understanding of the nature of the plea agreement and its consequences. Critics of this type of subjective analysis could argue that the Eighth Circuit's standard was too vague and prone to abuse by prisoners who might attack their plea-based convictions by feigning ignorance of the pleading process or its consequences; however, the Ford Court foreclosed any basis for that concern. It effectively eradicated the subjective analysis that it had just introduced in the same breath by declaring, "[T]he question of involuntariness raised by petitioner always presents a troublesome issue in that the subjective mind of the petitioner is in question but resolution of that factual issue most often must be determined by objective evidence." After that pronouncement, only Rule 11 requirements were left to determine the factors that should be included in the objective test analysis.

Applying the objective test, the Eighth Circuit concluded that when an accused is adequately represented by counsel and is made aware of the consequences of his guilty plea and is in fact guilty of the crime charged, he is then in the position to make a measured and deliberate choice of whether to plead guilty or to exercise his constitutional prerogative of trial. The court also noted, "[u]nder these circumstances a guilty plea meets constitutional and legal standards and the plea itself is a conviction." To support its conclusion that the first requirement of Rule 11 was met, the Eighth Circuit examined the record and found that the defendant had on three occasions discussed the terms of the plea agreement with his attorney, and that the defendant was duly informed of the consequences of his guilty plea. In addition, the court determined that the trial judge complied with the second Rule 11 requirement "by personally addressing the [defendant] and satisfying himself that the plea was voluntary." Specifically, the court found it significant that the defendant himself asserted that his plea was indeed voluntary, that he said no government official had tendered threats or promises, and that he provided enough facts to form a factual basis for the plea during his plea allocution.

50. Id. at 858.
51. Id. at 859.
52. Id. at 858.
53. Id. at 859.
54. Id.
55. Id. at 857.
56. Id.
57. Id. at 860.
The United States Supreme Court in *Brady v. United States* also evaluated the voluntariness of a plea based on the lower court's compliance with Rule 11 requirements. It found that the defendant's plea was "intelligently made" because the defendant was advised by competent counsel, he was made aware of the nature of the charge against him, and there was nothing to indicate that he was incompetent or otherwise not in control of his mental faculties; once his confederate had pleaded guilty and became available to testify, he chose to plead guilty, perhaps to ensure that he would face no more than life imprisonment or a term of years.

The foregoing applications of the objective test reflect the courts' heavy reliance on trial court judges as major gatekeepers to safeguard defendants' interests against the great power of the state in the bargaining process. When defendants appeal their plea convictions on grounds of involuntariness, appellate courts evaluate the colloquy that the trial judge conducted with the defendant. "The record must reflect a genuine attempt by the judge to probe the defendant's mind to ensure that the plea is voluntary and not made under coercion, that the defendant understands the rights being waived, and that a factual basis underlies the guilty plea." Appellate courts also review the record for evidence that the trial judge asked the defendant a series of questions designed to ensure that the defendant understood the plea agreement and its consequences. If the higher courts are satisfied with the lower court's dialogue with the defendant as demonstrated in the record, they rule against him and affirm the conviction on appeal.

2. The Meaning of "No Improper Threats"

In addition to objectively assessing the defendant's own understanding of the plea agreement and its consequences, courts also consider prosecutorial influences on the voluntariness of a plea. Since the 1960s, the Supreme Court and circuit courts have scrutinized various tactics employed by prosecutors to pressure defendants into pleading

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59. *Id.* at 756.
61. See, e.g., Hanson v. Phillips, 442 F.3d 789 (2d Cir. 2006) (reversing the district court's denial of habeas relief, in part because "Boykin established that the record of a guilty plea must affirmatively disclose that the defendant made his plea intelligently and voluntarily," and the Second Circuit "[found] no such assurance in [the] record").
62. See United States v. Torres, 129 F.3d 710 (2d Cir. 1997).
guilty. A review of the key cases that led to the modern boundary of permissible prosecutorial threats follows.

a. **Machibroda (1962): A “Marginal” Case**

In *Machibroda v. United States*, defendant John Machibroda alleged that the prosecuting Assistant United States Attorney (“AUSA”) promised him a prison sentence of no more than twenty years in exchange for a guilty plea, indicated that the promise of a reduced incarceration period was made on the authority of the United States Attorney, and told Machibroda that the plea bargain was “agreeable to the District Judge.” According to Machibroda, the AUSA also warned him not to tell his attorney about the conversations regarding the plea, and threatened to compound the defendant’s criminal charges with robbery charges that had not yet been dealt with if he “insisted in making a scene.” Machibroda then pled guilty, but petitioned the higher court to vacate the resulting conviction and set aside the subsequent sentence, based on the foregoing allegations. The appellate court denied Machibroda’s request without even granting him a hearing. On appeal, the Supreme Court vacated the lower court’s judgment and remanded the case for a hearing to determine whether Machibroda’s allegations were factual. The Court stated that the facts as Machibroda portrayed them presented a “marginal” case, and that if the allegations were true, the Court would vacate his sentence because “a guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void.” Machibroda had made a number of allegations in his petition, including the prosecutor’s threat to take action on additional robbery charges, a representation of judicial approval of the plea, and an order not to avail himself of legal counsel regarding the terms of the plea bargain. The Court did not indicate which of those factors, if true, would have been sufficient to “deprive [the plea] of the character of a voluntary act.”

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64. Id. at 489.
65. Id. at 489-90.
66. Id. at 488-90.
67. Id. at 488-89.
68. Id. at 496.
69. Id. at 493.
70. Id. at 490 n.1.
71. Id. at 493.
fore, the boundary of permissible prosecutorial actions in plea bargaining remained vague and undefined in the early 1960s.


In the late 1960s and early 1970s, plea bargaining jurisprudence settled into a position that granted prosecutors wide latitude. As the language in *Ford v. United States*\(^\text{72}\) and *Brady v. United States*\(^\text{73}\) illustrates, prosecutors must reach a high bar before courts entertain the possibility of calling their actions improper. In *Ford v. United States*, the Eighth Circuit stated, "To constitute fear and coercion on a plea, 'Petitioner must show he was subjected to threats or promises of illegitimate action'; and fear of a greater sentence may induce a valid plea of guilty."\(^\text{74}\) The Eighth Circuit thus legitimized prosecutorial threats to pursue maximum prison sentences or to press every available charge against a defendant for purposes of procuring guilty pleas, even if the prosecutors would not have otherwise taken such actions.\(^\text{75}\) In doing so, the court concluded that it would condone prosecutorial action as long as the prosecutors limited the scope of their threats to actions within their original scope of power.\(^\text{76}\)

The Supreme Court echoed similar sentiments in *Brady v. United States*, decided a year after *Ford*.\(^\text{77}\) In that case, defendant Robert Brady pled guilty to kidnapping, but later appealed his conviction on grounds that his plea was involuntary.\(^\text{78}\) Brady initially pleaded not guilty, but when prosecutors notified him that his co-defendant pled guilty and expressed willingness to testify against him, Brady changed

\(^{72}\) 418 F.2d 855 (8th Cir. 1969).
\(^{73}\) 397 U.S. 742 (1970).
\(^{74}\) *Ford*, 418 F.2d at 858 (citing Kent v. United States, 272 F.2d 795, 799 (1st Cir. 1959) (emphasis added)).
\(^{75}\) *Ford* court noted in dicta that "[a] threat to prosecute under state law where the facts warrant prosecution should not be considered as coercive or intimidating." *Id.* at 859. Continued the court: "To constitute fear and coercion on a plea 'Petitioner must show he was subjected to threats or promises of illegitimate action[;]’ [ ] and fear of a greater sentence may induce a valid plea of guilty." *Id.* (quoting Kent v. United States, 272 F.2d 795, 799 (1st Cir. 1959) (emphasis added). "[T]he State certainly has the right to proceed with any prosecution that is warranted under the factual situation." *Id.* at 859.
\(^{76}\) See also *Brady*, 397 U.S. at 751 n.8 ("In Brady's case there is no claim that the prosecutor threatened prosecution on a charge not justified by the evidence or that the trial judge threatened Brady with a harsher sentence if convicted after trial in order to induce him to plead guilty.").
\(^{77}\) *Id.*
\(^{78}\) See *id.* at 743–44.
his mind.\textsuperscript{79} Apparently convinced that his co-defendant's testimony would be sufficient to support a conviction, and motivated in part by fear that he might receive the death penalty if convicted at trial, Brady accepted a plea bargain.\textsuperscript{80} He was then sentenced to fifty years in prison even though the statute allowed a maximum penalty of life in prison or capital punishment.\textsuperscript{81}

In its evaluation of Brady's claim, the Supreme Court announced:

The standard as to the voluntariness of guilty pleas must be essentially "[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes)."\textsuperscript{82}

The Court also ruled that public officials "may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant," but held that because Brady was not "so gripped by fear of the death penalty or hope of leniency," he was, in the Court's estimation, free to exercise independent and rational judgment in his decision to plead guilty.\textsuperscript{83}

The question that Machibroda left unanswered, then, Ford and Brady addressed. Under the latter judicial formulations, the only impropriety in Machibroda lay in the prosecutor's order that restrained the defendant from discussing the plea bargain conversations with his own attorney.\textsuperscript{84} It was entirely permissible, however, for Machibroda's prosecutor to threaten additional robbery charges in retaliation against an uncooperative defendant, since the prosecutor already had probable cause to bring forth those charges.

\textsuperscript{79} Id. at 743.
\textsuperscript{80} Id.
\textsuperscript{81} The statute under which Brady was convicted reads:

Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

Id. at 743 n.1 (citing 18 U.S.C. § 1201(a) (2000)).
\textsuperscript{82} Id. at 755 (internal citations omitted).
\textsuperscript{83} Id. at 750.
\textsuperscript{84} Machibroda v. United States, 368 U.S. 487, 489-90 (1962).

In *Bordenkircher v. Hayes*, the Supreme Court solidified the *Ford* and *Brady* precedents, painting broadly the rights of prosecutors to exert leverage over defendants in plea bargains. The Court decided there was no improper threat when Paul Hayes' prosecutor told him that if he did not plead guilty and "save [ ] the court the inconvenience and necessity of a trial," the prosecutor would return to the grand jury to seek an indictment under the Habitual Criminal Act. If the prosecutor moved forward with the additional indictment, Hayes would unquestionably be convicted and face life imprisonment because he had two prior felony convictions. When Hayes insisted on pleading not guilty, the prosecutor followed through on his threat and reindicted Hayes under the Habitual Criminal Act. A jury conviction followed, and Hayes was sentenced to life in prison.

On appeal, the Court ruled that the prosecutor's actions were not improper and emphasized the importance of the prosecutor's intention, which was "clearly expressed at the outset of the plea negotiations." It also noted that Hayes was "fully informed of the true terms of the offer." Under the *Bordenkircher* Court's characterization, the prosecutor merely "openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution." A footnote tucked away in *Bordenkircher* indicated that the Court might consider a plea involuntary where the "prosecutor's offer during plea bargaining [involved] adverse or lenient treatment for some person other than the ac-

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86. *Id.* at 359 n.1.
89. The Court noted:
    [I]t is not disputed that the recidivist charge was fully justified by the evidence that the prosecutor was in possession of this evidence at the time of the original indictment, and that Hayes' refusal to plead guilty to the original charge was what led to his indictment under the habitual criminal statute.
*Id.* at 359.
90. *Id.*
91. *Id.* at 360.
92. *Id.*
93. *Id.* at 365.
cused," but did not address the question since Paul Hayes did not allege any such offer.


What the Bordenkircher Court left open for consideration in footnote eight, was addressed by the D.C. Court of Appeals fourteen years later, when United States v. Pollard brought the concept of "plea wiring" to the fore of judicial consideration. Jonathan Pollard was arrested and charged with espionage for delivering national defense information to the Israeli government. Upon his arrest, Jonathan sent a code signal to his wife Anne, who followed pre-set instructions and "removed a suitcase full of classified U.S. intelligence information from the Pollards' apartment and contacted Pollard's Israeli handlers to tell them that Pollard was in trouble . . . " Although those actions constituted the entirety of Anne's undeniably minimal role in her husband's treason, the government nonetheless charged her as an accessory. Prosecutors then approached Jonathan with a plea deal that "wired" his plea to Anne's; unless Jonathan agreed to plead guilty and comply with a number of requirements, the government refused to enter into plea negotiations with his wife. The terms of the proposed plea agreement included Jonathan's submission to polygraph tests and assistance to the government as it computed the damages caused by his espionage. In addition, under the terms of the plea agreement, if Anne failed to fulfill her end of her own plea bargain, Jonathan's would be voided. Thus, Anne's plea agreement was likewise wired to her husband's.

94. Id. at 364. The Court stated:
This case does not involve the constitutional implications of a prosecutor's offer during plea bargaining of adverse or lenient treatment for some person other than the accused, . . . which might pose a greater danger of inducing a false guilty plea by skewing the assessment of the risks a defendant must consider.

95. 959 F.2d 1011 (D.C. Cir. 1992).
96. Id. at 1021.
97. For about a year and a half, Pollard—a Navy Intelligence Research Specialist—"removed large amounts of highly classified U.S. intelligence information from his office, copied it, and delivered it to agents of the Israeli government." Id. at 1015.
98. Id. at 1016.
99. Id.
100. Id. at 1011, 1016–19.
101. Id. at 1016.
102. Id. Specifically,
Pollard was bound to plead guilty to one count of conspiracy to deliver national defense information to a foreign government (18 U.S.C. § 794(c)), which carried
Notably, by the time these plea offers had been made, Anne had already suffered a serious illness that caused her health to deteriorate significantly after her arrest and subsequent imprisonment in a D.C. jail.\textsuperscript{103} Despite these circumstances—the wired plea, combined with the pressure that Anne was in poor and worsening health—the court determined that Jonathan’s plea was not the product of coercion.\textsuperscript{104} The D.C. Circuit expressed agreement with other circuits that had consistently decided that plea wiring was not, in itself, unconstitutional as a violation of due process rights or the Fifth Amendment privilege against self-incrimination.\textsuperscript{105}

The \textit{Pollard} court framed the question as “whether the practice of plea wiring is so coercive as to risk inducing false guilty pleas.”\textsuperscript{106} Elaborating on the operative word \textit{coercive}, the circuit court opined that, “to say that a practice is ‘coercive’ or renders a plea ‘involuntary’ means only that it creates improper pressure that would be likely to overbear the will of some innocent persons and cause them to plead guilty.”\textsuperscript{107} In the way of examples, the court echoed the Supreme Court’s \textit{Brady} decision, stating, “physical harm, threats of harassment, misrepresentation, or ‘promises that are by their nature improper as having no proper relationship to the prosecutor’s business (e.g. bribes)’ render a plea legally involuntary.”\textsuperscript{108}

a maximum prison term of life, and to cooperate fully with the government’s ongoing investigation. He promised not to disseminate any information concerning his crimes without submitting to pre-clearance by the Director of Naval Intelligence. His agreement further provided that failure by Anne Pollard to adhere to the terms of her agreement entitled the government to void his agreement, and her agreement contained a mirror-image provision.

\textit{Id.} at 1021; see also \textit{id.} at 1016–21.

\textsuperscript{103} \textit{Id.}

\textsuperscript{104} The D.C. Circuit noted that Anne Pollard was so ill that she lost forty pounds during her three months in jail. The court later ruled, however, that [t]he appropriate dividing line between acceptable and unconstitutional plea wiring does not depend upon the physical condition or personal circumstances of the defendant; rather, it depends upon the conduct of the government. Where, as here, the government had probable cause to arrest and prosecute both defendants in a related crime, and there is no suggestion that the government conducted itself in bad faith in an effort to generate additional leverage over the defendant, we think a wired plea is constitutional.

\textit{Id.} at 1020–21 (“The circuits that have considered the question, however, while occasionally expressing distaste for the practice, have uniformly agreed that it does not, \textit{per se}, offend due process or the privilege against compulsory self-incrimination.” (internal citations omitted)).

\textsuperscript{105} \textit{Id.} at 1021.

\textsuperscript{106} \textit{Id.}

\textsuperscript{107} \textit{Id.}

\textsuperscript{108} \textit{Id.} (quoting \textit{Brady v. United States}, 397 U.S. 742, 755 (1970)).
Even after recognizing that "a threat of long imprisonment for a loved one, particularly a spouse, would constitute even greater pressure on a defendant than a direct threat to him," the court did not consider Jonathan's wired plea unconstitutional or void. Furthermore, the circuit court specifically pointed out that Anne's serious medical issues did not change its assessment of Jonathan’s plea as voluntary because the borderline of acceptability in plea wiring does not depend on physical or personal circumstances; instead, the court stated, "it depends upon the conduct of the government." In evaluating that conduct, the circuit court found that "almost anything lawfully within the power of a prosecutor acting in good faith can be offered in exchange for a guilty plea."

Therefore, under the court’s view, the prosecutor did not improperly threaten the Pollards. After all, Anne Pollard did, in fact, play an accessory role in her husband's espionage, and the government was not required to offer either Anne or Jonathan a plea deal in any case. So, in threatening to continue pressing full charges against Anne, prosecutors were merely doing what they had a right to do in the first place. Consequently, the appellate court was satisfied that no improper threat had been made.

The Tenth Circuit echoed these sentiments in *Miles v. Dorsey*, another plea wiring case. There, prosecutors offered a plea deal that promised lenience to Vernard Miles, Jr. and several of his family members. Specifically, the plea agreement was designed to shield his parents, his sisters and sister-in-law from imprisonment; and to effectuate his brother's release from prison. Miles did plead guilty, and the appellate court rejected his attack on the subsequent conviction when he appealed on grounds that his plea was involuntary.

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109. *Id.*
110. *Id.*
111. *Id.* at 1016–19.
112. 61 F.3d 1459 (10th Cir. 1995).
113. *Id.*
114. The court noted:

[The state proposed a new plea and disposition agreement whereby Petitioner would plead no contest to one count of murder and two counts of first degree criminal sexual penetration. In exchange, the state agreed to drop thirty of the thirty-three felony charges against Petitioner, and ensure that his family would serve no jail time for their concealment of his offenses. The state agreed to allow Petitioner's parents to plead no contest and serve probation on a conspiracy charge filed against them, dismiss criminal charges against his sisters and sister-in-law, and release his brother James Miles from prison.]

*Id.* at 1464.

115. *Id.* at 1469.
The Miles court decided that the defendant’s guilty plea was not involuntary just because the government used its prosecutorial power against the defendant’s family members as a bargaining chip. The court ruled that “so long as the government has prosecuted or threatened to prosecute a defendant’s relative in good faith, the defendant’s plea, entered to obtain leniency for the relative, is not involuntary.” The court further stated that the prosecution acts in “good faith” when it has probable cause to prosecute a third party. Therefore, since Miles’s prosecutors had probable cause to prosecute the defendant’s family members, the state’s offer of leniency in exchange for a guilty plea was a valid and constitutional exercise of power that did not render the plea involuntary.

The foregoing outline of key precedents in the law of plea bargaining demonstrates the courts’ consistent willingness to expand the jurisdiction of prosecutorial power. Courts have refused to determine that a plea was coerced unless the prosecutor engaged in particularly reprehensible actions that were blatantly illegal in their own right. As a result, the courts created incredible latitude for prosecutors in the plea bargaining process.

II. The Human Body Market

Unlike the relatively open criminal justice market, the human body market involves a much more regulation. Although SB 480 only relates to organ donation, it is helpful to put the bill into context by undertaking a broader analysis of the laws that govern exchanges relating to the body in a variety of subcategories: sales of the entire body, exchanges involving parts of the body, and rentals of the body.

A. Sales of the Entire Body

Since the abolition of slavery in 1865, the rule governing sales of humans has been resolute and unyielding: it is illegal to sell people in the United States. The Thirteenth Amendment of the Federal Constitution specifically protects every American citizen from enslave-
TRADING KIDNEYS FOR PRISON TIME

ment,119 a regime in which people are treated as property that can be bought and sold in a "human market." The national sentiment against the sale of humans has even inspired some states to fashion laws that prohibit the offering, payment, or receipt of any "money or other consideration or thing of value, directly or indirectly" in connection with the adoption of a child.120 Regardless of age (adult or child) and irrespective of the underlying purpose—whether nefarious (slavery) or noble (parenting)—the market involving the sale or purchase of a human being in America is closed, as any exchanges within that market are illegal and consequently void.

B. Exchanges Involving Parts of the Body

The degree of openness in the market of human body parts seems to vary according to the scarcity and importance of the specific part at issue. Where the body part being sold is non-vital and clearly regenerates, the market is wide open. For example, human hair is widely peddled across the United States.121 The market for human hair is especially active on the Internet, where bids for seventeen inches of "dead straight hair, never straightened or blow dried," start at $700.122 Ostensibly because hair steadily and easily regenerates, and because cutting hair poses no known health threats, human hair sales occur regularly without impunity. As for the rest of the market involving parts of the body, the term "sales" is replaced with "donation." But the euphemism hardly represents a functional distinction. After all, the structure of each trade remains the same: parts of the body are exchanged for money, or "compensation." Blood and human reproductive cells from both sexes are the most common "donations" for which compensation is permitted. Donated blood is probably the most prevalently exchanged commodity in America's market of body

119. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

120. See MICH. COMP. LAWS § 710.54 (2008).

121. Jennifer Alsever, Another Way to Bring out that Inner Rapunzel, N.Y. TIMES, Feb. 19, 2006, at 6. Great Lengths, a hair distributor, boasts annual sales revenues of $80 million—all from selling human hair extensions. Id. Though Great Lengths was first established in London, "American sales at Great Lengths [increased] 64 percent [from 2005 to 2006], hitting $20 million and reaching 3,000 salon customers [in 2006]." Id.

122. See Hair Classifieds, http://www.hairwork.com/bidhere.htm#1/15/08%201%20have%20about%2020%22%20to%20sell (last visited Apr. 1, 2009).
Blood donors typically receive twenty to forty dollars per donation. That money is considered compensation for donors’ time and the physical discomfort resulting from the donation process. Like hair, blood regenerates, so a donor’s health is generally unaffected by blood donation.

Human reproductive cells are also widely donated in the United States. Like blood, sperm are regenerative, enabling men to make donations to sperm banks and receive upwards of seventy-five dollars for each sperm sample that the bank accepts. Women, on the other hand, may receive thousands of dollars for their egg donations. Unlike sperm, eggs are not regenerable; every female is born with as many eggs as she will ever have. Scarcity of eggs is not an issue, however, since an estimated 400,000 eggs survive puberty and only one egg is released per menstrual cycle. Therefore, a woman may donate many eggs in her lifetime without risking ovarian depletion or infertility before she hits menopause.

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126. Banks, supra note 123, at 48 (“Human blood continues to replenish itself in the blood donor, generally leaving the donor in no worse condition than before the extraction of his or her blood.”).
127. See Victoria C. Wright et al., Ctr. for Disease Control, Assisted Reproductive Technology Surveillance—United States, 2000 (2003), available at http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5209a1.htm (“In 2000, a total of 25,228 live-birth deliveries and 35,025 infants resulting from 99,629 ART procedures were reported to CDC from 383 medical centers that performed ART in the United States and U.S. territories.”).
130. See id.
133. Sunni Yuen, Comment, An Information Privacy Approach to Regulating the Middlemen in the Lucrative Gametes Market, 29 U. PA. J. INT’L L. 527, 537 (2007) (“[I]n contrast to the vast quantities of sperm that can be released per ejaculation, the female body only naturally matures and releases one egg per month.”).
134. If a woman has over 400,000 eggs and only one egg is released each month, she would have to menstruate for over 30,000 years to exhaust the number of eggs in her ovaries. See Guzman, supra note 132, at 240.
disparity between eggs and sperm flows from the fact that egg harvesting is such a time-consuming, potentially hazardous, and physically invasive process. The donor must inject herself with artificial hormones every day for over a week to promote a greater "harvest," and the actual collection of eggs involves extraction through a long, vaginally inserted needle. Because of the significantly greater "time and inconvenience" associated with egg donation, donors frequently receive up to $5000 for each donation.

Regardless of their common labels, what makes sperm and egg "donations" more like sales is the fact that the compensation donors receive depends in part on certain qualities believed to exist in the particular reproductive cells they donate. In theory—as is true for financial remunerations for blood donations—money given to reproductive cell donors is intended to compensate for their sacrifices of discomfort, time, and inconvenience. If this were true in practice, all sperm donors would receive comparable payments, and all egg donors would collect roughly equal sums. But this is not the case. Sperm and egg donors who possess certain socially desirable traits, such as beauty or intelligence, receive greater "compensation" even though they sacrificed the same amount of time and inconvenience as their less educated and less beautiful cohorts. Some rare egg donors have received up to $50,000 for a single donation.

137. See Annie M. Lowrey, Will You Be My Baby's Mama?, Harv. Crimson, Apr. 29, 2004, http://www.thecrimson.com/article.aspx?ref=502192 ("Tiny Treasures LLC, a Somerville-based donation agency, creates a pool of 'Extraordinary Donors.' According to their website, a donor with either an SAT over 1250, an ACT over 28, a GPA over 3.5, or enrollment at an Ivy League school, qualifies as an 'Extraordinary Donor' whose eggs are worth more than three times that of a first-time, well, normal donor. A Perfect Match, a California based donation agency, currently advertises in The Crimson and posted the infamous $50,000 offer for a tall, athletic, brunette.").
price for reproductive cells significantly increases when certain donor traits are present, the exchanges of money for sperm and eggs more closely approximate "sales" than "donations," though the terminology suggests otherwise. In sum, the market for reproductive cells is as open as it is for blood, and exchanges of money for these resources take place frequently and legally across the United States.

The market for organs is a different story. The Uniform Anatomical Gift Act ("UAGA"), first introduced in 1968, legalizes the posthumous donation of cadaveric organs by consent of the donor, most commonly by will or by indication on the donor's driver's license, with consent of the donor's family. The UAGA pertains to the donation of any organ, eye, or tissue of a human being. The UAGA reflects "a commitment to the belief that organs should be given as a gift, either to a specific individual or to society at large." It has been adopted in some form by all fifty states and the District of Columbia.

Living donors may also give nonvital, nonregenerative organs—most commonly one of their two kidneys—but federal law expressly bars donors from receiving benefits in return, closing the market for two-way exchanges. In 1984, Congress passed the National Organ Transplant Act ("NOTA"), which prohibits the exchange of human organs for "valuable consideration." This Act effectively bans the sale of human organs, though it permits people to donate them instead. For purposes of NOTA, Congress defined "human organ" to encompass "the human (including fetal) kidney, liver, heart, lung, pancreas, bone marrow, cornea, eye, bone, and skin or any subpart

141. Banks, supra note 123, at 67.
143. UNIF. ANATOMICAL GIFT ACT, § 2(18) (2006), 8A U.L.A. § 2(18) (Supp. 2008) ("'Part' means an organ, an eye, or tissue of a human being. The term does not include the whole body.").
146. Id. at 41 ("Currently, federal and state statutes specifically forbid the sale of human organs.").
149. See 42 U.S.C. § 274e. Persons found guilty of violating this provision are subject to a fine of up to $50,000, and/or up to five years imprisonment upon conviction. Id.
thereof and any other human organ (or any subpart thereof, including that derived from a fetus) specified by the Secretary of Health and Human Services by regulation."\textsuperscript{150}

To summarize, in the overall schematic of the market involving body parts, the government allows people to trade regenerable parts like blood, hair, and sperm, for money. Although human eggs do not regenerate, they are hardly scarce, and their removal does not hinder a woman’s physical well-being. Therefore, the law permits women to exchange their eggs for economic benefits. Organs, however, are scarce and vital to one's health. Consequently, the government has firmly closed the market for their sale through NOTA, which strictly prohibits any exchange of money for human organs, whether from living or deceased donors.

C. Rentals of the Body

Unlike sales in the human body market, in which “donors” cede both power and possession over their body parts to other parties, body rentals involve only temporary leases of control over one’s body. Two common examples of body rentals that take place in the United States are prostitution and surrogacy. The market for prostitution is largely closed, while the market for surrogacy is mostly open, for reasons discussed after a brief overview of the laws governing each.

1. Prostitution

Prostitution, which can be characterized as a sale of sexual services or a rental of a sexual partner, is mostly outlawed, as determined by state law.\textsuperscript{151} In all but two states, prostitution is illegal.\textsuperscript{152} In Nevada, prostitution is legal only when practiced in licensed brothels, and in counties with populations of 400,000 or fewer people.\textsuperscript{153} In Rhode Island, prostitution is permitted, but prostitutes may not loiter or solicit customers outdoors.\textsuperscript{154} Although no federal statute directly proscribes prostitution, federal law bans prostitution near certain areas such as military bases, and criminalizes interstate movement of persons for the purpose of prostitution, even if the prostitute is transported to a state in which prostitution is legal.\textsuperscript{155}

\textsuperscript{150} Id. § 274e(c)(1).
\textsuperscript{151} Lauren M. Davis, Prostitution, 7 GeO. J. Gender & L. 835, 837 (2006).
\textsuperscript{152} Id. at 840.
\textsuperscript{153} Id.
\textsuperscript{154} Id. at 836–37.
\textsuperscript{155} Id. at 842; see also 18 U.S.C. § 1384 (2000).
2. Surrogacy

Surrogacy is the other type of regulated body rental; it essentially involves the rental of a woman’s womb and her ability to carry a baby to term. There are two types of surrogacy, traditional and gestational. In traditional surrogacy arrangements, the surrogate mother’s own egg is inseminated with the intended father’s sperm; the surrogate then brings the resulting embryo to term, but gives up the baby to the intended parents.156 The surrogate in traditional surrogacy is therefore genetically related to the child she carries. In contrast, a surrogate mother in a gestational surrogacy arrangement shares no genes with the baby she carries because the intended father’s sperm artificially inseminates the intended mother’s egg, and the resulting embryo is subsequently implanted in the surrogate’s uterus.157

States take different approaches to surrogacy and payment. Where surrogacy agreements are allowed, couples that “commission” the birth of a child may pay for the medical, psychological, and legal expenses that the surrogate mother incurs as a result of the arrangement.158 Some states also allow the commissioning parents to reimburse transportation costs, maternity clothes, and lost wages so the surrogate mother is not left in a worse position because of the surrogacy agreement.159 Other states distinguish enforceable and legal surrogacy agreements from those that are unenforceable or criminal based on whether the surrogate mother receives “compensation.”160 In those statutory contexts, “compensation” refers to any money the surrogate receives above and beyond reimbursement for medical and other necessary expenses.161 Commissioning parents usually give their surrogates well over $10,000 in compensation.162

Federal laws and many states remain silent on the issues of criminality or enforceability of surrogacy contracts, and state laws that do address surrogacy diverge widely in their approaches.163 Illinois stands

157. Id. at 1226.
159. Id. at 538–39.
161. Id.
162. Liz Doup, The New Extended Family, Sun-Sentinel (Fl. Lauderdale), Apr. 6, 2003, at 1E.
163. Watson, supra note 158, at 592, 537.
alone in extending explicit permission to give and receive compensation for surrogacy services.\textsuperscript{164} Alabama, Iowa, and West Virginia all forbid the sale of children, but have passed additional laws to clarify that surrogacy arrangements involving compensation do not fall within the meaning of the baby-selling statutes.\textsuperscript{165} In four states\textsuperscript{166} and the District of Columbia, surrogacy agreements of any kind—whether paid or unpaid—are unenforceable.\textsuperscript{167} Six states enforce surrogacy agreements, but only where the agreements do not include compensation for the surrogate.\textsuperscript{168} In five states, surrogacy agreements are legal only if unpaid.\textsuperscript{169} Other states, like Arkansas and Texas, expressly recognize the enforceability of surrogacy agreements, but do not indicate by statute whether or not those agreements may include compensation.\textsuperscript{170}

As the preceding set of various state laws illustrates, the primary issues in surrogacy law center on two main questions: whether the surrogate may financially profit from her services as a surrogate mother, and whether the surrogate can be forced to follow through and give up the baby to whom she gives birth because she entered into a formal contract with the commissioning couple. Michigan actually criminalizes participation in gestational surrogacy agreements that include payments to the surrogate.\textsuperscript{171} New York issues civil penalties for participation in for-fee surrogacy agreements, and imposes criminal liability only when a party has violated the law twice.\textsuperscript{172} Yet most states that

\textsuperscript{164} Id. at 532–33.
\textsuperscript{165} Id. at 533.
\textsuperscript{166} The four states are Arizona, Indiana, Michigan, and North Dakota. See id.
\textsuperscript{167} See id.
\textsuperscript{168} The six states are Kentucky, Louisiana, Nebraska, New York, North Carolina, and Washington. See id. at 534.
\textsuperscript{169} The five states are Florida, Nevada, New Hampshire, New Mexico, and Virginia. See id. at 534–35.
\textsuperscript{170} Id. at 536–37.
\textsuperscript{171} See Mich. Comp. Laws § 722.859 (2008) (assigning penalties of up to one year in prison and/or a $10,000 fine for participants in a gestational surrogacy arrangement involving compensation, and up to five years imprisonment and/or a $50,000 fine for third party participants who induce, arrange, or assist in the formation of such a contract).
\textsuperscript{172} See N.Y. Dom. Rel. Law § 123(2)(b) (Consol. 2008) ("Any other person or entity who or which induces, arranges or otherwise assists in the formation of a surrogate parenting contract for a fee, compensation or other remuneration or otherwise violates this section shall be subject to a civil penalty not to exceed ten thousand dollars and forfeiture to the state of any such fee, compensation or remuneration. . . . Any person or entity who or which induces, arranges or otherwise assists in the formation of a surrogate parenting contract for a fee, compensation or other remuneration or otherwise violates this section, after having been once subject to a civil penalty for violating this section, shall be guilty of a felony.").
address surrogacy merely refuse to enforce surrogacy contracts if certain requirements are not met.\textsuperscript{173} And the vast majority of states simply avoid the issue of surrogacy entirely, reflecting substantial acceptance of the practice in the United States. Consequently, the market for surrogacy contracts is remarkably open, especially when compared to prostitution, which is criminalized in all but two states.

3. Why Surrogacy and Prostitution Laws Differ

An in-depth comparison of surrogacy and prostitution helps uncover the reasons why the laws that govern each diverge so drastically. Although both are rentals, they differ in the level of financial compensation, extent of health risks, and physical invasiveness associated with each. The average rates for prostitution vary widely, but compensation for surrogacy typically ranged from $15,000 to $18,000 in 2003.\textsuperscript{174} The costs keep rising: in 2008, surrogates reportedly received an average of $20,000 to $25,000 for their services.\textsuperscript{175} Consequently, the cost of even the least expensive surrogacy arrangement greatly exceeds the most extravagant prostitution fee. The price disparity reflects significant differences in time investment, attendant risks, and health ramifications. The amount of time that prostitutes devote to each client in a given transaction ranges from minutes to hours. Surrogates, on the other hand, devote almost an entire year—if not more—as they prepare for pregnancy and carry an implanted embryo to term.

Furthermore, while prostitution places sex workers at risk for sexually transmitted diseases, the use of medical screening and prophylactics can significantly decrease that health risk.\textsuperscript{176} In stark contrast, surrogates subject themselves to all the physical risks inherent in pregnancy.\textsuperscript{177} And, their lifestyles are severely restricted, since all pregnant women must avoid smoking and drinking, and they must limit strenuous activity throughout their pregnancies, to reduce the probability of complications or the delivery of an unhealthy baby.\textsuperscript{178}

\textsuperscript{173} See Watson, supra note 158, at 532–38 (finding that the relevant statutes of most states referenced limit enforceability of surrogacy contracts under given circumstances, but do not criminalize the creation of surrogacy contracts).

\textsuperscript{174} See Doup, supra note 162, at 1E.


\textsuperscript{176} Davis, supra note 151, at 841.


Since surrogates sacrifice so much more than prostitutes in terms of time, health risks, and restraints on activity, and since the financial inducement for surrogacy is so far above that of prostitution, it may seem puzzling that prostitution is so widely proscribed across the nation while surrogacy is rarely addressed, let alone regulated. But a shift from this functional comparison of the rented bodies to analysis from a moral perspective may shed some light. Lawmakers and an American constituency with primarily Judeo-Christian roots strongly influenced the development of a set of acceptable mores in this nation's early years.\textsuperscript{179} The conservative values that molded the first laws against prostitution viewed the practice as a social evil, conceivably in part because the Bible does not condone sex outside of marriage.\textsuperscript{180}

The same Biblical foundations that informed prostitution laws also help explain the surprising lack of prohibition against surrogacy. After all, traditional surrogacy actually occurs in the Bible, when Sarai—the then-barren wife of Abram, a venerated patriarch in Biblical history—sent her servant Hagar to sleep with her husband.\textsuperscript{181} Sarai told Abram, "Go in to my slave-girl; it may be that I shall obtain children by her."\textsuperscript{182} Although the resulting pregnancy and birth caused great division between Sarai and Hagar, the Bible never proscribed the surrogacy arrangement, nor did it explicitly criticize surrogacy.

Furthermore, the Bible speaks enthusiastically about children as a blessing. Psalm 127 reads, "Behold, children are a heritage from the Lord, the fruit of the womb a reward. Like arrows in the hand of a warrior are the children of one's youth. Blessed is the man who fills his quiver with them!"\textsuperscript{183} The Biblical values that informed early American attitudes towards surrogacy and prostitution esteem children as precious blessings from God. Therefore, when the advent of modern reproductive technology enabled the use of surrogacy as a way to bring those blessings into being, a cultural acceptance of surrogacy was already firmly established. Using this lens, it should not be

\textsuperscript{179} See Richard A. Posner, Professionalisms, 40 Ariz. L. Rev. 1, 13 (1998) ("[L]aw is saturated with moral terms. And the morality from which those terms is drawn is Judeo-Christian.").

\textsuperscript{180} See Ephesians 5:31 ("For this reason a man will leave his father and mother and be united to his wife, and the two will become one flesh."); see also 1 Corinthians 6:16–18 ("Do you not know that he who unites himself with a prostitute is one with her in body? For it is said, 'The two will become one flesh.'"); Hebrews 13:4 ("Marriage should be honored by all, and the marriage bed kept pure, for God will judge the adulterer and all the sexually immoral.").

\textsuperscript{181} See generally Genesis 16.

\textsuperscript{182} Id. 16:2.

\textsuperscript{183} Psalm 127:3–5.
surprising that the same people who vigorously oppose prostitution—which involves sex outside of marriage—simultaneously endorse surrogacy, which in its traditional form also involves sex outside of marriage. The crucial distinction lies in the difference in objective. Prostitution's key aim is sexual pleasure, while surrogacy's goal is bringing new life into the world.

While the current laws governing surrogacy and contracts may have been rooted in a conservative morality inspired by Judeo-Christian teachings, such religious and moral values alone may have been insufficient to perpetuate those laws into the twenty-first century without bolstering support from rationales that modern society finds compelling. After all, as the popularity of abortion demonstrates, contemporary America no longer universally holds the view that "blessed is the man who fills his quiver"184 with children. Yet pragmatic justifications continue to sustain the laws borne of waning traditional values. This nation still has an interest in new life, as children represent a strengthened future workforce that will fuel tomorrow's economy and perpetuate hope for prosperity. The government's lack of significant regulation or restriction of surrogacy enables people who want—but cannot independently produce—biological children, to have and raise them into productive, contributing members of society.

Furthermore, the most-cited secular objections to prostitution do not apply to surrogacy arrangements. Common concerns about the sex trade include: violence committed against prostitutes; the problem of pimping; the spread of sexually-transmitted diseases;185 and the belief that prostitution multiplies other forms of crime when brothel profiteers funnel excess revenue into drug-related activities, gambling, and extortionary enterprises.186 Those issues do not plague the womb-rental market, however. Surrogacy does not spread disease, nor does our society tend to associate surrogacy with crime rings. And violence, in particular, is far-removed from the world of surrogate mothers. Commissioning parents have a paramount interest in promoting and maintaining the surrogate's welfare; after all, her well-being is essential to the safe and healthy delivery of the baby they so strongly desire. These modern, practical considerations help account for the current state of laws governing prostitution and surrogacy.

184. Id.
185. Davis, supra note 151, at 840-41.
III. Rationales for the Rules of These Markets

The South Carolina bill proposal, which contemplates the exchange of a six-month reduction in prison time for a felon's kidney donation, represents the intersection of the human body and criminal justice markets. It is useful to first compare the boundaries and rules that govern each market, and to understand some important distinctions that help explain the vastly different approaches that result in one market being closed or largely regulated, while the other remains open.

A. The Boundaries of Each Market

1. The Boundary of the Criminal Justice Market Is Voluntariness

The main boundary of the criminal justice "market," in which prosecutors and defendants haggle over exchanges of prison time and guilty pleas, is voluntariness. Unless judges deem a particular plea involuntary after applying both statutes and case law precedents, the market of criminal justice remains open for trade. Rule 11 of the Federal Rules of Criminal Procedure, which contains explicit directions and requirements regarding guilty pleas, represents Congress's procedural safeguard to ensure that all defendants who plead guilty actually do so voluntarily.\(^{187}\) The stringent criteria of Rule 11 suggest that it was designed to protect unwary defendants against the evils of overbearing state power and coercion.\(^{188}\) By demanding a judge's personal assessment of the defendant's demeanor and understanding of a plea agreement and its consequences on constitutional and practical levels, Rule 11 aims to satisfy the public's collective conscience, which might otherwise suspect that prosecutors can rope unwitting defendants into pleading guilty when they actually do not wish to do so.

In practice, Rule 11 heavily defers to the discretion of trial judges, who largely center their inquiries regarding defendants' voluntariness around a determination of whether the prosecutor imposed an improper threat in order to procure a plea. The stream of case law in Part I shows that judges draw that boundary very liberally in the state's favor, as courts have been reluctant to concede that even extreme prosecutorial actions are "coercive." As the Pollard case makes remarkably plain, courts refuse to find prosecutors' actions "improper" as

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\(^{188}\) Among other things, Rule 11 requires judges to inform and determine that the defendant understands a series of rights and consequences that accompany any accepted guilty plea. See Fed. R. Crim. P. 11(b)(1)(A)–(N) (emphasis added).
long as prosecutors do what they otherwise have a right to do in terms of pressing charges or pursuing maximum sentences. Therefore, in the absence of blatantly unethical conduct along the lines of bribery or threats of physical harm, judges do not render guilty pleas void on grounds of coercion.

2. The Boundary of the Human Body Market Is Scarcity and Essentiality

The market of exchanges related to the human body is often closed or restricted, and I submit that any exceptions the government has carved out in the rental and sales markets have been based on one of two grounds: life-generating potential or scarcity. Prostitution and surrogacy are both paid body rentals in which the body, apart from its use for partnership in sex or the incubation of another’s child, is left completely intact. Since nothing is permanently alienated from the body, the boundary that criminalizes the former while leaving the latter relatively unregulated is based on the degree to which each promotes generation of new life.

All other transactions in the human body market involve sales, which implicate complete alienation of elements from one’s body. In these instances, the boundary is drawn based on the scarcity of the product in question. Blood, hair, and sperm all regenerate; because the human body can produce more of each, their sale does not medically hinder the producer or otherwise diminish the “donor’s” body.189 And though human eggs are limited in number, they are sufficiently numerous that a woman can “donate” eggs without sacrificing her own fertility. The relatively vast supply of each of these resources helps explain why the law does not completely restrict their sale.

Notably, however, the very nomenclature used in each context signals a public discomfort with the commodification of certain human body parts. Even though exchanges of money for some body-derived resources look like sales, Americans freely “sell” hair, but insist on using the terms “blood donor,” “sperm donor,” and “egg donor.”190 The reason may be that—unlike hair—blood, sperm, and

189. See Banks, supra note 123, at 48; see also Bloodbanker.com, supra note 124.
190. See Rene Almeling, Selling Genes, Selling Gender: Egg Agencies, Sperm Banks, and the Medical Market in Genetic Material, 72 Am. Soc. Rev. 319 (2007) (discussing the buying and selling of sperm and eggs, and the rhetorical use of the terms "sperm donation" and "egg donation"). But see P. V. Holland, Selling Blood vs. Donating Blood, 94 Vox Sanguinis 171 (2008) (advocating a different classification between paid and unpaid blood givers, stating “blood donor should be enough to indicate that the person was not paid, or did not accept remuneration[ ]").
eggs all relate very closely to the essence of life itself. Therefore, the market is open, but with the understanding that "donors" are compensated for their time, physical inconvenience, and other efforts related to the "donation," rather than for the commodity itself. Whether or not the nomenclature is accurate or meaningful, it undoubtedly signifies a clear distancing from other commercial sales. Perhaps this is because humans can survive without hair, but they cannot live without blood, nor can they procreate or pass down their genes without sperm or eggs. The language thus indicates our culture's elevation of certain body parts over others, especially when they play an immeasurably significant role in human existence.

Given the scarcity of non-regenerable organs and their integral importance to one's physical survival, exchanges of body parts such as the kidney and liver enjoy special protection from the law. NOTA, the federal ban on organ sales, demands that organ donors and recipients strictly adhere to the language of "donation," and rigorously prohibits any exchange of value for the donated organs. Unlike eggs, sperm, and blood, organs are not replaceable, nor are they sufficiently numerous to render their absence unnoticeable. And, unlike other body parts that are sold under the guise of "donation," organs are so necessary to physical welfare that their failure spells death. These crucial distinctions between organs and other body parts set them apart for different legal safeguards and standards.

The risks that attend living donors who choose to give away scarce and vital organs increase the perceived need for legislative protection. While living organ donors may survive with one kidney and a partial liver, they do not give organs without increasing their risk for serious physical complications. Even the process of becoming a living donor poses potentially significant health hazards. For example, living kidney donors may suffer "'adverse reaction to anesthesia, unexpected blood loss, infection,' and most critically, the possibility of loss of function in the donor's remaining kidney." In addition, people who donate parts of their liver run the risk of "bleeding, infection, bile leakage, [and] possible death."  


193. Id. at 350–51 (citing Columbia University Department of Surgery, Living Donor Transplantation Explained, http://hora.cpmc.columbia.edu/dept/liverMD/procedure.html#risks (last visited Apr. 1, 2009)).
Furthermore, while the long-term health consequences of living kidney donation have not been studied extensively, the removal of vital organs intuitively increases one's physical vulnerability. Should cancer or some other incurable disease attack the remaining organ, the donor himself might need to join the national waiting list for organs because he lacks the natural emergency reserve that he gave away.  

As for the general effects of living donations on donor health, one study of individuals who sold their kidneys in India found that thirteen percent of participants indicated no decline in health while eighty-six percent reported some level of decline. Half of the participants in the study also reported "persistent pain at the nephrectomy [kidney removal] site," while over one-third complained of long-term back pain.

The boundary of the law governing the human body market is drawn at the exchange of any vital and scarce organ. Even though every living donor's relinquishment of a vital organ represents a second chance at life for one of many thousands of desperate patients on the national waiting list, legislators have unwaveringly closed the market for sale of kidneys and other organs. The criminalization of organ sales thus represents the law's paternalistic unwillingness to enable the exchange of a resource that—unlike blood, sperm, eggs, and other human tissue—is naturally scarce, yet essential, to every human being. In the absence of statutory restrictions like NOTA, an open market for these resources could greatly expose otherwise-unwilling donors to unacceptable pressures and financial inducements, to the detriment of their health and well-being.

B. Two Key Distinctions Between the Criminal Justice and Human Body Markets

The preceding examination of both markets in isolation identified the legal boundaries that govern each. What follows is a direct comparison between the two markets, which reveals two structural explanations for the status of each market as relatively open or closed.

195. Chandis, supra note 148, at 222 (citing Madhav Goyal et al., Economic and Health Consequences of Selling a Kidney in India, 288 J. AM. MED. ASS'N 1589, 1591, (2002)).
196. Goyal et al., supra note 195, at 1591.
The two structural explanations hinge on the degree to which the public at large believes that it has the power to hold the government accountable for its actions. Where the government is charged with overseeing exchanges within a market, and where the state is a participant in the market, the voice of the people—expressed through laws—permit an open market, because the public places faith in its own ability to police the judges and prosecutors who act on their behalf. In contrast, laws restrict the human body market, in which exchanges are removed from public oversight and occur purely between private parties.

1. Private Versus Public Oversight Over the Bargaining Process

Criminal defendants who engage in plea bargaining do so in a system in which both prosecutors and judges provide significant government oversight. To begin with, defendants bargain opposite a prosecutor, a representative of state power who is—in some form or fashion—accountable to the general public. The heads of all prosecutors' offices in America are either publicly elected or appointed by elected officials. In either case, head prosecutors answer to a constituency of voters. In the federal government, for example, Assistant United States Attorneys in each federal district work under the direction of one United States Attorney who is appointed by the President of the United States and confirmed by the Senate. Therefore, although United States Attorneys do not run for public office, they are accountable to the President, who is directly accountable to a body of voters. In addition, state attorneys general, county attorneys, and district attorneys who prosecute locally are usually elected public officials. All other prosecutors who work under the direction of these public servants follow the orders and policies of the elected officers.

198. Eric K. Klein, Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Criminal Justice, 35 AM. CRIM. L. REV. 371, 397 (1998).
199. Id.
203. See Robert F. Blomquist, Integrity in Public Service: Living up to the Public Trust?: Ten Vital Virtues for American Public Lawyers, 39 IND. L. REV. 493, 518 (2006) ("Public lawyers have to report to superiors within their agency, department, or branch regarding the implementation of law and policy; these superiors will usually (at least at the higher levels) be political appointees of the same political party as the chief executive (or an elected official other than the chief executive such as a state attorney general or county prosecutor).")
So there is, at least from a structural perspective, a natural mechanism through which prosecutors must answer to the general public.

Judges, who preside at hearings in which defendants plead guilty, are also publicly accountable. Defendants and prosecutors cannot, on their own, effectuate plea agreements because Rule 11 of the Federal Rules of Criminal Procedure requires judicial supervision over any defendant's tender of a guilty plea. The judge's acceptance of the plea agreement depends on his assessment in open court that the Rule's requirements have been satisfied with respect to factors such as the defendant's voluntariness; the prosecutor's integrity in the bargaining process; and a factual basis for the plea. State courts employ similar procedures, requiring that a judge's evaluation precede the court's final acceptance or rejection of the plea. The legal landscape of plea bargaining shows, then, that when defendants bargain away their constitutional rights, publicly-appointed officials—or people who are otherwise directly answerable to a general constituency—oversee its process.

While supervisory positions of judges and prosecutors are built into the criminal justice system, the human body market has no such corollaries. Rather, exchanges related to the body—whether in the form of sale or rental—are often shielded from public or governmental scrutiny because they occur apart from formal structures to which a publicly accountable supervisor might have access. For example, prostitutes and their clients engage in purely private transactions, wholly separate from any sort of public surveillance.

Public accountability exists to a slightly greater extent in exchanges involving surrogacy, human organs, tissue, and blood. In those sub-categories of the human body market, either the government or an organization has at least some oversight. The federal government has not commissioned any agency to supervise donors or the daily operations of sperm banks, nor does it significantly regulate

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206. See, e.g., Mass. R. Crim. Pro. 12(c)(5) ("The judge shall conduct a hearing to determine the voluntariness of the plea or admission and the factual basis of the charge."); see also Mass. R. Crim. Pro. 12(c)(5)(B) ("At the conclusion of the hearing the judge shall state the court's acceptance or rejection of the plea or admission.").
207. See Dawn R. Swink & J. Brad Reich, Caveat Vendor: Potential Progeny, Paternity, and Product Liability Online, BYU L. Rev. 857, 870 (2007) ("On the federal level, no regulatory agency oversees individual donors or sperm banks in their day-to-day business practices, nor has the government enacted a uniform body of federal regulatory legislation, despite the pleas that such legislation is desperately needed.").
the private companies that "broker" human eggs. But the market of sperm and egg donation is still subject to some form of accountability. The American Association of Tissue Banks ("AATB"), a non-profit, scientific, and educational organization, plays a quasi-public supervisory role by accrediting and certifying clinics that engage in the procurement and distribution of human tissue such as human sperm and eggs. It developed standards to address concerns about safety and quality in the delivery of tissue transfer services, and as of 2008, the AATB reported a membership of over 1000 individual members and over 100 accredited tissue banks. Blood banks are also subject to supervision, as they must be certified and are subject to government regulation and inspection.

This difference in the availability of public oversight and accountability helps explain the difference between the open or closed state of either market. Markets are more likely open where the public—either through democratically-elected government officials or through a third-party, non-profit organization—has a means, at least in theory, to supervise the exchanges. Because either the government or an organization like the AATB oversees the transfer of blood or tissue, the market of exchange for those body parts is more open than the market for prostitution, which is secluded from any public oversight.

This distinction also explains why bargains are permitted in the open market of criminal justice. Members of the public possess a collective self-assurance in their own power as voters to monitor the actions of judges and prosecutors. If constituents are unhappy with the actions of judges and prosecutors, they can refuse to re-elect the unsatisfactory officials, or otherwise apply political pressure to the incumbents who appointed them. Voters therefore expect judges and

208. See Kenneth Baum, Golden Eggs: Towards the Rational Regulation of Oocyte Donation, BYU L. Rev. 107, 128 (2001) ("There is no legislation in the United States that regulates the practice of oocyte donation.").
210. Sixth Circuit Holds that Expert Testimony Is Not Needed to Establish a Standard of Care in Surrogacy Cases, 106 Harv. L. Rev. 951, 956 n.41 (1993); see also AATB About Us, supra note 209.
211. AATB About Us, supra note 209.
213. See Abby L. Dennis, Reining in the Minister of Justice: Prosecutorial Oversight and the Superseder Power, 57 Duke L.J. 131, 138 (2007) ("The political nature of the district attorney's office reinforces the prosecutor's role as zealous advocate. As elected officials, district attorneys use high conviction rates as measures of success, currying public favor for their
prosecutors to act as agents—the substitute eyes and ears for the public—as they complete their tasks, which include overseeing the criminal justice market with the public's conscience. This deep-rooted faith in the power of the democratic system lulls voters into entrusting judges and prosecutors with supervision over the criminal justice system and all the exchanges that occur within it.

But the degree to which the public has reason to rely so heavily on its own power to monitor judges and prosecutors as overseers is questionable. Members of the community can only hold their public officials accountable when they are sufficiently informed about the decisions that the officials make. Yet the public has little meaningful opportunity to learn about plea bargaining decisions because prosecutors rarely publicly report the existence—let alone the details—of the plea agreements they tender to defendants day after day. Furthermore, the number of convictions procured by guilty plea are available in public records, but those records do not indicate whether those convictions resulted from plea bargaining, nor do they reveal the details of any such underlying bargains. The United States Bureau of Justice Statistics reports the annual percentage of cases resolved by guilty plea, but notes that:

[The percentage of convictions procured by guilty plea] is not the same [number] as the percentage of felony convictions that involved a plea bargain between the prosecution and the defense. Plea bargains, in which the defendant agrees to plead guilty in exchange for dropped or reduced charges or in exchange for a reduced sentence, is a common practice in the criminal justice system. The proportion of those who pleaded guilty as part of a plea bargain is not known.

As a result, the public does not possess the knowledge it needs to "police" prosecutors and judges with regard to plea bargains. Yet the criminal justice market remains open, since the public relies on a power that is virtually unexercisable due to lack of information, and functionally, is little more than a mirage.

current political office and, in some cases, future aspirations, such as advancement to the bench or Congress.


216. Id. (emphasis added).
2. Public Versus Private Participants in Exchange

In addition to the absence or presence of overseers, the identities of participants—as private parties or public officials—in various exchanges also explain why their respective markets experience more or less regulation. In the open market of plea bargaining, one party to the exchange is the government, which incurs intangible costs and accrues benefits on behalf of the public. As the Supreme Court noted in *Boykin v. Alabama*, whenever defendants engage in plea bargaining, they give up certain federal constitutional rights. But those rights are amorphous and abstract. Unlike property or tangible objects, the defendant does not actually “give” anything to anyone when he waives the right to a trial by jury or the right to confront witnesses. Yet on a practical level, by relinquishing certain constitutional rights, the defendant effectively saves a host of resources, time, and effort—the benefit of which devolves to the court, to the prosecutor, and to the tax-paying public that financially supports the criminal justice system.

At the same time, the government gives something seemingly abstract to the defendant in a plea bargain. In charge bargaining, for example, the government forgoes the right to prosecute the defendant for charges that the state otherwise could have pressed. In those cases, the government eliminates any risk of conviction or incarceration that the defendant may have faced with respect to those charges. Similarly, in sentence bargaining, the prosecutor gives up the public’s right to incarcerate an offender for the maximum term allowed by statute. It is unclear who bears what cost as a result of the decreased incarceration time or the decision to drop charges. The most that can be said is that society collectively bears the cost (if any) of the defendant’s relief from prosecution on certain charges or his early release from prison, and that the government’s role as a party in the criminal justice market enables these exchanges of intangible costs and benefits.

218. See Wippman, supra note 33, at 869–70.
220. See People v. Killebrew, 330 N.W.2d 834, 838 (Mich. 1982) (finding that “the prosecuting attorney, after conference with the defendant, may present to the court a sentence agreement stating that the parties agree that a specifically designated sentence is the appropriate disposition of the case[ ]”).
Since the benefits and costs exchanged in the criminal justice market are abstract, vague, and dispersed throughout the entire population, there is little reason for the public to suspect that prosecutors, who presumably act on behalf of the community, have any incentive to coerce particular defendants through plea bargaining. Even though they directly participate in the trade, prosecutors theoretically do not have a personal stake in the outcome of each bargain. Therefore, the criminal justice market may remain safely open, because the risk of coercion or undue influence from prosecutors, who have no direct or personal incentives to force pleas out of any given defendants, is relatively low.

In contrast, the human body market involves direct and more tangible exchanges between private parties. In all cases, private parties—with the occasional clinic or tissue bank serving as intermediaries—trade with each other, and individuals bear the resulting gains and losses. And money changes hands in every transaction: from client to prostitute; from commissioning parent to surrogate; from recipients of "donated" eggs or sperm, to their "donors." Therefore, the identities of traders and the benefits and costs incurred on either side of the exchange are clear, unlike the criminal justice market, in which costs and benefits accrue on behalf of an amorphous "general public."

The foregoing explains why the human body market is more closely regulated than the criminal justice market. The difference stems from a general suspicion that private parties will be reluctant to police themselves and curb the risks of coercion inherent in many exchanges related to the human body. Money's role as the primary currency of exchange in unsurveilled transactions triggers concerns that an open market renders poor people vulnerable to exploitation by the rich.\textsuperscript{221} Naturally, some exceptions are permitted, as evidenced by sections of the human body market that remain open for trade. After all, if the body parts being bought and sold are regenerable or non-vital resources, there is less at stake in a forced sale. Furthermore, the fact that the resources are not scarce signals a greater supply, as well as increased opportunity and means for demand to be filled. These factors reduce the risk that private parties will exert undue pressure over one another to force sales. Therefore, the law permits a rela-

\textsuperscript{221} Margaret Bichler, \textit{Lesson Learned: Why Federal Stem Cell Policy Must Be Informed by Minority Disadvantage in Organ Allocation}, 27 B.C. THIRD WORLD L.J. 455, 460 (2007) ("[I]mpoverished populations abroad are exploited by wealthy organ donees who buy their organs for minimal compensation.").
tively open market with respect to the particular exchanges to which those factors apply.

IV. South Carolina Bill—Intersection of the Two Markets

SB 480 is unique because it intersects two legal traditions that ordinarily have neither reason nor occasion to interact. It also reveals that the rules governing the two markets arrive at contradictory results. The bill proposes an exchange within the open market of the criminal justice system—but it simultaneously involves a kidney “donation” that seems to fall squarely within NOTA’s ban on organ sales. At this intersection of two well-established legal traditions, which tradition should have the right-of-way? In the final part of this Article, Sections A and B present cogent analyses made from each perspective; Section C distinguishes SB 480 from the issue of chemical castration, which to some extent resembles this intersection of the human body and criminal justice; and Section D explains which market, in the end, could have been forced to yield had this bill proposal advanced beyond the introductory stage.

A. The Criminal Justice Market Perspective

An examination of SB 480 through the lens of the criminal justice system in a vacuum suggests that the bill proposal falls comfortably within the strictures of voluntariness that bounded the plea bargaining market. In the seminal cases outlining the doctrine of plea bargaining, courts determined whether impermissible coercion, marked by prosecutors’ “improper threats,” had occurred. In the absence of threats of physical harm, bribes, or other activities outside the acceptable realm of prosecutorial power, courts consistently ruled prosecutorial plea offers were non-coercive, and defendants’ subsequent pleas were valid.


223. See supra Part I.B (discussing the appropriateness of threatening prosecution of a defendant’s family members when it is within the prosecutor’s discretion to pursue prosecution of those third parties).

224. See Miles v. Dorsey, 61 F.3d 1459, 1464 (10th Cir. 1995).
The key determinant lay in the court’s central belief that as long as the prosecutor merely threatened to do what he originally had a right to do, the prosecutor’s “threat” was proper.\(^2\)\(^2\)\(^5\) Therefore, since Jonathan Pollard’s prosecutor had probable cause to charge his wife Anne with a crime, the prosecutor could use the threat of that charge as leverage in plea bargaining with Jonathan.\(^2\)\(^2\)\(^6\) Similarly, even though defendant Paul Hayes was not initially charged under an enhanced sentencing statute, his prosecutor’s threat to bring that additional charge in the face of Hayes’ refusal to plead guilty was viewed by the Supreme Court as a permissible application of pressure that was well within the prosecutor’s realm of acceptable conduct.\(^2\)\(^2\)\(^7\)

With that theoretical framework as a backdrop, SB 480 should pass legal muster when examined from the perspective of the criminal justice system. After all, the bill proposal contemplates an exchange between the state and the prisoner, similar to the structural scheme of plea bargaining, in which the government both oversees and participates in the process. In addition, under the terms of SB 480, the leverage of reduced prison time is within the state’s original scope of power. While it would be impermissible for South Carolina to threaten an extension of the inmate’s sentence unless the prisoner “donated” his kidney, its offer to abbreviate the sentence length—as the bill proposal suggests—is permissible because the state has a right to incarcerate a convict for the full length of the term originally imposed at sentencing. Thus, the bill proposal is analogous to standard plea bargain offers to reduce charges or decrease prison sentence recommendations in exchange for guilty pleas. Therefore, SB 480 is unobjectionable under the law governing the market of criminal justice as it currently stands, since the proposal does not involve any coercion as courts have understood it in the context of plea bargaining.

Furthermore, the key distinction of public oversight weighs in favor of the South Carolina bill proposal. Under the terms of SB 480, the government would oversee the entire process of exchange in which kidneys were traded for prison time.\(^2\)\(^2\)\(^8\) Just as plea bargains occur within the criminal justice framework—rather than in an un-

\(^{225}\) One of the more extreme examples of plea wiring is illustrated by United States v. Pollard, 959 F.2d 1011 (D.C. Cir. 1992), which is discussed supra Part I.B.2.d.

\(^{226}\) See Pollard, 959 F.2d 1011.


\(^{228}\) Under the terms of the proposed bill, the agency head of the Department of Corrections, a government actor, would have discretion to “award up to one hundred eighty days of good conduct credits to any inmate who performs a particularly meritorious or humanitarian act.” S.B. 480, 117th Gen. Assemb., Reg. Sess. (S.C. 2007).
supervised space between two common citizens—the bill contemplates a trade made under the government’s presumably watchful eye. In propounding the bill proposal, Senator Anderson even reassured the public that, “We would check that this was voluntary and [prisoners] had all the information” and “[i]t would not be forced upon them.”229 His promise was offered to invoke the public’s trust that courts and other officials would supervise and ensure the legitimacy of the resulting trades.

In addition to government oversight, the buffer of government participation in the transaction also suggests that SB 480 should survive legal scrutiny. Under this scheme, an inmate donates his kidney, and the government reduces his prison sentence by 180 days.230 That arrangement is abstractly comparable to sentence bargaining, in which the government and the defendant are parties to a trade; the exchange now at issue simply occurs after sentencing, rather than before. With the government playing both supervisor and participant, citizens may feel satisfied with a false sense of security that they can hold judges and prosecutors accountable. This leads to the conclusion that the kidney-for-time market proposed by SB 480 should be open.

B. The Human Body Market Perspective

The pushback to the foregoing arguments finds fuel in the fact that SB 480 involves non-regenerable and scarce body parts, the exchange of which is wholly prohibited by federal law. NOTA expressly proscribes the trading of any human organ—including a kidney—for “valuable consideration.”231 The bill proposal contemplates a six-month reduction of prison time for the “donation” of a prisoner’s kidney.232 Certainly, those 180 days must be considered “valuable consideration” for purposes of NOTA. Liberty, unlike monetary compensation, is not quantifiable, but it is still undeniably valuable. It is so highly prized, in fact, that the government has, through the Fifth233 and Fourteenth234 Amendments, prohibited itself from taking away the liberty of its citizens without due process. These constitu-

229. Jarvie, supra note 9, at A25.
230. See S.C. S.B. 480; see also Stone, supra note 7.
233. “No person shall . . . be deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. V.
234. “[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .” U.S. Const. amend. XIV, § 1.
tional provisions represent societal recognition that liberty is a right of paramount value to all citizens.

Furthermore, on a personal level, liberty can be reasonably considered "valuable consideration" to any inmate who would be willing to donate a kidney under the legislative proposal. After all, if the extra six months of freedom meant nothing to the inmate, the South Carolina bill would present no extra inducement, and inmates would presumably donate their kidneys even without the promise of any such incentive. But such an idea is ludicrous. In fact, the dearth of such altruism created the perceived need for this bill in the first instance. In sum, when SB 480 is examined simply under the lens of laws governing the human body market, it is clear that NOTA renders the bill proposal moot, since the proposed exchange of kidneys for the "valuable consideration" of a mitigated prison sentence violates federal law.235

Furthermore, although the analysis in Section A demonstrates that government participation in the SB 480 scheme should add to its credibility, a more critical examination of the bill reveals a troubling complexity. Benefits gained from a defendant's plea bargain accrue to the entire society through decreased expenditures of publicly-funded time and resources. In stark contrast, benefits gained from a prisoner's participation in the SB 480 scheme would serve the needs of a single person, the sole beneficiary of the "donated" kidney. Therefore, SB 480 actually represents a hybrid scheme in which the government participates in an exchange of costs and benefits only on a facial level. Because the government merely passes the benefit (in the form of a kidney) on to a private party, the trade functionally occurs between two private individuals—and the inmate sacrifices his kidney for the sake of another citizen. Rather than representing the general public and passing on benefits to broader society, the government's role under the bill proposal is reduced to that of a broker who confers a benefit to the inmate in order to facilitate a transaction between two private parties. The twisted structure of this hybrid scheme thus departs from the strict government/defendant relationship inherent in plea bargaining. Under this analysis of the bill proposal, based strictly on the

235. Notably, the news media proffered this very analysis when S.B. 480 was first announced. See, e.g., Stone, supra note 7 ("Chances are the bill will not pass because it's probably going to be considered a violation of federal law. Congress passed the National Organ Transplant Act in 1984 that makes it a federal crime to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation. It is likely 180 days off a sentence could constitute 'valuable consideration.'" (internal citations omitted)).
rules governing the human body market, it seems obvious that the market contemplated by SB 480 should be firmly closed.

C. A Look at a Close Cousin: Chemical Castration

Although no other statutes directly pit the criminal justice market against the human body market in the way SB 480 does, laws in the several states that authorize chemical castration of sex offenders provide useful, current examples of how the worlds of criminal justice and physical invasion collide in contemporary America. In 1996, California enacted the first chemical castration law in the United States. The law required certain sex offenders to receive injections of a synthetic female hormone that significantly—or sometimes completely—deprives them of sexual desire and ability to function sexually. Six other states (Florida, Iowa, Louisiana, Montana, Oregon, and Wisconsin) have also enacted chemical castration laws. The laws governing chemical castration in these states are not uniform, but most condition the mandate for chemical castration based on three factors: the specific type of offense committed, the victim's age, and evidence of recidivism.

For example, Florida imposes chemical castration in cases involving sexual battery, while Iowa issues orders for castration in a broader range of cases, including indecent contact and sexual exploitation of children. In all states, however, castration is limited to cases involving sexual offenses. Furthermore, most states determine that a convict is eligible for chemical castration only if the victim was under a certain age, and the ceilings for these age limits range from twelve to fifteen years. Recidivism is a crucial factor as well; the majority of states with chemical castration statutes do not impose any treatment upon a first conviction for a sex offense. Only when the defendant

237. Id. at 577.
238. Id. at 562.
239. Id. at 579.
240. Id.
241. Id.
242. See id. at 579–81. For the convict to be eligible for chemical castration in Iowa, Louisiana, and California, the victim must be twelve years or younger; in Wisconsin, the victim must be thirteen years old or younger; and in Montana, the victim must be fifteen years or younger. See id. at 581.
243. See id. at 578–79.
is convicted again do the state statutes authorize chemical castration as part of their punishment.\textsuperscript{244}

In states that allow it, chemical castration has been used to negotiate the length of prison sentences; in that sense, it assumes a "market" dimension similar to that present in both plea bargaining and SB 480.\textsuperscript{245} In 2005, a recidivist sex offender in Louisiana was convicted by plea of aggravated rape of two girls, aged eleven and thirteen, and the judge sentenced him to twenty-five years rather than forty years when he volunteered to be surgically castrated.\textsuperscript{246} In Wisconsin, chemical castration may be imposed as a condition of parole or probation, so an inmate may be freed from prison earlier if he consents to the chemical castration.\textsuperscript{247} These examples demonstrate how the laws authorizing chemical and surgical castration intersect the markets of criminal justice and the market relating to one's body.

Although the castration laws bear some resemblance to the South Carolina bill proposal because both pair physical invasiveness with reduced incarceration time, a critical comparison shows that they are fundamentally dissimilar. Therefore, although state castration laws have endured both scrutiny and protest in the last ten years, their survival should not be used as predictive indicators of SB 480's fate.

To begin with, unlike castration laws, the kidney-for-time scheme does not directly relate an action on the body with an objective of incarceration. Castration statutes demand satisfaction of several factors before castration can be imposed;\textsuperscript{248} these requirements demonstrate that the purpose of castration is to prevent the commission of future crimes. The laws authorize castration only for enumerated sex-related offenses, since invasive physical treatment directly addresses the sexual drive and ability that otherwise enable convicts to commit those particular crimes.\textsuperscript{249} Furthermore, a key purpose of imprisonment of sex offenders is to protect society.\textsuperscript{250} When an individual is chemically or surgically castrated, he nearly or completely loses his sex drive, so the need for imprisonment on that basis is negated. Moreo-

\begin{itemize}
\item \textsuperscript{244} Id. at 578–81.
\item \textsuperscript{245} Lystra Batchoo, Note, \textit{Voluntary Surgical Castration of Sex Offenders: Waiving the Eighth Amendment Protection from Cruel and Unusual Punishment}, 72 \textit{BROOK. L. REV.} 689, 698 (2007).
\item \textsuperscript{246} Id. at 690.
\item \textsuperscript{247} Wis. Stat. § 304.06 (2007).
\item \textsuperscript{248} See Sinneford, supra note 236, at 577–79.
\item \textsuperscript{249} Chemical castration "eliminate[s] the sex drive by drastically reducing the offender's desire and capacity to engage in any form of sexual activity." Id. at 577.
\item \textsuperscript{250} Nora V. Demleitner, \textit{Abusing State Power Or Controlling Risk?: Sex Offender Commitment and Sicherungverwahrung}, 30 \textit{FORDHAM URB. L.J.} 1621, 1629 (2003).
\end{itemize}
ver, statutory requirements regarding the ages of victims, as well as the explicit reservation of castration for individuals who re-offend, also highlight the fact that the bodily intrusion of castration is logically related to its use in the criminal justice system.

Such a relationship is nowhere to be found in SB 480, however. That bill proposal envisions a system in which the government bargains with convicts to harvest their kidneys without any regard to the crimes that they committed, specific characteristics of their victims, their risks of recidivism, or any other discrete factor. The kidney “donations” thus fail to serve any objective of criminal justice or incarceration. Instead, this bill proposal is designed to harness governmental authority over the incarceration system and to leverage that power to procure more kidneys from prisoners within its control and jurisdiction, in order to meet a desperate need outside prison walls. Attempts to justify SB 480 based on the acceptance of chemical castration statutes are logically futile because of this fundamental difference.

D. The Rule of Law

Intuitively, the preceding analyses should settle the question of the bill proposal’s viability. Despite the apparent legitimacy of SB 480 when viewed in isolation in the field of criminal justice, its suggested exchange of human kidneys for liberty from prison is plainly proscribed by federal law. Even though the exchanges would occur under the supervision of the courts, and despite direct government participation in the trade, NOTA prohibits such trades. The fundamental American concept of “rule of law” dictates that the government may only do that which is specifically authorized by law. So, if private citizens may not exchange body organs for valuable consideration, certainly the government must similarly be restricted.

A brief detour to examine common law blackmail doctrine, however, reveals a surprising retort. Common law blackmail involves a conditional threat to do something that, in the absence of such a threat, might otherwise be lawful. Put another way, the two parts of a blackmail threat are independently legal, but illegal when combined in a certain structure.

253. Id.
A popular example presupposes X’s possession of photos revealing the scandal of Y’s adultery. X may approach Y and demand $500; while X is unlikely to find success with such a demand, his action is nonetheless legal. X may also confront Y and threaten to disclose the photos; such a confrontation would likewise be legal. If, however, X approaches Y and makes one threat conditional on the other (“If you do not give me $500, then I will disclose your adulterous relationship”), he commits the crime of blackmail. Scholars have puzzled over the fact that, as Justice Oliver Wendell Holmes stated, “What you may do . . . you may threaten to do,” but “the law of blackmail declares that what you may do you must not conditionally threaten to do.”

It can be difficult, however, to differentiate blackmail from general “hard bargains,” which are lawful. How does one determine, then, the dividing line? According to Professors Northrup and Steen, “The key to distinguishing blackmail from lawful hard bargaining lies in noting blackmail’s distinctive triangular structure,” which involves third-party interests. To illustrate, in the example cited above, the exposure of Y’s adulterous relationship would adversely affect parties besides Y, such as his spouse and children. In other instances, the affected third-party interests may extend beyond individuals to include a group, the state, or the general public.

Since blackmail is unlawful, one would expect that the “rule of law” likewise prohibits the government from engaging in it—yet a second look at plea bargaining reveals that, astonishingly, the opposite is actually true. Some plea bargains that prosecutors tender to defendants essentially contain threats with the same “triangular structure” inherent in classic blackmail. The “wired” plea offer in United States v. Pollard illustrates the triangular structure perfectly.

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254. Id. at 744.
255. Id. at 743 (quoting Vegelahn v. Guntner, 44 N.E. 1077, 1081 (Mass. 1896)).
256. Id.
257. Sandy, supra 251, at 743–44 (“For example, in the canonical blackmail scenario, Blackmailer shows Victim pictures of Victim engaging in adultery and utters to Victim the following proposal: ‘If you do not give me $1000, then I will disclose your adulterous relationship.’ No individual component of the proposal is unlawful.”).
259. See id.
260. See supra Part I.B.2.d (discussing the structure of plea bargaining when a prosecutor uses the threat of incarceration of third parties as a means to induce a defendant to plea bargain).
In Pollard, the prosecutors' "offer" to Jonathan Pollard included a demand—not for payment, but for Jonathan's full cooperation with authorities in the form of a plea, aid in investigation, submission to a polygraph test, and other conditions. Prosecutors joined that demand with a threat of refusal to plea bargain with Jonathan's wife, Anne. In that case, prosecutors had a right to demand a plea bargain—even though they did not have a right to force Jonathan to accept it. Thus, the prosecutors' demand was akin to X's demand for $500 from Y. Jonathan's prosecutors also had a right to withhold the opportunity for plea bargaining with Anne Pollard, since they had probable cause and grounds to press criminal charges against her. Similarly, X had a right to threaten to reveal photographic evidence of Y's adultery.

Significantly, the triangular structure is also present; Jonathan's acceptance or rejection of the prosecutors' plea bargain had great potential to impact his wife. The impact was magnified all the more by the fact that she suffered a serious illness during the three months she spent in jail, following her arrest. It was under these plea wiring conditions that prosecutors gave Jonathan Pollard the "option" of pleading guilty. This analysis, which applies parts of the Pollard case to their corresponding components of common law blackmail doctrine, demonstrates that Jonathan's prosecutors were basically blackmailing him. Any significant difference between plea wiring and blackmail in Pollard's case lies in terminology alone.

This parallel between plea bargaining and blackmail makes shockingly evident a pronounced double standard that the United States legal system applies to private and government actors. Even though plea wiring—a form of plea bargaining—fits perfectly into the theoretical framework of common law blackmail, our legal system nonetheless legitimizes it, ostensibly because it occurs in the public sphere, through public servants serving public functions. The same

262. Id. at 1016.
263. Id. at 1015 ("Anne Henderson Pollard had also been arrested in connection with Pollard's espionage, but the government refused to enter into a plea agreement with her unless he pleaded guilty as well.").
264. Id. at 1021.
265. The court noted:

Mrs. Pollard had, for several years, suffered from a debilitating gastrointestinal disorder that had not been accurately diagnosed prior to her arrest. During her stay in the D.C. jail, she was seriously ill, losing forty pounds over a period of three months. In February of 1986, Mrs. Pollard was released on bail.

Id. at 1016.
lenity does not apply, however, to common citizens who impose conditional threats on others in the private sphere.

NOTA’s ban on the exchange of organs for “valuable consideration” ought to absolutely bar SB 480 from passage. But the double standard manifested so clearly through plea wiring blatantly ignores the “rule of law” concept, which demands that the government obey its own rules. The same hypocritical distinction could very well justify the government’s exchange of kidneys for prison time pursuant to the South Carolina bill proposal, despite the federal ban on organ sales.

Undoubtedly, South Carolina legislators created this bill proposal in response to a grave necessity for human kidneys. In order to survive the scrutiny and restrictions of NOTA, however, the bill’s sponsors needed to subsume SB 480 under a well-established legal tradition. They found their perfect solution in plea bargaining, which has garnered sufficient support to survive over a century, and is now considered an indispensable fixture in the American judicial system. Desperate to increase the supply of human organs for their constituents, the bill’s legislative proponents conveniently framed their proposal as another form of government/defendant interaction akin to plea bargaining. By collapsing and diverting the bill proposal—the essence of which violates organ-selling laws—into the theoretical framework of the criminal justice system, the bill’s legislative sponsors effectively shrouded triggers for concerns about coercion, lack of public accountability, and scant official oversight, from immediate view. Therein lay the genius of SB 480.

Conclusion

Necessity is the mother of invention, and the need for more efficient case disposal led to the advent and now-entrenched tradition of plea bargaining. Authors of the South Carolina bill also attempted to serve a great need in society by inventing a scheme whereby the government could leverage its power to harvest organs from prisoners, a convenient and numerous pool of individuals within its authority and control.266 In the end, the South Carolina bill was shelved and did not move forward, as predicted.267 The bill quickly caught media atten-

266. Adam Liptak, Inmate Count in U.S. Dwarfs Other Nations’, N.Y. TIMES, Apr. 23, 2008, at A1 (“[The United States] has 751 people in prison or jail for every 100,000 in population. (If you count only adults, one in 100 Americans is locked up.)”)

267. The bill was last referred to the Committee on Corrections and Penology on February 22, 2007; since then, no further action has been taken. See S.B. 480, 117th Gen. Assemb., Reg. Sess. (S.C. 2007).
tion in its early introductory stages, and many people assumed that if it became law, it would be overturned as violative of federal law.268

Yet the power of the criminal justice system is stalwart. Citizens may want to believe that when the market of criminal justice meets the market of body parts, the law will protect the dignity of all people as human beings. They may hope that there are enforceable boundaries set firmly in place to prevent bad inventions from materializing into oppressive nightmares. This Article’s analysis of the South Carolina bill issues a warning as it demonstrates that the government can sometimes operate “above the law.” SB 480 could feasibly survive NOTA’s ban on organ sales simply because the bill contemplates government participation and supervision, just as plea wiring persists despite laws against blackmail. The bill demonstrates that legislators possess potentially great power to co-opt one value—the protection of scarce and vital human organs from coercive influence—and subsume it under the guise of another well-established tradition, all in the name of criminal justice.
