

## The Exchange of Inmate Organs for Liberty: Diminishing the “Yuck Factor” in the Bioethics Repugnance Debate

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Mississippi Governor Haley Barbour announced the release of Jamie and Gladys Scott on December 29, 2010.<sup>1</sup> This decision indefinitely suspended their double life sentences and freed them after sixteen years in prison for armed robbery.<sup>2</sup> The price of their liberty: Gladys’s kidney.<sup>3</sup>

Barbour released Jamie Scott on the condition that she comply with the usual parole obligations.<sup>4</sup> However, in his official statement regarding the release of the Scott Sisters, Governor Barbour said that “Gladys Scott’s release is conditioned on her donating one of her kidneys to her sister, a procedure which should be scheduled with urgency.”<sup>5</sup>

The story of the Scott Sisters’ release and the condition imposed upon Gladys Scott reflexively elicits an intense and typically negative response from law professors, lawyers, doctors and lay people alike.<sup>6</sup> But, what is it

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1. *Gov. Barbour’s Statement Regarding Release of Scott Sisters*, GOVERNORBARBOUR.COM (Dec. 29, 2010), [www.governorbarbour.com/news/2010/dec/12.29.10scottsistersrelease.html](http://www.governorbarbour.com/news/2010/dec/12.29.10scottsistersrelease.html).

2. *Id.*

3. *Id.*

4. See Saeed Shabazz, *Scott Sisters [sic] Suffering a sSgn [sic] of Criminal Justice Failures*, CINCINNATI HERALD, May 14, 2011, [http://www.thecincinnatiherald.com/news/2011-0514/News/Scott\\_Sisters\\_Suffering\\_a\\_sSgn\\_of\\_Criminal\\_Justice.html](http://www.thecincinnatiherald.com/news/2011-0514/News/Scott_Sisters_Suffering_a_sSgn_of_Criminal_Justice.html) (stating that the Scott Sisters “are required to undergo constant supervision, steer clear of any associates with criminal records, pay \$52 a month to the state of Mississippi for upkeep and cannot travel without court permission.”).

5. *Gov. Barbour’s Statement Regarding Release of Scott Sisters*, *supra* note 1.

6. This negative response is not just limited to that of the author’s friends and acquaintances.

about this story that causes the listener to bristle, raise an eyebrow, or screw her face into a frown? Is it because the required kidney donation is likely illegal?<sup>7</sup> Those who have heard about the Scott Sisters do not focus on the probable illegality, though some do recognize it. Rather, they focus specifically on the “yuck factor”—a strong sentiment that what they just heard is unfair, unseemly, or just plain wrong.

The term “yuck factor” is shorthand to express that one’s negative gut reaction to a thing, action, or idea proves it is intrinsically harmful and ultimately unethical.<sup>8</sup> In the field of bioethics, arguments are rooted in the “yuck factor” in an effort to defeat the usage or expansion of biotechnological advances such as human cloning,<sup>9</sup> nanotechnology (including nanobiotechnology and nanomedicine),<sup>10</sup> assisted human reproduction,<sup>11</sup> human-animal chimera creation,<sup>12</sup> human biological

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*See Organ Transplant Is Sister’s Key to Freedom*, L.A. TIMES, Dec. 31, 2010, available at 2010 WLNR 25667808 (citing the negative reactions of bioethicists and organ transplantation experts).

7. The likely illegality of Governor Barbour’s clemency condition is discussed more fully in Part I. *See infra* Part I.

8. “Yuck factor” has come to be used synonymously with the phrase “the wisdom of repugnance,” which was coined by Leon R. Kass, former chairman of the President’s Council on Bioethics (2002–2005). *See, e.g.*, David Orentlicher, *Cloning and the Preservation of Family Integrity*, 59 LA. L. REV. 1019, 1026–27 (1999); Ronald Chester, *Cloning Embryos from Adult Human Beings: The Relative Merits of Reproductive, Research and Therapeutic Uses*, 39 NEW ENG. L. REV. 583, 594 (2004–2005). Kass, in discussing his opposition to human cloning argued that “in crucial [bioethical] cases, . . . repugnance is the emotional expression of deep wisdom, beyond [a person’s] power to fully articulate it.” Leon Kass, *The Wisdom of Repugnance*, 216 NEW REPUBLIC 22, 17–26 (June 2, 1997); Leon Kass & James Wilson, *The Wisdom of Repugnance*, in THE ETHICS OF HUMAN CLONING 3–59 (1998).

9. Leon R. Kass, *The Wisdom of Repugnance: Why We Should Ban the Cloning of Humans*, 32 VAL. U. L. REV. 679 (1998). *But see* Orentlicher, *supra* note 8, at 1027 (agreeing that that which feels yucky does raise a “red flag”, but the proper response is “further analysis” to discern whether the discomfort is irrational or warranted).

10. *See* Gary E. Marchant et al., *What Does the History of Technology Regulation Teach Us About Nano Oversight?*, 37 J.L. MED. & ETHICS 724, 727 (2009) (noting that “[f]or many emerging technologies, including nanotechnology, public concerns tend to have a strong social or ethical element” that includes “the ever-present ‘yuck’ factor or repugnance in response to technological developments that cause discomfort or unease”).

11. *See* Maneesha Deckha, *Holding onto Humanity: Animals, Dignity, and Anxiety in Canada’s Assisted Human Reproduction Act*, 5 UNBOUND: HARV. J. LEGAL LEFT 21, 51–52 (2009), available at [http://www.legalleft.org/pdfs/2009/2-holding\\_onto\\_humanity.pdf](http://www.legalleft.org/pdfs/2009/2-holding_onto_humanity.pdf) (concluding that the “‘yuck’ factor was influential in generating the prohibitions” contained in the Canadian Assisted Human Reproduction Act).

12. *See* Rebecca A. Ballard, *Animal/Human Hybrids and Chimeras: What Are They? Why Are They Being Created? And What Attempts Have Been Made to Regulate Them?*, 12 MICH. ST. U. J. MED. & L. 296, 319 (2008) (arguing that if society desires cures to various diseases, “some sacrifices . . . have to be made; typically that means developing a comfort level with what is frequently refer[red] to as our initial ‘yuck’ factor”); Tia Sherringham, Comment, *Mice, Men, and Monsters: Opposition to Chimera Research and the Scope of Federal Regulation*, 96 CALIF. L. REV. 765, 775–776 (2008) (identifying the “instinctive hostility” that some experience at the contemplation of the

enhancement (such as steroid usage and certain cosmetic surgeries),<sup>13</sup> and human embryonic stem cell research.<sup>14</sup> Critics, however, note that “yuck factor” arguments are, by their very nature, anti-intellectual in that such arguments allow their proponents to eschew logic in favor of an appeal to emotion.<sup>15</sup> Moreover, critics voice concerns that feelings-based policymaking in the field of biotechnology could lead to discriminatory policymaking in other areas that those currently wielding power find to be personally distasteful.<sup>16</sup>

The same repugnant sentiment that accompanies Gladys Scott’s kidney-liberty exchange has been noted by those who oppose systems that would allow living donors to sell their organs to prospective donees.<sup>17</sup> However, critics of living donor organ sales have developed their arguments well beyond “yuck” or unreasoned repugnance, contending that under such

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creation of a human-animal chimera as a “yuck factor” response).

13. Henry T. Greely, *Remarks on Human Biological Enhancement*, 56 U. KAN. L. REV. 1139, 1153–54 (2008).

14. See Susan E. Wills, *Federal Funding of Human Embryonic Stem Cell Research - Illegal, Unethical and Unnecessary*, 18 J. CONTEMP. HEALTH L. & POL’Y 95, 105 (2001) (noting that the Human Embryonic Research Panel of the National Institute of Health (NIH) had rejected research proposals that it thought would fail the “‘public yuck factor’ test”); see also J. Frederick Miller, Jr., Comment, *Promoting Life?: Embryonic Stem Cell Research Legislation*, 52 CATH. U. L. REV. 437, 473 n.229 (2003) (arguing that the “yuck factor” response engendered by cloning could apply to embryonic stem cell research).

15. See MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME AND THE LAW* 74 (2004) (arguing that disgust is “of dubious reliability . . . in the life of the law”); Chester, *supra* note 8, at 594 (characterizing “yuck factor” arguments as “weak” responses to the utility of reproductive cloning); Greely, *supra* note 13, at 1153–54 (criticizing “yuck factor” arguments in the context of human biological enhancements as lacking “intellectual meat”); Sherringham, *supra* note 12, at 776 (urging that, in the context of human-animal chimera creation, “yuck factor”-based criticism is insufficiently persuasive unless coupled with a reasoned explanation of the reaction); Steven Pinker, *The Stupidity of Dignity: Conservative Bioethics’ Latest, Most Dangerous Ploy*, NEW REPUBLIC, May 2008, <http://pinker.wjh.harvard.edu/articles/media/The%20Stupidity%20of%20Dignity.htm> (critiquing Leon Kass’s theory regarding the “wisdom of repugnance” on the grounds that the notion of human dignity propounded by Kass is “a squishy, subjective notion, hardly up to the heavyweight moral demands assigned to it”).

16. See Deckha, *supra* note 11, at 52 (“[T]he danger of listening to a ‘yuck’ response resides in the fact that prejudices and hegemonic norms may cultivate that response.”); John Kunich, *The Tears of a Clone: The Unintended Consequences of Bans on Cloning*, 25 WOMEN’S RTS. L. REP. 195, 196 (2004) (arguing that using the “yuck factor” as a basis for banning human cloning can “lead to erosions of other cherished personal liberties and rights”).

17. These critics usually couch their opposition in terms of forgoing commodification in favor of preserving human dignity. See, e.g., Cynthia B. Cohen, *Public Policy and the Sale of Human Organs*, 12 KENNEDY INST. ETHICS J. 1, 48–49, 58 (2002) (arguing that the payment of organ donors would constitute a “den[al] of embodied human dignity . . . would violate a fundamental conviction . . . that we should not treat human beings . . . as commodities”); Francis L. Delmonico et al., *Ethical Incentives—Not Payment—for Organ Donation*, 346 NEW ENG. J. MED. 2002, 2004 (2002) (likening the sale of human organs to prostitution). In addition to critics of living donor sales, there are also a host of critics of sales of cadaveric organs. However, cadaveric sales are not within the scope of this Article.

systems healthy poor people who lack the information necessary to give informed consent will be coerced by the ailing rich into selling their organs.<sup>18</sup> They further urge that these organ vendors will ultimately be disadvantaged physically and financially.<sup>19</sup> Critics also note the potential vendor's loss (or partial loss) of an organ, for which she may not have received adequate medical care, and the desperation that may have caused her to misrepresent her eligibility to donate in order to reap the perceived financial benefits of donating, as among the hazards of living donor sales.<sup>20</sup> However, the "yuck factor" engendered by Governor Barbour's grant of conditional release appears to be based upon its coercive nature.<sup>21</sup> As noted, those who disfavor organ sales argue that those lacking financial means will be forced into selling their body parts to the highest bidder.<sup>22</sup> In the Scott Sisters' case, coercion takes the form of the powerful, white, male Governor of Mississippi requiring an imprisoned Black<sup>23</sup> woman to forfeit an organ in order to secure her freedom and that of her sister.<sup>24</sup>

What happens if the Scott Sisters' story is replicated—if it is multiplied

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18. See Delmonico et al., *supra* note 17, at 2005 ("[A] poor person feels compelled to risk death for the sole purpose of obtaining monetary payment for a body part.").

19. See Madhav Goyal et al., *Economic and Health Consequences of Selling a Kidney in India*, 288 JAMA 1589, 1591 (2002) (concluding that those who sold their organs in Chennai, India were ultimately disadvantaged by continued poverty coupled with poor health); Jeffrey P. Kahn, *Studying Organ Sales: Short Term Profits, Long Term Suffering*, CNN HEALTH (Oct. 10, 2002), [http://articles.cnn.com/2002-10-01/health/ethics.matters.selling.organs\\_1\\_kidney-donors-organ-sales-organ-donors?\\_s=PM:HEALTH](http://articles.cnn.com/2002-10-01/health/ethics.matters.selling.organs_1_kidney-donors-organ-sales-organ-donors?_s=PM:HEALTH) (arguing that Goyal's conclusions regarding the Indian organ vendors is relevant to discussions of proposed U.S. organ sales). *But see* James Stacey Taylor & Mary C. Simmerling, *Donor Compensation Without Exploitation*, in WHEN ALTRUISM ISN'T ENOUGH: THE CASE FOR COMPENSATING KIDNEY DONORS 50, 59–60 (Sally Satel ed., 2008) (arguing that Goyal's findings have little relevance in the U.S. context).

20. See Gabriel M. Danovitch & Alan B. Leichtman, *Kidney Vending: The 'Trojan Horse' of Organ Transplantation*, 1 CLINICAL J. AM. SOC'Y NEPHROLOGY 1133, 1133 (2006) ("In a vending system, in which regard for the recipient is divorced from the motivation for donation, powerful financial incentives for a donor not to be forthcoming about critical information could affect both their own health and that of the recipient . . ."). *But see* Taylor & Simmerling, *supra* note 19, at 58 (advocating that proper screening will eliminate donor deception regarding eligibility).

21. See *infra* Part III.A (noting the Scott Sisters' relative powerlessness as compared to Barbour and the "yuck factor" engendered by the convergence of Jamie's need for a kidney with Barbour's political aspirations).

22. Delmonico et al., *supra* note 17, at 2004.

23. This Article uses the capitalized term "Black" when referring to people of African descent individually or collectively because "Blacks, like Asians, Latinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun." Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988). It follows then that this Article does not capitalize "white," "which is not a proper noun, since whites do not constitute a specific cultural group." Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 n.6 (1991).

24. *Gov. Barbour's Statement Regarding Release of Scott Sisters*, *supra* note 1.

across prison populations? If programs were put into place that allowed prison inmates to trade their kidneys (or portions of their lungs, livers, or pancreases) for liberty, it follows that the “yuck factor” would be multiplied exponentially. However, it must be noted that in devising his peculiar condition of release, Governor Barbour chose a course of action that was, ironically, unobjectionable to the civil rights community (including the state’s Black activist community) that was clamoring for the release of the Scott Sisters.<sup>25</sup> The Scott Sisters’ clemency case is particularly intriguing in that civil rights activists cheered, rather than crying, “Yuck!” and objecting to the terms of release imposed by the Governor.<sup>26</sup> The outcry from some bioethicists notwithstanding, this scenario begs the question of why we should not allow other prisoners—those to whom serendipity has not provided an ailing sister—to do the same and whether it is in fact possible to do so while avoiding, or at least mitigating repugnance.

This Article contemplates whether the National Organ Transplant Act’s (NOTA)<sup>27</sup> prohibition against the trading of organs for “valuable

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25. See *Statement by Benjamin Todd Jealous on the Release of the Scott Sisters*, NAACP.ORG (Dec. 31, 2010), <http://www.naacp.org/blog/entry/statement-by-benjamin-todd-jealous-on-the-release-of-the-scott-sisters/> (praising the local NAACP chapter, the local Black newspaper, the *Jackson Advocate*, a “whole family of civil and human rights organizations,” and a “chorus of activists” for their efforts in seeking the release of the Scott Sisters).

26. See *Id.* (Governor Barbour’s release of the Scott Sisters “is a shining example of the way clemency power should be used”); *Mississippi Governor Wants Sick Inmates’ Cases Reviewed*, CLARION-LEDGER, Dec. 31, 2010, available at 2010 WLNR 25707146 (noting that “numerous advocates [including Ben Jealous, president and CEO of the NAACP, Derrick Johnson, president of the Mississippi NAACP, and Jaribu Hall, executive director of the Mississippi Workers Center for Human Rights gathered to] . . . celebrate the governor’s decision regarding the [release of] the Scott Sisters). Part of the lack of a civil rights outcry may be from the NAACP’s belief that the kidney donation condition imposed on Gladys is unenforceable. Jimmie E. Gates, *Scott Sister Must Lose 120 Lbs.*, CLARION-LEDGER, Jan. 26, 2011, available at 2011 WLNR 1586366. NAACP President Benjamin Jealous announced that Governor Barbour assured him that Gladys would not be returned to prison in the event that Jamie and Gladys are not a proper tissue match. Krissah Thompson, *Prison Release “Conditioned On” Kidney Donation*, WASH. POST, Dec. 31, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/30/AR2010123004722.html>. Likewise, the Scott Sisters’ attorney, Jackson, Mississippi City Councilman Chokwe Lumumba, said that the Governor’s attorney noted that Gladys would not be imprisoned if the transplant cannot take place for medical reasons. *Scott Sisters’ Mom Plans Homecoming*, CLARION-LEDGER, Dec. 31, 2010, available at 2010 WLNR 25707120. These revelations prompted one commentator to question whether Gladys’s release can truly be said to be conditioned upon her donating her kidney to Jamie. Christopher M. Burkle, *The Mississippi Decision Exchanging Parole for Kidney Donation: Is This the Beginning of Change for Altruistic-Based Human Organ Donation Policy in the United States?*, 86 MAYO CLINIC PROC. 414, 417 (2011). The lack of pushback from the general public in Mississippi may in part stem from claims by both the governor and Gladys Scott that she had previously volunteered to donate her kidney to Jamie. *Id.* See discussion *infra* Part I (regarding the importance of whether Gladys actually did volunteer).

27. National Organ Transplant Act, 42 U.S.C. §§ 273–74 (2004). National Organ Transplant Act of 1984, Pub. L. No. 98–507, tit. 3, §301, 98 Stat. 2346 (codified as amended at 42 U.S.C. § 274e (2006)).

consideration”<sup>28</sup> should include an exception that would allow state and federal prison inmates to donate organs in exchange for release or credit toward release. Such a stance surely raises questions regarding whether the State would be coercing the forfeiture of body parts as punishment or in exchange for freedom. Moreover, critics may question the potential effects on the criminal justice system including the permissibility or legality of allowing those facing incarceration to bargain their bodies, and conceivably their long-term health, in exchange for reduced prison terms. It must also be noted that “yuck factor” arguments have been used by proponents of the altruistic organ donation system codified by NOTA as one of the bases for keeping the altruistic system in place rather than allowing any measure of consideration to be given to donors.<sup>29</sup>

Conceivably, such an inmate organ donation program is only feasible if a system is devised to remove the “yuck factor” by eliminating coercion from the equation and by addressing the other concerns that mirror those addressed in the living donor sales debate. Such a program would need to reframe the legal context in which the Scott Sisters’ clemency condition was crafted into one in which a great measure of power and choice resides instead in the hands of the inmate participants. An exception to NOTA’s valuable consideration prohibition could also serve to modernize our current altruistic organ donation policy into one that may allow for future flexibility in responding to needs of both potential donors and donees.

Part I of this Article discusses the legality of the clemency condition imposed upon Gladys Scott. Part II frames the background of the Scott Sisters/Haley Barbour narrative, specifically focusing on the interplay of the parties’ particular histories with Professor Derrick Bell’s theory of interest convergence. Finally, in Part III, this Article proposes a framework for a program wherein inmates may be able to exchange organs for liberty without triggering a “yuck factor” response.

#### I. NOTA AND THE IL(LEGALITY) OF GOVERNOR BARBOUR’S KIDNEY CLEMENCY CONDITION

This Part discusses the legality of Barbour’s kidney clemency condition in the context of the current kidney shortage. It examines the prohibition on organ purchases imposed by NOTA and various state and federal attempts to provide donor incentives short of prohibited direct cash payments to donors

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28. National Organ Transplant Act of 1984, Pub. L. No. 98–507, tit. 3, §301, 98 Stat. 2346 (codified as amended at 42 U.S.C. §274e (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 . . . .”) (emphasis added).

29. See, e.g., Delmonico et al., *supra* note 17 (equating the exchange of human organs for consideration with a practice commonly established as repugnant—prostitution).

or their families. Finally, this Part concludes that the liberty-kidney exchange offered by Barbour to Gladys Scott violates Section 301 of NOTA as liberty is “valuable consideration” under the statute.

*A. The Relevant Demographics of the Kidney Shortage*

There were over 115,000 people on the United States organ transplant waiting list by the beginning of the first quarter of 2012.<sup>30</sup> Of those, nearly a third—approximately 93,000—are waiting for a kidney.<sup>31</sup> However, only approximately 16,000 kidney transplants are performed each year.<sup>32</sup> Additionally, only a little more than one-third of the kidneys that are transplanted come from living donors,<sup>33</sup> although living-donor kidneys are of a higher overall quality, and survive in a recipient on average for twice as long as deceased-donor kidneys.<sup>34</sup>

The shortage of kidney donors, both living and deceased, has resulted in lengthy wait times for kidney transplants; nearly half of the patients on the kidney transplant waiting list have been on the list for two years or more.<sup>35</sup> Nearly a third of hopeful kidney recipients have been waiting for three or more years.<sup>36</sup> The consequences of waiting are oftentimes deadly as between approximately 4,100 and 4,700 people per year die of end-stage renal

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30. Health Res. & Servs. Admin., U.S. Dep’t of Health & Human Servs., *Data, ORGAN PROCUREMENT & TRANSPLANTATION NETWORK*, <http://optn.transplant.hrsa.gov/data> (last visited Oct. 26, 2012) [hereinafter OPTN].

31. *Id.* The data related herein regarding those on the kidney transplant waiting list does not include those individuals who are waiting for a kidney along with another organ.

32. *Id.* (follow “National Data” on side bar; then choose category “Transplant”; choose organ “Kidney”; choose “Transplants by State”).

33. *Id.* (follow “National Data” on side bar; then choose category “Transplant”; choose organ “Kidney”; choose “Living Donor Transplants by State”).

34. Sally Satel, *Introduction*, in *WHEN ALTRUISM ISN’T ENOUGH: THE CASE FOR COMPENSATING KIDNEY DONORS* 1, 5 (Sally Satel ed., 2008).

35. OPTN, *supra* note 30 (follow “Build Advanced” on side bar; then in Step 1 (choose a data category) choose “Waiting List”; in Step 2 (choose report columns), choose “Waiting Time” and leave other options under Step 2 blank; in Step 3 (choose report rows), choose “Ethnicity” and leave other options under Step 3 blank; in Step 4 (choose your style), choose display “Counts” and choose desired format; in the “Optional” section, choose organ “Kidney,” choose count “Candidates” and leave other categories blank).

36. *Id.* (follow “Build Advanced” on side bar; then in Step 1 (choose data) choose “Waiting List”; in Step 2 (choose report columns), choose “Waiting Time” and leave other option under Step 2 blank; in Step 3 (choose report rows), choose “Ethnicity” and leave other options under Step 3 blank; in Step 4 (choose your style), choose display “Counts” and choose desired format; in the “Optional” section, choose organ “Kidney,” choose count “Candidates” and leave other categories blank).

disease (ESRD) while waiting for a kidney.<sup>37</sup>

The statistics for Black ESRD patients are even more alarming than the overall national data. Blacks represent only thirteen percent of the United States population,<sup>38</sup> but, disproportionately, represent approximately thirty percent of those on the kidney waiting list.<sup>39</sup> The number of Black patients who have been hoping for a kidney for two years or more and three years or more are fifty-three percent and thirty-six percent respectively.<sup>40</sup> Blacks who are on the kidney waiting list also die at a rate averaging approximately 1,500 people per year—a number that represents thirty-eight percent of all kidney waiting list deaths.<sup>41</sup>

The number of Mississippians anticipating an organ transplant is quite small relative to the rest of the nation: 215 individuals.<sup>42</sup> These patients are almost exclusively in need of kidneys.<sup>43</sup> Black Mississippians are more disproportionately represented on that state's kidney transplant waiting list than nationally, as approximately three-quarters of Mississippi's ESRD patients on the kidney waiting list are Black.<sup>44</sup> Blacks, however, make up only thirty-seven percent of Mississippi's total population.<sup>45</sup> Given these statistics, it is hardly surprising that three-quarters of those who died in

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37. *Id.* (follow “National Data” on side bar; then choose category “Waiting List Removals”; choose organ “Kidney”; choose count “Candidates”; choose “Death Removals by State by Year”).

38. *State and County QuickFacts:USA*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/gfd/states/00000.html> (last visited Nov. 12, 2012).

39. OPTN, *supra* note 30 (follow “National Data” on side bar; then choose category “Waiting List”; choose count “Candidates”; choose “Organ by Ethnicity”).

40. *Id.* (follow “Build Advanced” on side bar; then in Step 1 (choose data), choose “Waiting List”; in Step 2 (choose report columns), choose “Waiting Time” and leave other option under Step 2 blank; in Step 3 (choose report rows), choose “Ethnicity” and leave other options under Step 3 blank; in Step 4 (choose your style), choose display “Counts” and choose desired format; in the “Optional” section, choose organ “Kidney,” choose count “Candidates” and leave other categories blank).

41. *Id.* (follow “National Data” on side bar; then choose category “Waiting List Removals”; choose organ “Kidney”; choose count “Candidates”; choose “Death Removals by Ethnicity by Year”).

42. *Id.* (follow “State Data” on side bar; then chose Mississippi; choose category “Waiting List”; choose count “Candidates”; choose “Overall by Organ”).

43. Of the 215 waiting list patients in Mississippi, 195 are waiting for kidneys; the remaining twenty are waiting for a heart transplant. *Id.* (follow “State Data” on side bar; then choose Mississippi; choose category “Waiting List”; choose count “Candidates”; choose “Overall by Organ”).

44. *Id.* (follow “State Data” on side bar; then choose Mississippi; choose category “Waiting List”; choose count “Candidates”; choose “Organ by Ethnicity”).

45. *State and County Quick Facts: Mississippi*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/index.html> (last visited Nov. 12, 2012).

Mississippi in the last year while awaiting a kidney transplant were Black.<sup>46</sup>

### *B. NOTA's Prohibition of Incentivized Organ Exchanges*

Despite the nationwide kidney shortage, federal transplant policy has clung steadfastly to altruistic giving in the area of organ donation and has resisted compensating donors or their families in any way.<sup>47</sup> With regard to living donors, a regime of uncompensated and unincentivized donating is enforced through NOTA.<sup>48</sup> Specifically, Section 301 of NOTA, entitled “Prohibition of Organ Purchases,”<sup>49</sup> prohibits the “transfer [of] any human organ for valuable consideration for use in human transplantation.”<sup>50</sup> It also imposes a fine of up to \$50,000 and five years in prison upon one who knowingly violates that prohibition.<sup>51</sup> Proponents of keeping Section 301 unchanged often note their repugnance at any modification to NOTA that might result in the commodification of human organs.<sup>52</sup>

Section 301 lists kidneys as among its defined “human organs,”<sup>53</sup> but fails to positively define what constitutes “valuable consideration.” Instead, the term is defined in the negative. Thus, “‘valuable consideration’ does not include the reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ.”<sup>54</sup> This permits hospitals, doctors, organ procurement

46. This percentage reflects deaths from 1995 through September 2012. OPTN, *supra* note 30 (follow “State Data” on side bar; then choose Mississippi; choose category “Waiting List Removals”; choose organ “Kidney”; choose count “Candidates”; choose “Death Removals by Ethnicity by Year”).

47. Chad A. Thompson, *Organ Transplantation in the United States: A Brief Legislative History*, in *WHEN ALTRUISM ISN'T ENOUGH: THE CASE FOR COMPENSATING KIDNEY DONORS* 131, 141–43 (Sally Satel ed., 2008).

48. National Organ Transplant Act, 42 U.S.C. §§ 273–274 (2004).

49. National Organ Transplant Act of 1984, Pub. L. No. 98–507, tit. 3, §301, 98 Stat. 2346 (codified as amended at 42 U.S.C. §274e (2006)).

50. *Id.* § 274e(a).

51. *Id.* § 274e(b).

52. See, e.g., Delmonico et al., *supra* note 17 (comparing the sale of human organs to prostitution).

53. 42 U.S.C. § 274e(c)(1) (“The term ‘human organ’ means the human (including fetal) kidney, liver, heart, lung, pancreas, bone marrow, cornea, eye, bone, and skin or any subpart thereof and any other human organ (or any subpart thereof, including that derived from a fetus) specified . . . by regulation.”); see also 42 C.F.R. § 121.13 (2011) (“‘Human organ,’ as covered by section 301 of the National Organ Transplant Act, as amended, means the human (including fetal) kidney, liver, heart, lung, pancreas, bone marrow, cornea, eye, bone, skin, and intestine, including the esophagus, stomach, small and/or large intestine, or any portion of the gastrointestinal tract.”).

54. 42 U.S.C. § 274e(c)(2).

agencies, and other medical industry providers to receive payment for their services.<sup>55</sup> Donors, on the other hand, are only allowed to recoup certain losses: “the expenses of travel, housing, and lost wages incurred by the donor . . . in connection with the donation of the organ.”<sup>56</sup>

Despite the lack of a concrete definition of “valuable consideration” under Section 301, it has been widely accepted that not only are direct cash payments to donors prohibited, but that a wide range of donor incentives are also violate NOTA. Therefore, when scholars and policy-makers have proposed various incentive regimes aimed at increasing the number of organ donors, those proposals have usually been made with an eye toward amending Section 301 to expand the list of that which does not amount to valuable consideration.<sup>57</sup> These proposed incentives have included college scholarships,<sup>58</sup> housing,<sup>59</sup> and the payment of household bills.<sup>60</sup> Additionally, federal lawmakers have tried unsuccessfully to provide living organ donors with tax credits, life insurance policies, and guaranteed unpaid medical leave in exchange for their donations.<sup>61</sup> State legislative efforts have largely mirrored those of their federal counterparts both in their tactics and in their overall failure to mitigate organ shortages.<sup>62</sup> One notable exception is South Carolina’s failed effort at instituting an inmate organ-for-liberty exchange.<sup>63</sup> However, unlike Barbour, the proponents of the measure in South Carolina recognized the danger that such an exchange may have run

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55. *See id.*

56. *Id.*; *see also* Charlie W. Norwood Living Organ Donation Act, Pub. L. No. 110–144, 121 Stat. 1813 (codified as amended at 42 U.S.C. §§ 273–274 (2007)) (clarifying that paired donations—those in which the intended recipient of an organ donation receives a donation from another donor when she is not biologically compatible with her intended donor—do not constitute the transfer of a human organ for valuable consideration).

57. *See, e.g.,* Michele Goodwin, *The Body Market: Race Politics & Private Ordering*, 49 ARIZ. L. REV. 599, 617 (2007) (advocating that organ donors or their families should receive alternative remuneration such as scholarships for higher education, housing, or the payment of household expenses); Jake Linford, *The Kidney Donor Scholarship Act: How College Scholarships Can Provide Financial Incentives for Kidney Donation While Preserving Altruistic Meaning*, 2 ST. LOUIS U. J. HEALTH L. & POL’Y 265 (2009) (arguing that providing kidney donors with scholarships for higher education would not run counter to the values of altruistic organ donation).

58. Linford, *supra* note 57, at 267.

59. Goodwin, *supra* note 57, at 617.

60. *Id.*

61. Chad Thompson, *supra* note 47, at 141–43. *But see* Organ Donor Leave Act, Pub. L. No. 106–56, 113 Stat. 407 (codified as amended in scattered sections of 5 U.S.C. (1999)) (providing federal employees with seven days’ paid leave for donating bone marrow and thirty days of paid leave for donating organs).

62. *See* Chad Thompson, *supra* note 47, at 140.

63. *See* discussion *infra* Part I.C.

afoul of NOTA.<sup>64</sup>

*C. Liberty as “Valuable Consideration” Under Section 301 of NOTA*

When questioned about the legality of his kidney donation condition, Governor Barbour noted that Gladys Scott volunteered to donate her kidney to her sister and that Gladys’s offer weighed favorably in his decision to grant clemency to them.<sup>65</sup> The Governor’s spokesperson denied that the exchange may have been illegal and instead pointed to Gladys’s petition to the parole board in which she indicated her willingness to donate.<sup>66</sup> Gladys Scott even publicly claimed that it was her idea to donate her kidney to Jamie and that she would have done so willingly, even without the promise of freedom.<sup>67</sup> This Article argues that one may therefore surmise that both Gladys and the Governor thought that the potential issue of valuable consideration (to the extent that they were aware of the issue) was meaningless because Gladys actually wanted to give a kidney to Jamie. Whether Gladys volunteered to donate her kidney to Jamie is immaterial to whether a violation of NOTA occurred.<sup>68</sup> Rather, in order to decide whether Barbour violated NOTA, one must determine whether Gladys is to receive

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64. See Jenny Jarvie, *Inmates Could Trade an Organ for an Early Out*, L.A. TIMES, Mar. 9, 2007, available at 2007 WLNR 4464503 (reporting that legislators would refrain from debating the bill until they were able to determine whether the reduced sentences contemplated by the measure constituted “valuable consideration”).

65. See *Scott Sisters Freed From Prison*, CLARION-LEDGER, Jan. 8, 2011, available at 2011 WLNR 452375 (quoting the Governor as saying, “(Gladys) [sic] asked for the opportunity to give her sister a kidney and we’re making that opportunity available to her”).

66. See *Organ Transplant Is Sister’s Key to Freedom*, supra note 6 (quoting Barbour’s spokesman, Dan Turner, as saying that the idea that Gladys would donate her kidney to Jamie was “some- thing [sic] that she [Gladys] came up with . . . not an idea the governor’s office brokered. It’s not a quid pro quo” reporting that Gladys Scott volunteered to donate a kidney to Jamie in her petition for early release).

67. See *Gladys Scott: I’m Not Bitter*, CLARION-LEDGER, Apr. 6, 2011, available at 2011 WLNR 6727736 (quoting Gladys Scott as saying, “I was going to give it [my kidney] to her [Jamie] anyway — he [Governor Barbour] didn’t have to let me out of prison to do that”).

68. In an interview with the Los Angeles Times, Professor George Cochran of the University of Mississippi School of Law stated that he believed there to be no legal problem with Barbour’s kidney donation clemency condition since Gladys Scott volunteered to donate to Jamie. *Organ Transplant Is Sister’s Key to Freedom*, supra note 6. In this same news article, Professor Cochran’s opinion is directly disputed by Dr. Michael Shapiro of United Network of Organ Sharing’s (UNOS) ethics committee because of Dr. Shapiro’s contention that the clemency condition constitutes impermissible valuable consideration under Section 301 of NOTA. *Id.* Professor Cochran, in explaining his position, noted: “You have a constitutional right to body integrity, but when you consent [to donate an organ], you waive that [right].” Holbrook Mohr, *Is Kidney Donation Price of Parole or Governor’s Kindness?*, PITTSBURGH POST-GAZETTE, Dec. 31, 2010, <http://www.post-gazette.com/stories/news/us/is-kidney-donation-price-of-parole-or-mississippi-governors-kindness-279895/>. This analysis discounts the role that Section 301 of NOTA plays in determining the legality of the Scott Sisters’ exchange.

valuable consideration for her kidney.<sup>69</sup> When Governor Barbour turned Gladys's voluntary offer to donate into a government mandate, he fundamentally changed the exchange by introducing both coercion and valuable consideration.<sup>70</sup> Thus, just as the proposed federal and state incentives discussed in Part I.B. violate Section 301, the kidney-for-liberty clemency condition imposed upon Gladys Scott is likely a violation of NOTA's "valuable consideration" prohibition as well.<sup>71</sup>

Prominent medical ethicists appear to be of one accord: the clemency condition imposed by Governor Barbour violates Section 301.<sup>72</sup> Shortly after the announcement of the Scott Sisters' impending conditional release, Dr. Michael Shapiro, chairman of the ethics committee of the United Network for Organ Sharing (UNOS)<sup>73</sup> was quoted as saying: "[i]f the governor is trading someone 20 years for a kidney, that might potentially violate the valuable consideration clause [of Section 301 of NOTA]."<sup>74</sup> Likewise, Dr. Arthur Caplan, director of the University of Pennsylvania's Center for Bioethics, expressed consternation at the condition imposed upon Gladys Scott and opined that the condition is illegal.<sup>75</sup> These opinions notwithstanding, legislators and legal theorists have not uniformly shied away from contemplating such a scheme. In 2007, South Carolina legislators introduced Senate Bill 480 (SB 480), which provided a six-month sentence reduction for inmates who consented to donate their kidney. SB 480 was never enacted, in part due to reluctance on the part of legislators to debate the bill until they were assured that it did not violate Section 301.<sup>76</sup> Had its proponents been successful in passing it, South Carolina would have been the first state to reduce the prison sentences of its inmates in exchange for a human organ, as defined by NOTA.<sup>77</sup> Scholars writing about SB 480 rightly

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69. 42 U.S.C. § 274e(a) (2006).

70. See Timothy Williams, *Jailed Sisters Are Released for Kidney Transplant*, N.Y. TIMES, Jan. 7, 2011, [http://www.nytimes.com/2011/01/08/us/08sisters.html?\\_r=1](http://www.nytimes.com/2011/01/08/us/08sisters.html?_r=1) (quoting Dr. Arthur Caplan, director of the Center for Bioethics at the University of Pennsylvania: "Either out of ignorance or out of indifference, he [Barbour] shifted what had been a gift into compensation").

71. See *supra* Part I.B.

72. See *Organ Transplant Is Sister's Key to Freedom*, *supra* note 6 (quoting Dr. Michael Shapiro of the UNOS ethics committee and Dr. Arthur Caplan of the Center for Bioethics at the University of Pennsylvania).

73. UNOS is the private, non-profit organization that manages OPTN under contract with the federal government per 42 U.S.C. § 274 (2006).

74. *Organ Transplant Is Sister's Key to Freedom*, *supra* note 6 (internal quotation marks omitted).

75. *Id.*

76. Jarvie, *supra* note 64.

77. In 1998, a bill was introduced in the Missouri legislature to create the "Life for a Life"

argue that, despite the unquantifiable nature of liberty, “[c]ertainly [a reduction in prison time]. . . must be considered ‘valuable consideration’ for purposes of NOTA” and, thus, had SB 480 passed, it would have violated Section 301.<sup>78</sup> As evidence, one scholar noted that the government recognizes the value of liberty by assenting to protect it through the due process clauses of the Fifth<sup>79</sup> and Fourteenth<sup>80</sup> Amendments.<sup>81</sup>

Similarly, the Tenth Circuit articulated the importance of individual liberty interests in *United States v. Singleton*.<sup>82</sup> In *Singleton*, a panel of the court held that a federal prosecutor’s offer of leniency in exchange for a witness’s testimony violated 18 U.S.C § 201(c)(2), a federal bribery statute which provides that “whoever gives, offers or promises anything of value to any person for or because of . . . testimony . . . shall be fined or imprisoned for not more than two years, or both.”<sup>83</sup> The panel decided that “anything of value” included leniency in that “the recipient [of such leniency] subjectively attaches value to [it].”<sup>84</sup> Among other inducements, the leniency offered by prosecutors may include reduced prison time or the possibility of no prison time at all. Thus, the byproduct of prosecutorial leniency may, in many cases, be liberty. Therefore under the Tenth Circuit’s reasoning in *Singleton*, liberty is included in the definition of “anything of value” or, in the parlance of NOTA, can be regarded as “valuable consideration.”<sup>85</sup>

It appears that Governor Barbour could have released both Scott Sisters without the additional condition knowing that, if at all possible, Gladys

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program, under which the sentences of death row prisoners would be commuted in exchange for donating a kidney or bone marrow. Kim Bell, *Bill Would Let Inmates Barter Their Organs*, ST. LOUIS POST-DISPATCH, Feb. 6, 1998, available at 1998 WLNR 938957. Unlike inmates under South Carolina’s proposal, the Missouri prisoners’ sentence reductions would not have made them eligible for eventual release, as their sentences would have been reduced to life without parole. *Id.*

78. Emily C. Lee, *Trading Kidneys for Prison Time: When Two Contradictory Legal Traditions Intersect, Which One Has the Right-of-Way?*, 43 U.S.F. L. REV. 507, 549 (2009); see also Burkle, *supra* note 26, at 416.

79. U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law . . .”).

80. U.S. CONST. amend XIV, §1 (“nor shall any State deprive any person of life, liberty, or property, without due process of law . . .”).

81. Lee, *supra* note 78, at 550.

82. *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998), *rev’d en banc*, 165 F.3d 1297 (10th Cir. 1999).

83. 18 U.S.C. § 201(c)(2) (2006).

84. *Singleton*, 144 F.3d at 1349.

85. Although *Singleton* was reversed en banc, the reversal was based upon a finding that 18 U.S.C. § 210(c)(2)’s use of the word “whoever” did not apply to government prosecutors. See *Singleton*, 165 F.3d at 1299. Left undisturbed was the reasoning that prosecutorial leniency and the liberty that might be derived from it constituted something of value under the statute. See generally *id.*

would give Jamie her kidney. So, then why make kidney donation a condition of Gladys's release? Why release Gladys at all? She could, after all, donate a kidney to her sister and then continue to serve out her sentence.<sup>86</sup> Rather, Barbour made the donation an explicit requirement of Gladys's continued freedom<sup>87</sup> and in doing so, likely violated NOTA.<sup>88</sup> Though some may object to Barbour's actions, his decision raises the issue of whether inmate organ donation should violate NOTA at all. The colliding narratives of Barbour and the Scott Sisters demonstrate that the inmate organ donation "yuck factor" can be diminished when interests converge, which may allow for the re-thinking of NOTA's apparent prohibition on inmate organ donation for liberty.

## II. INTEREST CONVERGENCE AND THE CREATION OF KIDNEY CLEMENCY

This Part frames the background of the Scott Sisters/Haley Barbour narrative in an effort to explain how the interests of Governor Barbour and the Scott Sisters converged in a manner that resulted in Barbour offering and the Scott Sisters accepting the kidney donation clemency condition.

### *A. Narrative Collision and Interest Convergence: A Compromise that Violates NOTA*

After a decade behind bars, the Scott Sisters, who had steadfastly maintained their innocence, gained the attention of the Innocence Project, a national legal aid clinic dedicated to exonerating the wrongly convicted.<sup>89</sup> However, the Scott Sisters' plight did not garner the national media spotlight until January of 2010 when doctors confirmed that Jamie's kidneys were failing.<sup>90</sup> This revelation, coupled with pressure from the Scott family, the NAACP, and local community leaders prompted Governor Barbour—then a possible presidential candidate<sup>91</sup>—to free the Scott Sisters in January 2011.<sup>92</sup>

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86. This idea mirrors the sentiment expressed by Dr. Michael Shapiro of UNOS's ethics committee, who favors divorcing the legal issues in Gladys Scott's case from the medical issues faced by Jamie Scott. Krissah Thompson, *supra* note 26.

87. *Gov. Barbour's Statement Regarding Release of Scott Sisters*, *supra* note 1.

88. *See supra* Part I.B.

89. The Innocence Project expanded its New Orleans office into the State of Mississippi in September of 2003. *Project Aims to Battle "Miscarriages of Justice"*, CLARION-LEDGER, Aug. 4, 2003, at A1, available at 2003 WLNR 18082571; *Sisters Doing Life for Robbery Get Project's Attention*, CLARION-LEDGER, Aug. 4, 2003, at A6, available at 2003 WLNR 18082572. The Scott Sisters' case was one of several Mississippi cases that the nascent office was reviewing. *Id.*

90. *See Williams*, *supra* note 70.

91. *See Andrew Ferguson, The Boy from Yazoo City: Haley Barbour Mississippi's Favorite Son*, WKLY. STANDARD, Dec. 27, 2010, at 20 (noting that Barbour had been fielding media questions

There is, however, an argument that neither the pressure from inside Mississippi—from the Scott family and the local NAACP—nor the pressure exerted from outside of Mississippi—by the national NAACP, marchers,<sup>93</sup> bloggers,<sup>94</sup> or the national media—would have swayed Governor Barbour had it not been for his own national political aspirations.<sup>95</sup> Thus, in some quarters, Governor Barbour’s release of the Scott Sisters was seen as a mere political ploy. For example, Jamie and Gladys’s mother, Evelyn Rasco, expressed this sentiment: “[t]o me [Barbour’s decision to release Jamie and Gladys] was a political decision . . . . It’s not that he actually had any sympathy for my daughters or cared about them.”<sup>96</sup>

The Scott Sisters’ double life sentences were roundly criticized by civil rights activists and the Scott Sisters’ national media advocates as examples of racial disparities in sentencing.<sup>97</sup> In this regard, studies have shown that Blacks routinely receive harsher sentences than whites and, as compared to whites, Blacks are far more likely to be disadvantaged with regard to the decision to incarcerate at all.<sup>98</sup> These sentencing disparities result in greater

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about his presidential aspirations throughout 2010); *see also Barbour Timeline*, CLARION-LEDGER, Apr. 26, 2011, *available at* 2011 WLNR 8082966 (chronicling Barbour’s appearances in New Hampshire, Iowa, and Florida in the spring of 2011); *What Are Barbour’s Chances?*, CLARION-LEDGER, Feb. 27, 2011, at A1, *available at* 2011 WLNR 3860399 (reporting that Barbour had been visiting the key early voting states of Iowa and South Carolina).

92. Although Governor Barbour’s order releasing the Scott Sisters was signed on December 29, 2010, they were not actually released from custody until January 7, 2011. *Gov. Barbour’s Statement Regarding Release of Scott Sisters*, *supra* note 1; *Scott Sisters Free Today*, CLARION-LEDGER, Jan. 7, 2011, at A1, *available at* 2011 WLNR 395769.

93. In September of 2010, more than 300 people rallied at the state capitol in support of the Scott Sisters. *See Backers Hopeful Sisters to Be Freed*, CLARION-LEDGER, Oct. 13, 2010, at B1, *available at* 2010 WLNR 20448126; *Scott Sisters to Be Freed*, CLARION-LEDGER, Dec. 30, 2010, *available at* 2010 WLNR 25703608.

94. *See Scott Sisters’ Mom Plans Homecoming*, *supra* note 26 (reporting that the Scott Sisters’ mother Evelyn Rasco credits their release to the five-year long internet campaign that she and then-Loyola Chicago School of Law student Nancy Lockhard waged; Rasco and Lockhard eventually built a network of more than 15,000 supporters across Europe, Africa and North America); *see also* Williams, *supra* note 70 (“The effort on behalf of the sisters . . . was first taken up by African-American-themed Internet sites . . .”).

95. *See Recent Remarks Raise Suspicion Over Gov.’s Motive*, CLARION-LEDGER, Dec. 31, 2010, at A1, *available at* 2010 WLNR 25707088 (reporting that “social networking sites . . . lit up with speculation that the move [to release the Scott Sisters] was a political ruse to . . . shore up [his] presidential campaign”).

96. *Scott Sisters Free Today*, *supra* note 92.

97. *See, e.g.,* Leonard Pitts, Op-Ed., *Justice, Mississippi Style*, BUFFALO NEWS, Nov. 23, 2010, at A9, *available at* 2010 WLNR 23361245 (“[I]f you are poor or black, the justice system has long had this terrible tendency to throw you away like garbage. If you doubt it, . . . [t]ry to imagine some rich white girl doing double life for an \$11 robbery. You can’t.”); *see also* discussion *infra* Part II.C. (noting the rare circumstances of a judge’s reading the life sentence instruction in a robbery relatively lacking in violence).

98. TUSHAR KANSAL, RACIAL DISPARITY IN SENTENCING: A REVIEW OF THE LITERATURE 4

rates of Black incarceration; for instance, the national incarceration rate is 497 per 100,000.<sup>99</sup> However, the national rate of incarceration of Blacks is over 5.5 times that national rate, at 2290 per 100,000.<sup>100</sup> Mississippi's rate of Black incarceration, at 1742 per 100,000, though lower than the national average, is still more than triple its rate of white incarceration, which hovers at 503 per 100,000.<sup>101</sup>

In explaining how such civil rights injustices are remedied, Professor Derrick Bell wrote that “[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”<sup>102</sup> This provocative principle serves as the foundation for his “interest convergence” theory.<sup>103</sup> The Scott Sisters’ story is illustrative of a brief moment of interest convergence.<sup>104</sup> This brief moment, rather than representing a macro-level interest convergence similar to the Supreme Court’s decision in *Brown v. Board of Education*<sup>105</sup> cited by Bell, was instead interest convergence on the micro-level in that it affected the interests of just a few: Jamie and Gladys Scott and Governor Haley Barbour. Although merely reflective of “micro-interest convergence,” the timing of Barbour’s release of Jamie and Gladys Scott gives additional credence to Bell’s assertion that “[r]acial justice—or its appearance—may, from time to time, be counted among the interests deemed important by . . . society’s policymakers.”<sup>106</sup> As demonstrated below, Haley Barbour needed to appear racially tolerant and capable of leading a diverse nation at just the same time that Jamie Scott needed to be released for a life-saving renal transplant. This

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(Marc Mauer ed., 2005), available at [http://www.sentencingproject.org/doc/publications/rd\\_sentencing\\_review.pdf](http://www.sentencingproject.org/doc/publications/rd_sentencing_review.pdf).

99. *Map of Correctional Populations by State*, SENT’G PROJECT, <http://www.sentencingproject.org/map/map.cfm> (last visited Nov. 13, 2012).

100. *Federal Correctional Populations*, SENT’G PROJECT, <http://www.sentencingproject.org/map/statedata.cfm?abbrev=NA&mapdata=true> (last visited Nov. 13, 2012); see also MARC MAUER & RYAN S. KING, *UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY* 6 (2007), available at [http://www.sentencingproject.org/doc/publications/rd\\_stateratesofincbyraceandethnicity.pdf](http://www.sentencingproject.org/doc/publications/rd_stateratesofincbyraceandethnicity.pdf).

101. MAUER & KING, *supra* note 100, at 8–9.

102. Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

103. *Id.*

104. In explaining Derrick Bell’s stance regarding interest convergence and the Supreme Court’s decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), Richard Delgado and Jean Stefancic described 1954 as follows: “[t]he interests of whites and blacks, for a *brief moment*, converged.” RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 23 (2d ed. 2012) (emphasis added).

105. See generally *Brown v. Board of Education*, 347 U.S. 483 (1954).

106. Bell, *supra* note 102, at 523.

convergence of the particular interests of Haley Barbour and the Scott Sisters provides a key to answering the question of how Governor Barbour settled upon the kidney donation clemency condition, and how a condition that would normally engender a “yuck factor” response came to be acceptable to the Scott Sisters, their attorneys, and the civil rights community.

*B. Prisons and Mississippi’s Peculiar Institution*<sup>107</sup>

The story of the Scott Sisters cannot be fully understood without considering Mississippi’s history and the racial background of the protagonists—the Scott Sisters are Black and Barbour is white. More particularly, it cannot be wholly appreciated without exploring the intersection between slavery and the state prison system in Mississippi in the context of both the historical ownership of, and control over, Black bodies. Jamie and Gladys Scott were not imprisoned at Mississippi’s notorious Parchman prison farm, nor were they sentenced to labor in the fields. Their story, however—particularly that of the disproportionately harsh sentence meted out to them—is perhaps only comprehensible in light of Mississippi’s history.

Antebellum Mississippi’s economy was built almost entirely upon the exploitation of enslaved Africans.<sup>108</sup> Mississippi was not just a slave-holding state, but was *the* preeminent slave-holding state in the union in terms of both the numbers of humans held in bondage there and the wealth that they produced for those who owned their bodies and their labor.<sup>109</sup> Shortly before the beginning of the Civil War, Mississippi was the country’s leading producer of cotton<sup>110</sup>—a crop that comprised more than half of United States

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107. The term “peculiar institution” was “a euphemistic term that white southerners used for slavery . . . [the term’s] implicit message was that slavery in the U.S. South was different from the very harsh slave systems existing in other countries and that southern slavery had no impact on those living in northern states.” Fletcher M. Green, *Peculiar Institution*, ENCYCLOPEDIA.COM, <http://www.encyclopedia.com/doc/1G2-3401803191.html> (last visited Dec. 29, 2012). The term is also the title of historian Kenneth M. Stampp’s seminal work, published in 1956, on slavery in the American South. See KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTEBELLUM SOUTH* (1956).

108. See Michael P. Mills, *Slave Law in Mississippi From 1817-1861: Constitutions, Codes and Cases*, 71 MISS. L.J. 153, 153–54 (2001).

109. See STAMPP, *supra* note 107, at 29–33 (noting that in the 1860s, slaves made up fifty-five percent of the total state population of Mississippi, a statistic that was surpassed only by South Carolina, in which slaves made up fifty-seven percent of the state’s population).

110. Mills, *supra* note 108, at 154 (noting that, in 1859, Mississippi ginned over 1.2 million 400-pound bales of cotton while Alabama, the next highest-producing state, ginned a mere 990,000 bales).

exports of the day.<sup>111</sup> This cash crop was planted, tended, and harvested by Black slaves.<sup>112</sup>

Antebellum Mississippi had been a veritable land of opportunity for young white men looking to make their fortunes.<sup>113</sup> Yet, the same agriculturally-dominated economy, built upon racial subjugation, that made Mississippi a land of opportunity and prosperity for whites in the early to mid-nineteenth century, made it no less than backwards in subsequent years.<sup>114</sup> As the United States pressed through the Second Industrial Revolution, Mississippi, like much of the Deep South, clung to its antebellum agricultural roots, including its dependence on exploited Black labor.<sup>115</sup> After the Civil War, Mississippi needed a means of asserting control over its Black population in order to keep it tied to the land and to assure white social and political dominance in the wake of Emancipation.<sup>116</sup> White Mississippians met this need in a two-fold manner, as they effectuated systematic control of Black bodies through both peonage and through the use of prison labor to swell agricultural profit.<sup>117</sup>

The system of sharecropping, as practiced in the South after

111. *Id.*

112. *Id.* at 155.

113. *See id.* (noting that “[e]arly Mississippi literature pictures a society driven by lust for quick riches based on the production of cotton”).

114. *Id.* at 155 (“Hindsight affords us the luxury of condemning a way of life [slavery] which inarguably created many of the social and economic ills we suffer today in Mississippi.”). In 2008, Mississippi had a Human Development (HD) Index—according to the American Human Development Project, “a numerical measure of well-being and opportunity made up of health, education, and income indicators”—of 3.58 on a scale of 0 to 10. SARAH BURD-SHARPS, KRISTEN LEWIS & EDUARDO BORGES MARTINS, AM. HUMAN DEV. PROJECT, A PORTRAIT OF MISSISSIPPI: MISSISSIPPI HUMAN DEVELOPMENT REPORT 4–5 (2009), available at [http://measureofamerica.org/wp-content/uploads/2009/01/a\\_portrait\\_of\\_mississippi.pdf](http://measureofamerica.org/wp-content/uploads/2009/01/a_portrait_of_mississippi.pdf). Mississippi’s HD Index was lower than that of the entire United States in the late 1980s. *Id.* By comparison, top-ranking Connecticut had an HD Index of 6.37, which the American Human Development Project predicts will be the HD Index of the U.S. as a whole in the year 2020. *Id.* Thus, Mississippi (the lowest-ranking state) lags three decades behind Connecticut and fifteen years behind the national average in terms of life expectancy, educational opportunities and income. *Id.*

115. *See* Ron Soodalter, *A Blight on the Nation: Slavery in Today’s America*, 25 CONN. J. INT’L L. 37, 38–39 (2009) (noting that Southern dependence on the antebellum plantation system caused “peonage slavery” to persist well into the 1960s). *But see* DAVID J. LIBBY, *SLAVERY AND FRONTIER MISSISSIPPI: 1720–1835*, at 45–47 (2004) (“[T]he assumption that [cotton] plantation life was ‘premodern’ or agrarian overlooks both the unrelenting constancy of labor, in contrast to the seasonal breaks in most other agrarian regimes, and the relationship between its product, cotton fiber, and the Industrial Revolution.”).

116. *See* Soodalter, *supra* note 115, at 38–39 (“Crops in the South still needed planting, cultivating and harvesting, and there was a vast population of unemployed former slaves. Planters instituted a system that was as close to the old slavery as possible, but with some new wrinkles [referring to peonage].”).

117. *See id.*

Emancipation, was no more than peonage, or debt bondage.<sup>118</sup> Former slaves invariably found themselves in debt year after year to the planter on whose property they resided.<sup>119</sup> After the crops were harvested, the landowner took his share of the crop's proceeds and deducted the (often inflated) cost of seed and other supplies from the sharecropper's account, usually leaving the sharecropper with a negative balance.<sup>120</sup> As the sharecropper was cash poor,<sup>121</sup> he could only make payment in hope of settling his account, by agreeing to work for the planter for yet another year.<sup>122</sup> Jail was the penalty for nonpayment and death brought no relief, as this burden of debt bondage slavery passed from parent to child, thus binding entire families often to the same plantations on which their ancestors had been slaves.<sup>123</sup>

After the Civil War, Mississippi's jails and prisons underwent a sea change.<sup>124</sup> Prior to Emancipation, slave owners punished slaves for their infractions, with no interference from the State.<sup>125</sup> After the war, Mississippi penal institutions no longer housed primarily white offenders; in short order, Mississippi's prison populations became predominantly Black.<sup>126</sup> This explosion in the number of imprisoned Blacks was a direct reflection of whites' desire to control former slaves by either compelling them to return to plantations or by otherwise corralling them.<sup>127</sup> By 1865, the Mississippi legislature had enacted the Mississippi Black Codes—a number of laws aimed at proscribing the freedom of what white Mississippians saw as a free-roaming vagrant Black population.<sup>128</sup> As such, Blacks who could not show proof of employment—i.e., that they worked for a white planter—were

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118. See *Taylor v. Georgia*, 315 U.S. 25, 29 (1942) (“[P]eonage is a form of involuntary servitude within the meaning of the Thirteenth Amendment. . . .”); *Clyatt v. United States*, 197 U.S. 207, 215 (1905) (“[Peonage] may be defined as a status or condition of compulsory service, based upon the indebtedness of the peon to the master.”).

119. Soodalter, *supra* note 115, at 39.

120. *Id.*

121. Landowners usually issued sharecroppers tickets rather than cash as payment. *Id.* These tickets were often only accepted at the landowner's store, thus furthering the dependence of Black farm laborers on their former masters. *Id.*

122. *Id.*

123. *Id.*

124. DAVID M. OSHINSKY, “WORSE THAN SLAVERY”: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 34 (1996).

125. *Id.*

126. *Id.*

127. *Id.* at 21.

128. *Id.* at 20–22.

fined fifty dollars.<sup>129</sup> A freedman's inability to pay the fifty-dollar fine would result in his being hired out—in effect sold to—a white man who was willing to pay the fine in his stead. In these transactions, preference was given to the former master.<sup>130</sup> What began as small-scale hiring out of convicts had grown tremendously by the late 1860s, when the State awarded the first large convict leasing contract under which Black prisoners were sent to work mostly in the cotton fields of the Delta.<sup>131</sup> This leasing program ended in 1904 with the construction of the Mississippi State Penitentiary in Parchman, Mississippi—a penal farm designed to house Black inmates in plantation conditions.<sup>132</sup>

As mentioned earlier, Jamie and Gladys Scott were not housed at Parchman.<sup>133</sup> Rather, they were imprisoned at the Central Mississippi Correctional Facility (CMCF).<sup>134</sup> CMCF is one of three state prisons in Mississippi and the only one housing female inmates.<sup>135</sup> It is important to note that, in Mississippi, the number of imprisoned women in the state prison system had, until the mid-twentieth century, always been relatively small and limited in its racial composition.<sup>136</sup> As historian David Oshinsky wrote, “[a]t no time between 1870 and 1970 did females comprise more than five percent of the state prison population [in Mississippi]. Their numbers were low, and their color [Black] never changed.”<sup>137</sup>

The nation experienced a post-Civil Rights Era explosion of its prison population.<sup>138</sup> Prior to the mid-1970s, national incarceration rates hovered around 100 per 100,000.<sup>139</sup> By the time the Scott Sisters were convicted in 1994, rates had more than tripled to 389 per 100,000.<sup>140</sup> When Governor

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129. *Id.* at 21.

130. OSHINSKY, *supra* note 124, at 21.

131. *Id.* at 35–36.

132. *Id.* at 52–53, 109. The 1890 Mississippi Constitutional Convention abolished convict leasing effective January 1, 1895, but it took until 1904 for Parchman to be built. *Id.*

133. *See supra* Part II.B.

134. Gates, *supra* note 26.

135. MISS. DEP'T OF CORR., DIV. OF INSTS. STATE PRISONS, *There Are Three State Prisons in Mississippi*, (Nov. 13, 2012), [http://www.mdoc.state.ms.us/division\\_of\\_institutions%20State%20Prisons.htm](http://www.mdoc.state.ms.us/division_of_institutions%20State%20Prisons.htm).

136. *See* OSHINSKY, *supra* note 124, at 169.

137. *Id.*

138. U.S. Dep't of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics Online*, ALBANY.EDU, <http://www.albany.edu/sourcebook/pdf/t6282010.pdf> (last visited Jan. 2, 2013).

139. *Id.*

140. *Id.*

Barbour announced the Scott Sisters' release in 2010, the rate had risen to 497 per 100,000.<sup>141</sup> Among women, the increase was even more shocking. The female prison population per 100,000, which had remained in the single digits until the mid-1970s, more than quadrupled to 45 per 100,000 by 1994.<sup>142</sup> By 2010, it was more than ten times the rate that it had been at the end of the Civil Rights Era.<sup>143</sup> Scholars opine that the exponential growth in the prison population and the disproportionate representation of Blacks in that population is a direct reaction to the civil and political gains of the Civil Rights Movement.<sup>144</sup> Not surprisingly then, Blacks have borne the brunt of this expanded carceral regime. Both the national and Mississippi rates of Black incarceration far outstrip those of white incarceration.<sup>145</sup> The same racial disparities that characterize the overall national prison population are also prevalent within the population of imprisoned women, as Black women are incarcerated at three times the rate of white women.<sup>146</sup> Moreover, just as in the 100 year period prior to the end of the Civil Rights Era, the pace of Mississippi's imprisoning of Black women far outstripped that of its imprisoning of white women. Black women make up forty-three percent of the State's female prison population, despite making up roughly only fifteen percent of the population.<sup>147</sup> It is with this historical and statistical backdrop in mind that one must examine how two more Black women—the Scott Sisters—found themselves in a Mississippi state prison.

### *C. The Scott Sisters*

Jamie and Gladys Scott, then twenty-one and nineteen, respectively, were convicted as the masterminds behind a Christmas Eve 1993 armed robbery.<sup>148</sup> No one was hurt during the commission of the robbery, which

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141. *Id.*

142. *Id.*

143. In 1968, the rate of female incarceration was 6 per 100,000. *Id.* In 2010, the rate was 67 per 100,000. *Id.*

144. See, e.g., Pricilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 1239, 1269–70 (2012) (citations omitted).

145. See *supra* Part II.A.

146. E. ANN CARSON & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, PRISONERS IN 2011, at 8 (2012), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p11.pdf>.

147. *Fact Sheet as of October 01, 2012*, MISS. DEP'T OF CORR., (2012), <http://www.mdoc.state.ms.us/Research%20and%20Statistics/MonthlyFactSheets/Research%20and%20Stat%20Monthly%20Fact12.htm>.

148. See Bob Herbert, Op-Ed., 'So Utterly Inhumane,' N.Y. TIMES, Oct. 12, 2010, <http://www.nytimes.com/2010/10/12/opinion/12herbert.html>.

netted between \$11 and \$200.<sup>149</sup> Prior to that time, neither sister had a criminal record as well.<sup>150</sup>

Authorities accused Jamie and Gladys of luring two male acquaintances to a secluded area where three teenaged boys, allegedly in league with the Scott sisters, robbed them.<sup>151</sup> The teens all claimed that Jamie and Gladys planned the robbery.<sup>152</sup> Jamie and Gladys tell a different story: that they caught a ride with two men after their own car would not start, but got out of the car when the men made unwanted sexual advances toward them.<sup>153</sup> Jamie and Gladys claimed not to have known that the men with whom they had been riding had been followed by the teenage boys or that they were going to be robbed.<sup>154</sup>

Although the teenage boys did not implicate Jamie and Gladys in their initial statements to the police, the jury believed the prosecution's assertion that Jamie and Gladys had orchestrated the robbery.<sup>155</sup> As a result, each sister was convicted and sentenced to two consecutive terms of life in prison.<sup>156</sup> Their three male accomplices, on the other hand, were spared long jail sentences.<sup>157</sup> Two of the three teens testified against the Scott Sisters at trial.<sup>158</sup> Those two teens served approximately three years in prison.<sup>159</sup> The third boy recanted, testifying that authorities had threatened that, if he did not testify that Jamie and Gladys were behind the robbery, they would send him to Parchman prison where they said he would surely be raped.<sup>160</sup> He was released on parole in 2006.<sup>161</sup>

Officials never explained why Jamie and Gladys received such harsh

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149. *Id.*; Gladys Scott: 'I'm not Bitter', *supra* note 67; Pitts, *supra* note 97.

150. Pitts, *supra* note 97.

151. See Gladys Scott: 'I'm Not Bitter,' *supra* note 67; Herbert, *supra* note 148; see also Pitts, *supra* note 97.

152. Gladys Scott: 'I'm Not Bitter,' *supra* note 67; Herbert, *supra* note 148.

153. *Victim: Sisters in on Holdup*, CLARION-LEDGER, Jan. 9, 2011, available at 2011 WLNR 490945.

154. See *id.*

155. Herbert, *supra* note 148.

156. *Id.*

157. *Id.* The male accomplices were each sentenced to eight years in prison and were released after serving just two years. *Id.*

158. *Id.*

159. *Victim: Sisters in on Holdup*, *supra* note 153.

160. Herbert, *supra* note 148.

161. *Victim: Sisters in on Holdup*, *supra* note 153.

sentences.<sup>162</sup> The only explanation for their sentences was that offered by their mother, Evelyn Rasco, who surmised that the sentences were retribution exacted against her family due to earlier testimony by family members against a corrupt Scott County sheriff.<sup>163</sup> There is also speculation that the sisters' sentences were graver than the teens who actually robbed the victims because the judge believed Jamie and Gladys organized the crime.<sup>164</sup> However, in Mississippi, only juries can impose a life sentence for a robbery.<sup>165</sup> The sisters' current attorney of record, Chokwe Lumumba (who did not represent them at trial), noted that, "[i]n the majority of robbery cases, even the ones that are somewhat nasty, . . . [state judges] don't read . . . [the] instruction [authorizing the jury to impose a life sentence]."<sup>166</sup> Indeed, Ken Turner, the district attorney who prosecuted the case, admitted that, "[n]ormally, life sentences are only returned when it is a grisly case, and this case wasn't particularly grisly."<sup>167</sup> Nevertheless, he has offered no explanation as to why the life sentence option was included in the jury instructions.<sup>168</sup> He does, however, admit that the life sentences meted out to the Scott Sisters were atypical and agreed that reducing their sentences would have been "appropriate."<sup>169</sup> Eventually, even Governor Haley Barbour admitted that the sisters' life sentences were "unusually long."<sup>170</sup>

*D. Haley Barbour, "The Boy from Yazoo City"*<sup>171</sup>

Haley Barbour is the most celebrated native son of Yazoo City—the principal town and seat of government of Yazoo County, Mississippi—on the southern edge of the state's Delta region.<sup>172</sup> As historically known, the Mississippi-Yazoo Delta is the land of fertile alluvial plains, generations of

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162. Pitts, *supra* note 97.

163. *Id.*

164. See Williams, *supra* note 70.

165. See MISS. CODE ANN. § 97-3-79 (2006) ("Every person . . . guilty of robbery . . . shall be imprisoned for life in the state penitentiary *if the penalty is so fixed by the jury*; and in cases where the jury fails to fix the penalty at imprisonment for life . . . the court shall fix the penalty at . . . any term not less than three (3) years.") (emphasis added).

166. Herbert, *supra* note 148.

167. *Sisters Doing Life for Robbery Get Project's Attention*, *supra* note 89.

168. See, e.g., Herbert, *supra* note 148; *Victim: Sisters in on Holdup*, *supra* note 153.

169. *Victim: Sisters in on Holdup*, *supra* note 153.

170. *Scott Sisters to Be Freed*, *supra* note 93.

171. This is the title of an article published in *The Weekly Standard* that profiled Haley Barbour. Ferguson, *supra* note 91. See discussion *infra* Part II.D.

172. Ferguson, *supra* note 91, at 21.

rich, white planters and the poor descendants of African slaves.<sup>173</sup> More than any other region of Mississippi, it is steeped in Mississippi's antebellum past and more than any other recent Mississippi politician, Haley Barbour is steeped in the culture and lore of the Delta.<sup>174</sup> Barbour is not just a son of the Delta, but a scion of Mississippi politics.<sup>175</sup> His great-great-great-great-grandfather Walter Leake was the first United States senator from Mississippi, after it gained statehood in 1817, and served as its third governor from 1822–1825.<sup>176</sup> His paternal grandfather was a judge.<sup>177</sup> His older brother was elected mayor of Yazoo City while Barbour was in college.<sup>178</sup> The Barbour family even claims descent from the Choctaw chief Greenwood Leflore, who served in the Mississippi State Senate in the mid-1800s.<sup>179</sup>

In the fall of 2010, Barbour was the president of the Republican Governors' Association and a successful former Republican National Committee chairman.<sup>180</sup> As such, he was widely regarded as a likely contender for the GOP presidential nomination.<sup>181</sup> However, some National Republican leaders and political observers were concerned that Barbour, as a white conservative from Mississippi, might be "too Southern" for the national stage—implying that either his actual racial politics or others' perceptions of the historic racial climate in Mississippi might hinder any national candidacy.<sup>182</sup> By the winter of 2010, Barbour had proved the pundits right. He was quoted in December of that year in the conservative magazine *The Weekly Standard* as saying about the Civil Rights Era: "I just

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173. *Id.* at 21–22.

174. *See generally id.*

175. *See id.* at 22.

176. *Id.*; David G. Sansing, *Governors of Mississippi from 1817 to Present*, MISSISSIPPI HISTORY NOW, [mshistorynow.mdah.state.ms.us/articles/265/governors-of-mississippi-from-1817-to-present](http://mshistorynow.mdah.state.ms.us/articles/265/governors-of-mississippi-from-1817-to-present) (last visited Dec. 27, 2012); *Mississippi's United States Senators*, SENATE.GOV, <http://www.senate.gov/states/MS/senators.shtml> (last visited Dec. 22, 2012).

177. Ferguson, *supra* note 91, at 22.

178. *Id.* at 24.

179. *Id.* at 22.

180. As head of the Republican Governors' Association, Barbour orchestrated a near sweep of gubernatorial races in November 2010. *Id.* at 20. Prior to that, while serving as the Republican National Committee chairman from 1993–1997, Barbour spearheaded the 1994 Republican retake of the majority in the House of Representatives. *Id.*

181. *What Are Barbour's Chances?*, *supra* note 91.

182. *Id.*; *see also Scott Sisters to Be Freed*, *supra* note 93 ("As a white Southern Republican considering a challenge against the nation's first black president, Barbour's race relations are likely to be under the microscope . . .").

don't remember it as being that bad."<sup>183</sup> In the same interview, he went on to praise the members of the segregationist White Citizens' Council as peacekeepers and credited them with uneventful desegregation of the schools in his hometown of Yazoo City.<sup>184</sup> Barbour later released a statement calling segregation and the Citizens' Council "indefensible."<sup>185</sup> His original statement, however, was the beginning of the end of Barbour's moment in the spotlight as a potential GOP contender.<sup>186</sup> As 2011 approached, he attempted to rehabilitate his reputation regarding civil rights and racial equality by announcing a celebration of the fiftieth anniversary of the Freedom Rides,<sup>187</sup> calling for a civil rights museum in the state capital of Jackson,<sup>188</sup> and by finally agreeing to free the Scott Sisters.<sup>189</sup>

Although Jamie and Gladys Scott had originally petitioned for a pardon from the Governor, what they ultimately received was an indefinite suspension of their sentences, the functional equivalent of parole.<sup>190</sup> They are, therefore, required to report monthly to a parole officer, secure judicial permission before traveling, refrain from associating with others who have criminal records, and pay a monthly fee of fifty-two dollars each for the cost of their supervision.<sup>191</sup> After having been released from prison, the Scott Sisters again petitioned Governor Barbour for a full pardon.<sup>192</sup> In early April 2011, Barbour indicated that he would deny that and any future pardon

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183. Ferguson, *supra* note 91, at 25 (internal quotation marks omitted).

184. *Id.*

185. *Gov. Barbour's Statement Regarding Weekly Standard Article*, GOVERNORBARBOUR.COM (Dec. 21, 2010), <http://www.governorbarbour.com/news/2010/dec/12.21.10govbarbourweeklystandard.html>.

186. One observer, Professor Stephen Rozman, a political science professor at the historically Black Tougaloo College characterized Barbour as having "foot in mouth disease" and not "play[ing] well outside of his culture." *What Are Barbour's Chances?*, *supra* note 91.

187. This announcement was made on the 2011 Martin Luther King, Jr. holiday. *Gov. Barbour Formally Announces Celebration of Freedom Riders*, GOVERNORBARBOUR.COM (Jan. 17, 2011), [http://www.governorbarbour.com/news/2011/jan/1\\_17freedomridersanniversary.html](http://www.governorbarbour.com/news/2011/jan/1_17freedomridersanniversary.html).

188. Barbour announced his support for a civil rights museum in Jackson, Mississippi during his State of the State address on January 11, 2010. *Text of Governor Barbour's State of the State Address*, GOVERNORBARBOUR.COM (Jan. 11, 2011), <http://www.governorbarbour.com/news/2011/jan/1.11.11%20Gov.%20Barbour's%20State%20of%20the%20State%20Address%20TEXT.pdf>.

189. *Gov. Barbour's Statement Regarding Release of Scott Sisters*, *supra* note 1; see also *What Are Barbour's Chances?*, *supra* note 91 (citing these events as Barbour's attempts to "reach[] across the racial divide").

190. Shabazz, *supra* note 4.

191. *Id.*

192. *Kidney Transplant Possible, But Don't Count on Pardons*, HOUS. CHRON., Apr. 1, 2011, available at 2011 WLNR 6363285.

requests from the Scott Sisters.<sup>193</sup> The sisters' supporters vowed to make their pardon an issue should Barbour attempt to run for the presidency.<sup>194</sup> By April's end, however, Barbour had announced that he would not seek his party's nomination for the office of president.<sup>195</sup> Barbour, who was term-limited as governor,<sup>196</sup> no longer needed to improve his local or national image. Barring political expediency, the Scott Sisters had nothing to offer Barbour. Their interests were no longer convergent.<sup>197</sup>

### III. LESSENING COERCION, MITIGATION OF THE "YUCK FACTOR"

This Part sketches the framework of a program for inmate organ donation. This framework is conceived as an adaptation of Professor Bell's interest convergence theory that realigns the interests of proposed inmate donors with those of the patients on the organ transplant waiting list. In proposing this realignment, this Part examines the historical context of the exchange of inmate biological material for liberty.

#### *A. Interest Convergence in the Inmate Organ Donation Context*

Professor Bell's model of interest convergence can be applied beyond the struggle for racial equality to other scenarios where the interests of the relatively powerless and those of the relatively powerful align to create a moment of opportunity for the disadvantaged party to advance its cause. The interest convergence in the Scott/Barbour case—Jamie's dire medical need

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193. *Id.* (quoting Barbour as saying in response to media inquiries about his pardoning the Scott Sisters, "I wouldn't hold my breath . . . . Tell 'em don't save any space in the newspaper for that [pardon] to be announced.") (internal quotation marks omitted).

194. Emily Wagster Pettus, *Barbour's Plan to Deny Pardon Makes Ex-Inmate Cry*, SEATTLE TIMES, Apr. 1, 2011, available at [http://seattletimes.com/html/nationworld/2014659032\\_apussistersreleasedkidney.html](http://seattletimes.com/html/nationworld/2014659032_apussistersreleasedkidney.html) (quoting the sisters' attorney Chokwe Lumumba: "[e]verywhere that Haley Barbour looks in this country, if he's looking for an independent or a moderate or whatever else they call those people that they're supposed to be getting the votes for, he's going to see us there waving the banner of the Scott sisters").

195. *Statement of Gov. Barbour*, GOVERNORBARBOUR.COM (Apr. 25, 2011), <http://www.governorbarbour.com/news/2011/apr/4.25barbourstatement.html>.

196. See MISS. CONST. art.V, § 116 ("The chief executive power of this state shall be vested in a Governor, who shall hold his office for four (4) years. Any person elected to the office of Governor shall be eligible to succeed himself in office. However, no person shall be elected to the office of Governor more than twice . . . ."). Haley Barbour served as Governor of Mississippi from 2004 – 2012. Sansing, *supra* note 176.

197. Barbour remained true to his word and did not include the Scott Sisters in his end-of-term pardons. Rather, he pardoned 200 convicted felons, more than two dozen of whom had been convicted of homicide. Holbrook Mohr & Emily Wagster Pettus, *Outgoing Governor Pardons Nearly 200, Including Killers*, SEATTLE TIMES, Jan. 11, 2012, [http://seattletimes.com/html/nationworld/2017206018\\_barbour11.html](http://seattletimes.com/html/nationworld/2017206018_barbour11.html).

with Barbour's political aspirations—serves to heighten the “yuck factor” experienced by individuals outside of the Scott/Barbour story (bioethicists and the national media), while engendering no such response from the narrative's actors (Barbour, Jamie and Gladys Scott, and the NAACP). Variation in the level—or existence—of repugnance notwithstanding, it is possible to conceive of interests wholly lacking in a “yuck factor” response that converge with inmates' interests in securing freedom, namely those of the patients waiting for organ transplants. As such, by adapting Bell's interest convergence model to the interests of inmates as they converge with those of the individuals awaiting transplants,<sup>198</sup> one can argue that such convergence lends support to the creation of an inmate organ donation program.

Those in favor of keeping NOTA intact argue that preventing the trading of organs for valuable consideration protects the most vulnerable members of society—among them the poor and minorities—from becoming mere organ farms for the ailing wealthy.<sup>199</sup> Other proponents claim that NOTA's prohibition is in keeping with our country's longstanding tradition of altruistic organ donations.<sup>200</sup> NOTA, however, was not initially conceived as anti-incentive.<sup>201</sup> In fact, NOTA's main proponent, Representative Al Gore, Jr. of Tennessee, initially considered the use of incentives and only backed away from their use after Congressional hearings exposed fears of exploitation fostered by *private* organ markets.<sup>202</sup> However, in the context of the overwhelming numbers of patients lingering and dying on the transplant waiting list, a policy of strict altruistic organ donations is outmoded. Instead, a narrow and tightly-regulated market, as an exception to NOTA, may prove extremely beneficial to both prisoners and patients. We have considered shortages and the needs of patients in inmate donation programs before in

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198. One may question whether those suffering on the organ transplant waiting list represent the powerful. However, when compared to the incarcerated, those awaiting transplants are more able to garner public sympathy and support and have a positive impact on political will. See ROBERT M. PAGE, *STIGMA, CONCEPTS IN SOCIAL POLICY TWO 2–7* (Vic George & Paul Wilding eds., 1984) (noting that “conduct” or “moral” stigma—such as that associated with incarceration—accords blameworthiness and diminished social acceptance to the carrier of that species of stigma as compared to those who carry the “physical” category of stigma, which is associated with illness and disability). Thus, from a relative standpoint, they can be said to be the more powerful actors in this particular scenario.

199. Delmonico et al., *supra* note 17, at 2004.

200. See Gabriel M. Danovitch & Alan B. Leichtman, *Kidney Vending: The “Trojan Horse” of Organ Transplantation*, 1 *CLINICAL J. AM. SOC'Y NEPHROLOGY* 1133–35 (2006). “[K]idney selling would distort and undermine the altruism . . . on which our whole organ donation system currently relies.” *Id.* at 1134.

201. CHAD THOMPSON, *supra* note 47, at 134 (“[E]arly [Congressional] hearings [on NOTA] held little opposition to incentives for organ donation.”).

202. *Id.* at 134–35.

this country. The surprising level of acceptance of kidney clemency for Gladys Scott may indicate that this is the time to reinstitute and expand such programs.

### *B. Blood-Time and the Case Against Coercion*

Exchanges involving inmates' biological materials for liberty are not novel. Beginning in the 1950s, in response to blood plasma shortages, a number of states enacted statutes that created what came to be known as "blood-time" programs under which inmates who donated blood were awarded good-time credit, thereby reducing their sentences.<sup>203</sup> While some states have maintained their blood-time programs,<sup>204</sup> many of these programs were discontinued in the 1980s as blood supplies became tainted by HIV-infected plasma.<sup>205</sup> Despite advances in blood screening technology, the discontinued state prison blood-time programs have not been reinstated. However, it must be noted that while such programs were in place, there was no criticism lodged against them that in any way mirrored the arguments against organ donation-based sentence reduction programs. Rather, they were discontinued for purely medical reasons and in some cases, reinstated as donation programs without the time credit component and with limitations designed to ensure that only the healthiest inmates were eligible to donate.<sup>206</sup>

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203. See, e.g., ALA. CODE § 14-9-3 (2011) (providing that every prisoner who donates at least one unit of blood to the American Red Cross shall be entitled to a thirty-day reduction of his sentence, such deduction to be applied one time per twelve-month period); CAL. PENAL CODE § 4352 (repealed 1968) (giving a five-day sentence reduction per pint of blood donated by a prisoner, up to four times per year); MASS GEN. LAWS ch. 127, § 129A (repealed 1989) (providing for sentence reductions for blood donations), MICH. COMP. LAWS ANN. § 791.233a (repealed 1982) (allowing that in determining a prisoner's fitness for release on parole, the parole board may consider the prisoner's blood donations); OKLA. STAT. tit. 57, § 65 (2004) (providing that an inmate serving in any county jail shall be entitled to receive three days' credit for each pint of blood that he donates during his first thirty days in jail and five days' credit for every pint donated in any sixty-day period thereafter); R.I. GEN. LAWS § 42-56-25 (repealed 1988) (giving sentence reductions for blood donations in certain situations), VA. CODE ANN. § 53.1-191 (2002) (allowing the parole board of the State of Virginia, with the consent of the Governor, to give good-time credit to a person who donates blood to a fellow inmate and "[i]n unusual circumstances" providing that "a prisoner may receive credit for donating blood . . . to blood banks . . .").

204. Alabama, Oklahoma, and Virginia are among those states that still have blood-time statutes in force. See ALA. CODE § 14-9-3 (2011); OKLA. STAT. tit. 57, § 65 (2012); VA. CODE ANN. § 53.1-191 (2002).

205. Massachusetts, Michigan, and Rhode Island, for example, all repealed their blood-time statutes in the 1980s. See CAL. PENAL CODE § 4352 (repealed 1968); MASS GEN. LAWS ANN. ch. 127, § 129A (repealed West 1989); MICH. COMP. LAWS ANN. § 791.233a (repealed West 1982); R.I. GEN. LAWS § 42-56-25 (repealed 1988).

206. Some states that have discontinued blood-time still allow prisoners to donate blood. For

Blood is not a prohibited “human organ” under NOTA.<sup>207</sup> Despite blood’s not being classified as a “human organ,” analogizing blood-time programs with a proposed “organ-time” program is not unhelpful. Rather, one can use the former blood-time programs to illustrate the historical willingness of the criminal justice system to bargain with prisoners on terms that include bodily products in exchange for liberty. The argument can be made that blood, unlike the organs enumerated in NOTA, is regenerative (bone marrow excepted).<sup>208</sup> This Article proposes, however, that the standard should not be regeneration, but the criminal justice system’s ability to orchestrate a scheme under which an incentivized organ exchange will not be deemed coercive.

Traditionally, coercion involves the threat that an unfavorable change in circumstances will occur if the coercee does not take the action desired by the coercer.<sup>209</sup> Thus, without a conditional threat, coercion cannot be said to exist. In the case of a proposed inmate donation program, the State would not be threatening to punish an inmate by unfavorably changing his circumstances if he chooses not to donate. Rather, it would only be offering to favorably change the circumstances of those who did choose to participate. Thus, rather than a conditional threat, the program would consist of a conditional offer and would, therefore not meet the definition of coercion.<sup>210</sup> A prisoner who did not participate would be no worse off with regard to the length of her sentence or the circumstances of her confinement than before the offer to participate was made. In mitigating coercion, it is therefore, important to refrain from framing the inmate’s donation as the State’s exacting retribution for the inmate’s crimes.<sup>211</sup> Donation, in lieu of confinement, should not be offered as part of a plea arrangement or as part

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example, California continues to allow its prisoners to donate provided that they submit to an examination by a physician and limit their donations to once per seventy-two days. CAL. PENAL CODE § 4351 (2011). One scholar reasoned that prisoners may continue to volunteer to donate blood without the promise of blood-time in the hope of favorably impressing the parole board. *See* Marc A. Franklin, *Tort Liability for Hepatitis: An Analysis and a Proposal*, 24 STAN. L. REV. 439, 441 n.13 (1972).

207. *See* 42 U.S.C. § 274e(c)(1) (2006) (defining “human organ”). In a recent case, the Ninth Circuit held that NOTA did not prohibit compensation for blood containing peripheral blood stem cells, even though such cells had recently been a “subpart” of the bone marrow and were only present in the blood as a result of the administering of a certain drug. *Flynn v. Holder*, 684 F.3d 852, 863 (9th Cir. 2011).

209. *Coercion*, STANFORD ENCYCLOPEDIA PHILOSOPHY (revised Oct. 27, 2011), <http://plato.stanford.edu/entries/coercion/>.

210. *Id.*

211. *But see* Mark F. Anderson, *The Prisoner as Organ Donor*, 50 SYRACUSE L. REV. 951, 964 (2000) (envisioning that the emphasis of any inmate organ donation program will “be on the fact that the prisoners are paying society and not that society is paying the prisoners”).

of the sentence,<sup>212</sup> or as *the* condition of release as in the Gladys Scott case. Rather, the inmate must be free to choose or reject donation, such a choice being made after careful, studied consideration. The program outlined in Part III.C. below seeks to instill such autonomous decision-making.

There still remains the question of whether, if not coercive, the offer of liberty in exchange for an organ represents an “undue inducement”—one in which the thing offered, liberty, is so attractive that a prisoner’s ability to make an autonomous decision would be overridden such that she would disregard her better judgment and donate an organ to obtain that liberty.<sup>213</sup> The danger of undue inducement, like that of coercion, can be overcome by creating an environment in which the proposed inmate donor can gather facts sufficient to develop informed consent to donate.

### *C. A Proposal for an Exchange of Inmate Organs for Liberty*

This Article proposes that an inmate organ donation program should consist of five components: (1) screening; (2) donor education; (3) donation and release; (4) post-operative care and follow up; and (5) continued outreach and education. In addition, such a program should include protective measures, such as provisions for judicial oversight. Finally, the program should be structured so as to avoid placing inmates in a position where eschewing the donation program can worsen their circumstances.

Recent scholarship has documented the historical mistreatment of vulnerable populations, particularly Blacks, by the healthcare system.<sup>214</sup> This mistreatment has taken various forms, including the lack of access to healthcare, substandard care, and nonconsensual experimentation. Critics may argue that any proposals to elicit informed consent from inmates for organ/time exchange programs could eventually be utilized to abuse another vulnerable population, prison inmates, much as Blacks were abused by the healthcare system. Once established in the area of organ donation, informed consent could be applied to situations involving medical experimentation, including drug trials and experimental procedures. However, the proposal contained herein solely advocates creating a narrow exception to the

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212. *But see id.* (describing a retributivist scheme under which inmate organ donation “would be an integral part of the criminal sentencing process”).

213. *The Sale of Human Organs*, STANFORD ENCYCLOPEDIA PHILOSOPHY (Oct. 17, 2011), <http://plato.stanford.edu/entries/organs-sale/>.

214. *See generally* HARRIET WASHINGTON, MEDICAL APARTHEID: THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT 5 (2006) (documenting “a peculiar type of injustice in health: the troubled history of medical experimentation with African Americans . . .”); Vernellia R. Randal, *Slavery, Segregation and Racism: Trusting the Health Care System Ain’t Always Easy! An African American Perspective on Bioethics*, 15 ST. LOUIS U. PUB. L. REV. 191 (1996); Michele Goodwin & L. Song Richardson, *Patient Negligence*, 72 LAW & CONTEMP. PROBS. 223, 230–31 (2009).

established organ donation regime as codified in NOTA, not authorizing the targeting of prison populations for medical experimentation. As such, this proposal, with the following steps, advocates the usage of conventional medical techniques in organ procurement and transplantation and merely seeks a novel solution to the current legal obstacle imposed by NOTA.

### 1. Screening

Inmates who express an interest in donating an organ would undergo screening to determine their eligibility for the program. Screening would assess the candidate's suitability for the program from both a penological and medical standpoint. Jurisdictions adopting an inmate donation program may want to limit the program by type of conviction, length of sentence (or remaining length), or other factors. Medical screening would aim to discover those with communicable diseases, medical conditions contraindicating donation, or those whose organs are otherwise unsuitable for transplant. Such inmates would be rejected as program candidates. An inmate being rejected from the program for reasons of poor health and, therefore, being unable to avail herself of the benefit being offered to healthy inmates may, admittedly, seem unfair. As a means of mitigating the result of rejection, any inmate who agrees to undergo screening and participate in the educational process (as described below) would receive modest credit toward release.

A screening regimen would make it impossible for an inmate to misrepresent her eligibility to donate. Such a regimen would also serve to expand donor registries, such as the bone marrow registry. It is anticipated that some inmates who are not rejected for medical reasons may still self-select out of the program at a later point. However, there remains the possibility that even post-release, they may be identified as a match for a particular candidate and may choose to make a donation at that time. In the case of bone marrow, it is likely that an inmate who registers now may not be called upon to donate until some point in the future.

### 2. Donor Education

While medical screening is ongoing, potential inmate donors will undergo some months of patient education in order to advise them of the need for donation, the process of donating, and the potential risks involved. The aims of such education would be twofold: (1) to obtain informed consent from the potential donor and (2) to extend the timeline between acceptance into the program and actual donation. The purpose of lengthening the time between acceptance and donation is to lessen any pressure that an inmate may feel to donate immediately by actually

removing the option of immediate donation.<sup>215</sup> The attenuated timeline reduces desperation and, thus, the appearance of undue inducement.<sup>216</sup> A longer education timeline will also give ample opportunity for potential donors to opt out of the program as they gain knowledge regarding the donation process and risks. Again, an inmate would receive credit toward release for time spent in the education phase of the program.<sup>217</sup>

### 3. Donation and Release

After completing the months-long screening and donor education process, a candidate would appear before a judge in order to be cleared to donate and to be released from prison. Such a hearing would be designed to confirm informed consent and the absence of coercion. Donation would take place in a public or private hospital under the care of the same transplant surgeons that care for non-inmate donors. The State and the recipients' insurer would be responsible for medical costs. Upon completion of the surgery, the donor would no longer be deemed to be in state custody.

### 4. Post-Operative Care and Follow Up

As part of the program, a donating former inmate would be entitled to post-operative care in the hospital and to follow up care after discharge. Such follow up care would take the place of normal parole or probation obligations. It would last as long as necessary for full recuperation, as determined by the former inmate's doctors.

### 5. Continued Outreach and Education

The final phase of the program would be optional for the former inmate. In this phase, she would be provided with additional education and would have the opportunity to participate in community outreach programs aimed at increasing organ donors. It is anticipated that participating states would devise measures to provide training and possibly employment to inmates choosing continued participation.

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215. See Taylor & Simmerling, *supra* note 19, at 57 (discussing the benefits of timeline attenuation in reducing coercion in the context of providing cash payments to donors).

216. *Id.*

217. Some interested candidates may be rejected for medical reasons before completing the education phase. As discussed above, they would be entitled to credit toward release for the part of the education phase that they had completed.

## IV. CONCLUSION

The Scott Sisters' case is illustrative of a classically repugnant exchange in which coercion, coupled with political expediency, played a major role. This example, however, does not have to be the model for an inmate organ-liberty exchange. Instead, we can adapt Professor Derrick Bell's interest convergence model to apply to the alignment of the interests of inmates with those of transplant hopefuls.<sup>218</sup> Further, by providing inmates with patient education and opportunities to opt out without adverse consequences, it may be possible to create a program under which such exchanges would not trigger a "yuck factor" response.

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218. See discussion of Professor Bell's theory of interest convergence, *supra* Parts II.A., III.A.