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My Father's Eyes and My Mother's Heart: The Due Process Rights of the Next of Kin in Organ Donation

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Notes

MY FATHER'S EYES AND MY MOTHER'S HEART: THE DUE PROCESS RIGHTS OF THE NEXT OF KIN IN ORGAN DONATION

I. INTRODUCTION

When Bonnie Butler arrived in this world, she had beautiful blue eyes. Doted upon by her parents, Bonnie hated the dark and loved riding her pony. Yet, as it is prone to do in legal hypotheticals, tragedy struck when Bonnie suffered fatal injuries in a riding accident. Stricken with grief, the Butlers wanted nothing more than to give their little girl a peaceful burial. As a result, they were horrified to learn that, without asking permission, the county coroner removed the corneas from Bonnie's beautiful blue eyes at the request of the local organ bank. Grief soon turned to anger, and the Butlers visited their local lawyer, convinced that the coroner "stole" their daughter's corneas.¹

Across town from the Butlers, Ashley Wilkes was similarly devastated when his wife Melanie died due to complications from childbirth. Because Melanie was always a kind and generous person, Ashley felt that the best way to honor her memory was to donate Melanie's organs so that some other person could benefit from this tragic turn of events. Consequently, Ashley was enraged when the coroner refused to remove Melanie's organs, stating that he first needed to perform an autopsy, as the local police believed that Melanie went into premature labor as a result of spousal abuse. By the time the coroner performed the autopsy, Melanie's organs were no longer viable for transplant. Like the Butlers, Ashley is convinced that the coroner wrongfully deprived him of his right to dispose of Melanie's body and organs in a manner that he saw fit.

As the above scenarios demonstrate, the organ donation process often has an immense emotional impact on the decedent's family members. The Butlers are tormented by the idea of their daughter's scarred blue eyes, while Ashley Wilkes is haunted by the thought of the lives that could have been saved if the coroner had allowed him to donate his wife's organs. Yet, despite the emotional ramifications of

¹ All families described in this hypothetical are fictional. However, the situation of the Butler family bears close resemblance to the plaintiff-family members in *Georgia Lions Eye Bank, Inc. v. Lavant*, 335 S.E.2d 127 (Ga. 1985) and *Newman v. Sathyavagiswaran*, 287 F.3d 786 (9th Cir. 2002) described *infra* Part II.D.

organ donation, the extent of the family members' rights in the organ donation process is not always clear.² In most states, family members can consent to organ donation through some form of the Uniform Anatomical Gift Act and enjoy a common law "quasi-property" right to bury their next of kin.³ However, it is not certain that any of these rights rise to a constitutional level.⁴ Although the Due Process Clause of the Constitution provides that no state may deprive any citizen of a right, such as life, liberty, or property, without due process of law, a right is protected only if a party can establish a "legitimate claim of entitlement" to that right.⁵ Therefore, the Butlers and Ashley Wilkes will bear a heavy burden if they wish to establish a constitutional claim against the coroner in either of their respective counties.

This Note explores the various common law and statutory rights held by the next of kin in the organ donation process, analyzes whether these rights create any sort of liberty or property interest protected by the Due Process Clause, and if so, determines what sort of process the state must provide before it can deprive family members of any right they may have in making, or refusing to make, an anatomical gift of a body organ of a decedent. Part II of this Note explores the legal history of organ donation as well as the common law "quasi-property" rights enjoyed by the next of kin in the disposition of the decedent and any interests the state may hold in a dead body.⁶ Part II further establishes a basic framework for due process analysis and presents relevant court opinions applying due process analysis to determine whether the relatives of a decedent have a constitutionally protected property interest in the decedent's body organs.⁷ Part III examines the merits of recognizing a property interest in the decedent's body organs and analyzes the various types of process that the state must provide before it may deprive family members of their interest in these organs.⁸ Finally, Part IV proposes amendments to the Uniform Anatomical Gift Act to unilaterally establish that the relatives of a decedent have a legitimate claim of entitlement to control the disposition of the deceased's body organs and to establish a proper procedural framework to ensure that

² See *infra* Part II.C.1.

³ See *infra* Part II.C.1.c.

⁴ See *infra* Part III.

⁵ U.S. CONST. amend. XIV, § 1; *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

⁶ See *infra* Parts II.A-C.

⁷ See *infra* Parts II.C-D.

⁸ See *infra* Part III.

family members are not unjustly deprived of their established constitutional rights.⁹

II. BACKGROUND: ORGAN DONATION AND THE DUE PROCESS CLAUSE

Since organ transplantation first became a viable medical option, many significant legal developments regarding the rights involved in the organ donation process have arisen. Parts II.A and II.B examine the history of organ donation, the National Organ Transplant Act, and the Uniform Anatomical Gift Act.¹⁰ Next, Part II.C reviews the basic workings of due process analysis, demonstrating that if a person has a constitutionally protected property or liberty interest, the amount of process required is determined by weighing the private interests, public interests, and the risk of erroneous deprivation of the protected property interest.¹¹ Part II.C then explores the nature of body organs as personal property, including the “quasi-property” rights that the next of kin have in the decedent’s body as well as the interests that the state may have in a dead body.¹² Finally, Part II.D presents differing court opinions that analyze whether relatives of a decedent have a constitutionally protected property interest in his body or body organs, and if so, determining how much process is due.¹³

A. *The Development of Organ Donation*

Over the past fifty years, organ transplantation has dramatically progressed from a dream of science fiction to medical reality.¹⁴ Although the first successful organ transplant was performed in 1954,¹⁵ it was not until the development of immunosuppressant drugs in 1962 that organ

⁹ See *infra* Part IV.

¹⁰ See *infra* Parts II.A–B.

¹¹ See *infra* Part II.C.

¹² See *infra* Parts II.C.1–2.

¹³ See *infra* Part II.D.

¹⁴ See Gloria J. Banks, *Legal & Ethical Safeguards: Protection of Society’s Most Vulnerable Participants in a Commercialized Organ Transplantation System*, 21 AM. J.L. & MED. 45, 47, 53–57 (1995) (describing the major obstacles faced by physicians in organ transplantation and exploring the increase in demand for transplantable organs due to increases in transplant surgery success rates); Erik S. Jaffe, Note, *She’s Got Bette Davis[s] Eyes: Assessing the Nonconsensual Removal of Cadaver Organs Under the Takings and Due Process Clauses*, 90 COLUM. L. REV. 528, 531 (1990) (describing the “catch up” required in legal doctrine necessitated by increases in organ transplant rates).

¹⁵ Joel D. Kallich & Jon F. Merz, *The Transplant Imperative: Protecting Living Donors from the Pressure To Donate*, 20 IOWA J. CORP. L. 139, 139–40 (1994). The operation took place at Peter Bent Brigham Hospital in Boston, where a kidney was transplanted from one twin to another. *Id.* The transplanted kidney functioned for nine years. *Id.*

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donation became a viable medical option.¹⁶ Today, doctors have the capability to successfully transplant a wide variety of organs, including the kidney, liver, cornea, skin, bone, and lung.¹⁷

As organ donation became increasingly successful, a major gap developed in the supply and demand for transplantable organs.¹⁸ In 2003, more than 22,000 people, approximately sixty people per day, received a life-saving organ transplant.¹⁹ However, for each of those sixty people who received an organ, another fifteen people died while waiting for a transplantable organ to become available.²⁰ Overall, it is

¹⁶ Theodore Silver, *The Case for a Post-Mortem Organ Draft and a Proposed Model Organ Draft Act*, 68 B.U. L. REV. 681, 682 (1988) (noting that “pharmacologic immunosuppression lifted the curse of prompt, certain rejection”).

¹⁷ *Id.* Transplantable organs and tissue that can be harvested from a single corpse include: brain tissue, the jaw bone, bone marrow, heart valves, heart, lungs, liver, kidneys, small and large intestines, 206 bones, twenty-seven ligaments and cartilage, corneas, inner ear workings, heart pericardium, stomach, pancreas, hip joints, 600 miles of blood vessels, and twenty square feet of skin. NORA MACHADO, USING THE BODIES OF THE DEAD: LEGAL, ETHICAL AND ORGANISATIONAL DIMENSIONS OF ORGAN TRANSPLANTATION 2, fig. 1 (Dartmouth 1998).

¹⁸ See Silver, *supra* note 16, at 682. Silver notes that as of 1988, there appeared to be a shortage of 5,000 to 7,000 kidneys annually. *Id.* at 683–84. While conventional estimates gauged the demand for livers in 1985 to be somewhere between 5,000 and 7,000, only 300 to 600 livers were available for transplant. *Id.* at 685–86. Similarly, while the annual need for transplantable hearts in 1985 was as high as 50,000, only 719 hearts were donated. *Id.* at 684–85.

¹⁹ H.R. REP. NO. 108-15, at 2 (2003), 2003 WL 361132. In a 1993 Gallup survey, eighty-five percent of those surveyed expressed general approval for organ donation. MACHADO, *supra* note 17, at 54. Those expressing disapproval of organ donation usually express the following concerns: disbelief in brain death, maintaining bodily integrity, fear that doctors will not work as hard to save the life of an organ donor, fear that organ donation will upset the family, belief that old age prevents organ donation, fear of pain, and various religious barriers. *Id.* at 55. A variety of additional factors also influence the decision to donate organs, including age (young people generally express more positive attitudes towards organ donation than older people) and education (the higher the level of education, the greater the tendency to approve of organ donation). *Id.* at 55. Another possible factor is gender. *Id.* at 55. Men represented sixty percent of cadaveric donors in 1996. *Id.* at 54. Explanatory factors for this phenomenon include the higher mortality rate of men in traffic accidents and the higher percentage of men that die under ventilator treatment. *Id.* at 54. However, among living donors (those who donate a “duplicate” organ such as a kidney), during their lifetime, women substantially outnumber men. *Id.* at 57, tbl. 8 (noting that women comprise sixty-seven percent of living pancreatic donors in Minnesota and sixty-five percent of liver transplants in Chicago). A substantial number of these transplants are from women to men, especially mothers to children. *Id.* at 56.

²⁰ H.R. REP. NO. 108-15, at 2 (2003), 2003 WL 361132.

estimated that on any given day, 76,000 people are on the waiting list compiled by the United Network for Organ Sharing.²¹

B. Responses to Organ Shortages: The National Organ Transplant Act and the Uniform Anatomical Gift Act

In response to this organ shortage, a wide variety of proposals have been introduced to increase the supply of transplantable organs, most notably the Congressional passage of the National Organ Transplant Act in 1984²² and the drafting of the Uniform Anatomical Gift Act in 1968, which was subsequently amended in 1987.²³

1. The National Organ Transplant Act

In response to pleas from patients and family members seeking transplantable organs, the possible appearance of a commercial market for transplantable organs, and concern for the equitable allocation of donated organs, Congress passed the National Organ Transplant Act ("NOTA") in 1984.²⁴ First and foremost, NOTA halted any development of a commercialized organ donation system, forbidding the exchange of

²¹ *Id.* See *infra* notes 27–28 and accompanying text for a description of the United Network for Organ Sharing and its functions.

²² See 42 U.S.C. §§ 273–74 (2000).

²³ UNIF. ANATOMICAL GIFT ACT (1987) 8A U.L.A. 1 (2003); UNIF. ANATOMICAL GIFT ACT (1968) 8A U.L.A. 69 (2003). Other proposals considered by Congress to increase the supply of transplantable organs include the creation of futures contracts for organs, tax credits of up to \$10,000 on the estate of deceased organ donors, reimbursement for funeral expenses, charitable donations, direct payment for organs, and congressional medals of honor for organ donors. *Increasing Organ Donation: Hearing Before the Subcomm. on Oversight & Investigations of the House Comm. on Energy & Commerce*, 108th Cong. 5 (2003) (statement of Dr. Robert M. Sade, Professor of Surgery, Medical University of South Carolina), 2003 WL 21280502; see also Linda C. Fentiman, *Organ Donation as National Service: A Proposed Federal Organ Donation Law*, 27 SUFFOLK U. L. REV. 1593, 1598–1600 (1993) (proposing a system where consent to organ donation is presumed unless a participant has specifically chosen to "opt out" and providing compensation for those people who do consent to organ donation); Shelby E. Robinson, Comment, *Organs for Sale? An Analysis of Proposed Systems for Compensating Organ Providers*, 70 U. COLO. L. REV. 1019, 1030–51 (1999) (examining a variety of proposals to increase organ donation, including presumed consent to donation, conscription of organs, a mandated choice system in which people are required to officially state whether they wish to donate their organs, compensation for organs, an organ futures market, and a system of death benefits, ultimately concluding that a death benefits system would be the most effective); Silver, *supra* note 16 (proposing a conscription system authorizing physicians and hospital personnel to remove any organ from a deceased body that they deem useful to a living patient).

²⁴ H.R. CONF. REP. NO. 98-1127, at 16 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3989, 3992 ("The conferees are particularly concerned that [Organ Procurement Organizations] adopt medical criteria for the equitable allocation of donated organs among transplant centers and patients."); Robinson, *supra* note 23, at 1028.

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human organs for any type of valuable consideration.²⁵ NOTA also established a nationwide framework for organ donation through the creation of a nationwide Organ Procurement and Transplantation Network as well as regional Organ Procurement Organizations ("OPOs").²⁶

On a nationwide level, the Organ Procurement and Transplantation Network, administered through the United Network for Organ Sharing ("UNOS"), maintains a computerized database of the potential organ recipients' medical and pertinent information and develops criteria to facilitate matching organs to individuals in need.²⁷ UNOS also preserves

²⁵ 42 U.S.C. § 274e (2000). The Act provides that: "It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce." *Id.* "[V]aluable consideration' does not include the reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ or the expenses of travel, housing, and lost wages incurred by the donor of a human organ in connection with the donation of the organ." *Id.*

²⁶ 42 U.S.C. §§ 273-74 (2000). Congress delegated the administration of the Organ Procurement and Transplantation Network to the United Network for Organ Sharing ("UNOS"), a pre-existing registration database for potential kidney recipients. Robinson, *supra* note 23, at 1030.

²⁷ 42 U.S.C. § 274(b)(2). The Act provides, in relevant part, that:

- (2) The Organ Procurement and Transplantation Network shall—
 - (A) establish in one location or through regional centers—
 - (i) a national list of those individuals who need organs, and
 - (ii) a national system, through the use of computers and in accordance with established medical criteria, to match organs and individuals included in the list, especially individuals whose immune system makes it difficult for them to receive organs,
 - (B) establish membership criteria and medical criteria for allocating organs and provide to members of the public an opportunity to comment with respect to such criteria,
 - (C) maintain a twenty-four-hour telephone service to facilitate matching organs with individuals included in the list,
 - (D) assist organ procurement organizations in the nationwide distribution of organs equitably among transplant patients,
 - (E) adopt and use standards of quality for the acquisition and transportation of donated organs, including standards for preventing the acquisition of organs that are infected with the etiologic agent for acquired immune deficiency syndrome,
 -
 - (N) carry out studies and demonstration projects for the purpose of improving procedures for organ donation procurement and allocation, including but not limited to projects to examine and attempt to increase transplantation among populations with special needs, including children and individuals who are members of racial or ethnic minority groups, and among populations with limited access to transportation....

quality and testing standards for donated organs and carries out studies and projects to help improve organ donation rates, especially among special needs populations.²⁸

At a regional level, NOTA requires OPOs to establish agreements with local hospitals and health care entities to identify potential organ donors and to help educate medical professionals and other citizens about organ donation in order to acquire as many usable organs as possible.²⁹ Each OPO has the responsibility to ensure that donated organs meet the quality standards adopted by the national Organ

Id.

²⁸ *Id.* The current criteria for organ matching are objective and vary by organ, but common matching criteria include: blood type, tissue type, size of the organ, medical urgency of the patient, time on the waiting list, and the distance between the donor and the recipient. The Organ Procurement and Transplantation Network, *Donor Matching System*, at <http://www.optn.org/about/transplantation/matchingProcess.asp> (last visited Nov. 2, 2005). The criteria used to determine the order of placement for any given organ donation waiting list have been a subject of much debate. See Michele Goodwin, *Altruism's Limits: Law, Capacity, and Organ Commodification*, 56 RUTGERS L. REV. 305, 331–41 (2004). Goodwin argues that even though race is not a stated factor for organ matching, many methods currently used to waitlist placement disproportionately favor white recipients. *Id.* She likens this discriminatory effect to many controversial methods historically used to ration scarce medical treatment, such as the “God Squad,” an all white committee in Seattle, Washington, that evaluated a patient’s “social value” to determine whether or not a the patient could receive life-saving kidney dialysis. *Id.*

²⁹ 42 U.S.C. § 273(b)(3). The Act provides, in pertinent part, that:

- (3) An organ procurement organization shall—
 - (A) have effective agreements, to identify potential donors, with a substantial majority of hospitals and other health care entities in its service area which have facilities for organ donations,
 - (B) conduct and participate in systematic efforts, including professional education, to acquire all useable organs from potential donors,
 - (C) arrange for the acquisition and preservation of donated organs and provide quality standards for the acquisition of organs which are consistent with the standards adopted by the Organ Procurement and Transplantation Network under section 274(b)(2)(E) of this title, including arranging for testing with respect to preventing the acquisition of organs that are infected with the etiologic agent for acquired immune deficiency syndrome,
 - (D) arrange for the appropriate tissue typing of donated organs,
 - (E) have a system to allocate organs equitably among transplant patients according to established medical criteria,
 - (F) provide or arrange for the transplantation of organs to transplant centers,
 -
 - (K) assist hospitals in establishing and implementing protocols for making routine inquiries about organ donations by potential donors.

Id.

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Procurement and Transplantation Network and to coordinate the logistics involved with the physical retrieval of organs.³⁰ In cooperation with UNOS, each OPO also works to coordinate the transportation of organs from the hospital where the organ was removed to area transplant centers, helping to ensure that the organ donation process proceeds as smoothly as possible.³¹

2. The Uniform Anatomical Gift Act

Just as NOTA helped to provide logistical structure to organ donation and procurement, approval of the Uniform Anatomical Gift Act of 1968 ("UAGA") by the National Conference of Commissioners on Uniform State Laws helped to provide legal structure to the organ donation process.³² Amended in 1987, the UAGA attempted to increase the supply of transplantable organs by replacing a confusing mix of state statutes with a uniform process for obtaining consent to organ donation.³³

Both versions of the UAGA specify that any adult may consent to make an anatomical gift of his own body for the purposes of organ transplantation or for research and development.³⁴ This gift must be made by a signed document, such as a will or an organ donor card.³⁵ If the donor is unable to sign, the document of gift may be signed by another individual in the presence of two witnesses, who must also sign the document.³⁶ If a decedent has not already made an anatomical gift and has not explicitly stated his wishes to the contrary, both the 1968 and 1987 versions specify that a qualified family member may provide the necessary consent for organ donation.³⁷ Although either the decedent or

³⁰ *Id.*

³¹ *Id.*

³² See Jaffe, *supra* note 14, at 530.

³³ Nat'l Conference of Comm'rs on Unif. State Laws, *Prefatory Note* to UNIF. ANATOMICAL GIFT ACT (1968) 8A U.L.A. 70 (2003) ("The laws now on the statute books do not, in general, deal with these legal questions in a complete or adequate manner. The laws are a confusing mixture of old common law dating back to the seventeenth century and state statutes that have been enacted from time to time.").

³⁴ UNIF. ANATOMICAL GIFT ACT (1987) § 2(a), 8A U.L.A. 24 (2003); UNIF. ANATOMICAL GIFT ACT (1968) § 5(a), 8A U.L.A. 44 (2003).

³⁵ UNIF. ANATOMICAL GIFT ACT (1987) § 2(b), 8A U.L.A. 24 (2003); UNIF. ANATOMICAL GIFT ACT (1968) §§ 4(a)-(b), 8A U.L.A. 129-30 (2003). The 1968 Act also requires that any anatomical gift made by an individual must be signed in the presence of at least two witnesses. UNIF. ANATOMICAL GIFT ACT (1968) § 4(b).

³⁶ UNIF. ANATOMICAL GIFT ACT (1987) § 2(b); UNIF. ANATOMICAL GIFT ACT (1968) § 4(b).

³⁷ UNIF. ANATOMICAL GIFT ACT (1987) § 3(a), 8A U.L.A. 33 (2003); UNIF. ANATOMICAL GIFT ACT (1968) § 2(b), 8A U.L.A. 116 (2003). The 1968 Act establishes the following order

family members may specify a recipient of the anatomical gift, the gift may also be made to an unspecified donee.³⁸ However, both versions of the act ensure that the wishes of the decedent take preference over those of the next of kin, by either vesting all rights in a gifted organ with the donee or by specifying that all previously made anatomical gifts become irrevocable upon the death of the decedent.³⁹ Both versions also provide methods by which any person making an anatomical gift of his own body organs may revoke that gift.⁴⁰

In addition to providing the legal framework for making and accepting anatomical gifts, the 1987 UAGA further encourages organ donation by giving hospitals an affirmative duty to obtain consent to organ donation.⁴¹ The 1987 UAGA specifically states that upon admission to a hospital, a designated member of the hospital staff must ask each adult patient if he is an organ donor, and if he is, obtain the

of priority for determining which family member may provide consent for organ donation: (1) the spouse, (2) an adult son or daughter, (3) either parent, (4) an adult brother or sister, (5) a guardian of the person of the decedent at the time of his death, (6) any other person authorized or under obligation to dispose of the body. UNIF. ANATOMICAL GIFT ACT (1968) § 2(b). Although substantially similar to the 1968 version, the 1987 Act provides a slightly different order of consent: “(1) the spouse of the decedent; (2) an adult son or daughter of the decedent; (3) either parent of the decedent; (4) an adult brother or sister of the decedent; (5) a grandparent of the decedent; and (6) a guardian of the person of the decedent at the time of death.” UNIF. ANATOMICAL GIFT ACT (1987) § 3(a).

³⁸ UNIF. ANATOMICAL GIFT ACT (1987) § 6(b), 8A U.L.A. 54 (2003); UNIF. ANATOMICAL GIFT ACT (1968) § 4(c), 8A U.L.A. 130 (2003). If the donee is not designated, the hospital or attending physician may accept the anatomical gift. UNIF. ANATOMICAL GIFT ACT (1987) § 6(b); UNIF. ANATOMICAL GIFT ACT (1968) § 4(c).

³⁹ UNIF. ANATOMICAL GIFT ACT (1987) § 2(e), 8A U.L.A. 24 (2003); UNIF. ANATOMICAL GIFT ACT (1968) § 2(e), 8A U.L.A. 116 (2003). The 1968 version provides that “[t]he rights of the donee created by the gift are paramount to the rights of all others,” while the 1987 version stipulates that “[a]n anatomical gift by will takes effect upon death of testator, whether or not the will is probated. If, after death, the will is declared invalid for testamentary purposes, the validity of the anatomical gift is unaffected.” UNIF. ANATOMICAL GIFT ACT (1987) § 2(e); UNIF. ANATOMICAL GIFT ACT (1968) § 2(e).

⁴⁰ UNIF. ANATOMICAL GIFT ACT (1987) §§ 2(f)–(g); UNIF. ANATOMICAL GIFT ACT (1968) § 6(a), 8A U.L.A. 143 (2003). Although the language differs slightly, both acts provide for revocation by a signed statement, an oral statement made in the presence of two or more individuals, any communication during a terminal illness or surgery addressed to a physician, or, if the gift is made by will, by any method provided for in the amendment or revocation of wills. UNIF. ANATOMICAL GIFT ACT (1987) §§ 2(f)–(g); UNIF. ANATOMICAL GIFT ACT (1968) § 6(a). The 1968 Act also allows revocation by delivery of a signed statement to the intended donee of the gift. UNIF. ANATOMICAL GIFT ACT (1987) §§ 2(f)–(g); UNIF. ANATOMICAL GIFT ACT (1968) § 6(a).

⁴¹ Robinson, *supra* note 23, at 1026–27 (noting that one of the major criticisms of the UAGA of 1968 was that it failed to increase the supply of transplantable organs through any system to encourage donation).

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appropriate documentation.⁴² If a patient is near death and no documentation of any previous anatomical gift or refusal to make a gift exists, the hospital must discuss the option to make an anatomical gift with immediate family members.⁴³

The 1987 UAGA also provides that organ donation must not interfere with any autopsy or investigation⁴⁴ and forbids the sale of organs for any valuable consideration on a statewide level.⁴⁵ Each of the fifty states has adopted some version of either the 1968 or 1987 UAGA.⁴⁶

⁴² UNIF. ANATOMICAL GIFT ACT (1987) § 5(a), 8A U.L.A. 44 (2003). If a patient refuses to make a gift or makes no answer, the designated employee must attempt to obtain the attending physician's permission to further discuss the decision not to donate with the patient. *Id.*

⁴³ *Id.* § 5(b). The request to the family to donate a patient's organs "must be made with reasonable discretion and sensitivity to the circumstances of the family." *Id.* A record of the conversation must be made in the patient's medical record. *Id.*

⁴⁴ *Id.* §§ 4(a)(5), 11(b). Section 4(a)(5) of the Act provides that the coroner or medical examiner may release a body part so long as "the removal will not interfere with any autopsy or investigation," while section 11(b) provides that "[t]he provisions of this [Act] are subject to the laws of this State governing autopsies." *Id.*

⁴⁵ *Id.* § 10.

⁴⁶ See Nat'l Conference of Comm'rs on Unif. State Laws, *Table of Jurisdictions Wherein Act Has Been Adopted* for UNIF. ANATOMICAL GIFT ACT (1987) 8A U.L.A. 3 (2003 & Supp. 2004); Nat'l Conference of Comm'rs on Unif. State Laws, *Table of Jurisdictions Wherein Act Has Been Adopted* for UNIF. ANATOMICAL GIFT ACT (1968) 8A U.L.A. 69 (2003 & Supp. 2004). States enacting the 1968 UAGA include: Alabama (ALA. CODE §§ 22-19-40 to -74 (2004)), Alaska (ALASKA STAT. § 13.50.010.090 (Michie 2004)), Colorado (COLO. REV. STAT. §§ 12-34-101 to -110 (2003)), Delaware (DEL. CODE ANN. tit. 16, §§ 2710-19 (2004)), Florida (FLA. STAT. ANN. §§ 765.510 to .522 (West 2003)), Georgia (GA. CODE ANN. §§ 44-5-140 to -151 (Michie 2004)), Illinois (755 ILL. COMP. STAT. ANN. 50/1 to 50/9 (West 2004)), Kansas (KAN. STAT. ANN. §§ 65-3209 to -3219 (2003)), Kentucky (KY. REV. STAT. ANN. §§ 311.165-.235 (Michie 2004)), Louisiana (LA. REV. STAT. ANN. §§ 17:2351-.2359 (West 2003)), Maine (ME. REV. STAT. ANN. tit. 22 §§ 2901-10 (West 2003)), Maryland (MD. CODE ANN., EST. & TRUSTS §§ 4-501 to -512 (2003)), Massachusetts (MASS. GEN. LAWS ANN. ch. 113, §§ 7 to 14 (West 2004)), Michigan (MICH. COMP. LAWS §§ 333.10101 to .10109 (2004)), Mississippi (MISS. CODE ANN. §§ 41-39-11, 41-39-31 to -53 (2004)), Missouri (MO. REV. STAT. §§ 194.210-.290 (2004)), Nebraska (NEB. REV. STAT. §§ 71-4801 to -4820 (2003)), New Jersey (N.J. STAT. ANN. §§ 26:6-57 to -65 (West 2004)), N.Y. PUB. HEALTH LAW §§ 4300-09 (Consol. 2004)), North Carolina (N.C. GEN. STAT. §§ 130A-402 to -412.12 (2004)), Ohio (OHIO REV. CODE ANN. §§ 2108.01-.09 (Anderson 2004)), Oklahoma (OKLA. STAT. tit. 63, §§ 2201-18 (2004)), Pennsylvania (20 PA. CONS. STAT. §§ 8601, 8611-24 (2004)), South Carolina (S.C. CODE ANN. §§ 44-43-310 to -420 (Law. Co-op. 2003)), South Dakota (S.D. CODIFIED LAWS §§ 34-26-20 to -41 (Michie 2004)), Texas (TEX. HEALTH & SAFETY CODE ANN. §§ 692.001-.016 (Vernon 2004)), and Wyoming (WYO. STAT. ANN. §§ 35-5-101 to -109 (Michie 2003)). States enacting the 1987 UAGA include: Arizona (ARIZ. REV. STAT. §§ 36-841 to -850 (2004)), Arkansas (ARK. CODE ANN. §§ 20-17-601 to -618 (Michie 2003)), California (CAL. HEALTH & SAFETY CODE §§ 7150-56.5 (West 2004)), Connecticut (CONN. GEN. STAT. §§ 19a-279a to -288 (2003)), Hawaii (HAW. REV. STAT. ANN. §§ 327-1 to -14 (Michie 2003)), Idaho (IDAHO CODE §§ 39-3401 to -3418 (Michie 2004)), Iowa (IOWA CODE §§ 142C.1-.18 (2003)), Minnesota (MINN. STAT. ANN. §§ 525.921-.9224 (West

C. *Organ Donation and the Due Process Clause*

While the UAGA attempts to provide a framework for the varying interests in organ donation, including the interests of the relatives of a decedent, it does not specifically explain the legal boundaries of each of these interests.⁴⁷ Although the UAGA does allow family members to consent to organ donation, the issue remains of whether family members of a decedent have recourse under the Due Process Clause if a state official prevents a desired organ donation from occurring. Alternatively, it remains unclear whether family members have constitutional recourse when organ donation occurs after they have refused to consent to organ donation.

The Due Process Clause of the Fourteenth Amendment guarantees that no person shall be deprived of "life, liberty, or property, without due process of law."⁴⁸ In order to prove a violation of procedural due process, plaintiffs must first assert that they have a constitutionally protected "liberty" or "property" interest.⁴⁹ As explained by the

2003)), Montana (MONT. CODE ANN. §§ 72-17-101 to -312 (2004)), Nevada (NEV. REV. STAT. §§ 451.500-.590 (2004)), New Hampshire (N.H. REV. STAT. ANN. §§ 291-A1:1 to :16 (2003)), New Mexico (N.M. STAT. ANN. §§ 24-6A-1 to -15 (Michie 2004)), North Dakota (N.D. CENT. CODE §§ 23-06.2-01 to -12 (2003)), Oregon (OR. REV. STAT. §§ 97.950-.968 (2003)), Rhode Island (R.I. GEN. LAWS §§ 23-18.6-1 to -15 (2004)), Utah (UTAH CODE ANN. §§ 26-28-1 to -12 (2004)), Vermont (VT. STAT. ANN. tit. 18, §§ 5238-48 (2003)), Virginia (VA. CODE ANN. §§ 32.1-289 to -297.1 (Michie 2004)), Washington (WASH. REV. CODE §§ 68.50.500-.630, 68.50.901-.904 (2004)), West Virginia (W. VA. CODE §§ 16-19-1 to -14 (2004)), and Wisconsin (WIS. STAT. § 157.06 (2003)). Indiana and Tennessee have enacted portions of both the 1968 and 1987 versions of the UAGA. See IND. CODE §§ 29-2-16-1 to -16 (2003); TENN. CODE ANN. §§ 68-30-101 to -116 (2004).

⁴⁷ See Nat'l Conference of Comm'rs on Unif. State Laws, *Prefatory Note* to UNIF. ANATOMICAL GIFT ACT (1968), 8A U.L.A. 70 (2003). The Commission notes that the principle competing interests when determining if an anatomical gift is to be made are:

- (1) the wishes of the deceased during his lifetime concerning the disposition of his body; (2) the desires of the surviving spouse or the next of kin; (3) the interest of the state in determining by autopsy, the cause of death in cases involving crime or violence; (4) the need of autopsy to determine the cause of death when private legal rights are dependent on such cause; and (5) the need of society for bodies, tissues and organs for medical education, research, therapy and transplantation.

Id.

⁴⁸ U.S. CONST. amend. XIV, § 1.

⁴⁹ Bd. of Regents v. Roth, 408 U.S. 564, 570-71 (1972). This case dealt with a non-tenured professor at Wisconsin State University whose contract was not renewed for the upcoming academic year. *Id.* at 567-68. The Court held that the University did not violate the Professor's due process rights by refusing to renew his contract without a hearing because the professor did not have a "genuine claim of entitlement" to re-employment. *Id.* at 578.

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Supreme Court in *Board of Regents v. Roth*,⁵⁰ property interests are not created by the Constitution, but are instead “created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.”⁵¹ Therefore, “property” is regarded as a “legitimate claim of entitlement” that is created by state law.⁵² While a “liberty” interest can never be precisely defined, a liberty interest is generally an established and protected interest, long recognized “as essential to the orderly pursuit of happiness by free men.”⁵³

Even if a party has a protected property or liberty interest, the degree of process to which he is entitled before the state may deprive him of that right varies greatly.⁵⁴ As recently articulated by the Supreme Court in *Hamdi v. Rumsfeld*,⁵⁵ due process analysis must ultimately balance competing governmental interests against private interests to determine whether a private citizen was “deprived of life, liberty, or property, without due process of law.”⁵⁶ The Court explained this process in *Mathews v. Eldridge*,⁵⁷ noting that the process due in any given instance is determined by weighing the private interest affected against the government interest, including the function involved and the burdens the government would face in providing greater process.⁵⁸ Therefore, with any due process claim brought by the relatives of a decedent, one must first determine whether the relatives had a protected

⁵⁰ 408 U.S. 564 (1972).

⁵¹ *Id.* at 577.

⁵² *Id.*

⁵³ *Id.* at 571. The Court observed that both “liberty” and “property” are elusive terms to define, noting that:

“Liberty” and “property” are broad and majestic terms. They are among the “[g]reat [constitutional] concepts . . . purposely left to gather meaning from experience. . . . [T]hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.”

Id. at 571 (alteration in original) (quoting *Nat’l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949)).

⁵⁴ See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2646 (2004); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

⁵⁵ 542 U.S. 507 (2004).

⁵⁶ *Hamdi*, 124 S. Ct. at 2646 (quoting U.S. CONST. amend. V). The court noted that a “tension . . . often exists between the autonomy that the Government asserts is necessary in order to pursue effectively a particular goal and the process that a citizen contends he is due before he is deprived of a constitutional right.” *Id.*

⁵⁷ 424 U.S. 319 (1976).

⁵⁸ *Id.* at 335.

property or liberty interest in a decedent's body and then weigh this interest against competing government interests to determine how much, if any, process is due.⁵⁹ To this end, this Part now explores the nature of property, explaining the traditional property interests in the human body and organs in Part II.C.1 and any interests the state may have in the body organs of a decedent in Part II.C.2, before examining the significant cases weighing these interests in the organ donation process in Part II.D.⁶⁰

1. Traditional Interests and Property Rights in a Decedent's Body and Organs

Before it is possible to determine whether relatives of a decedent have any property rights in the decedent's body, it is important to understand what property is. This Part first develops a definition of property, and then it applies this definition to the rights that individuals have over their own body organs as well as the rights that family members have over the body of the decedent to determine if these rights constitute a constitutionally protected property interest.

a. What Is Property?

By its very nature, "property" is an elusive concept, the definition of which evolves over time.⁶¹ However, the Supreme Court emphasized that property is "an individual entitlement grounded in state law, which cannot be removed except 'for cause.'"⁶² This principle is best understood by examining property not as a tangible item but as a "bundle of rights" a person has in an object or thing.⁶³ Typical "rights"

⁵⁹ See *Hamdi*, 124 S. Ct. at 2646; *Mathews*, 424 U.S. at 335.

⁶⁰ See *infra* Parts II.C.1-2, II.D.

⁶¹ *First Victoria Nat'l Bank v. United States*, 620 F.2d 1096, 1102 (5th Cir. 1980) ("There is no cosmic synoptic definiens that can encompass [property's] range. The word is at times more cognizable than recognizable. It is not capable of anatomical or lexicographical definition or proof. It devolves upon the court to fill in the definitional vacuum with the substance of the economics of our time.").

⁶² *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982).

⁶³ *First Victoria*, 620 F.2d at 1103; see also Michelle Bourianoff Bray, Note, *Personalizing Personalty: Toward a Property Right in Human Bodies*, 69 TEX. L. REV. 209, 211-12 (1990). Bray explores four main theories that have developed regarding reasons for personal property rights: utilitarianism, natural rights, libertarianism, and personhood. *Id.* Advocates of a utilitarianism system assert that unless people have the right to use and control personal objects, they will consume these objects immediately, resulting in an inefficient distribution of resources. *Id.* Those advocates supporting a natural justification for property rights believe "that the right to own property is an individual right derived from the law of God, Nature, or Reason." *Id.* Advocates of libertarianism assert that property ownership is justified on the grounds that it frees individuals from natural and social constraints, thus

or characteristics common to property include: the right to transfer to others, the right to devise and inherit, the right to control, that the item can satisfy a judgment, that the item comes under the jurisdiction of a bankruptcy court in a bankruptcy proceeding, that the item is protected against invasion by the courts, and that the item cannot be taken away without due process of law.⁶⁴ This list is neither conclusive nor exhaustive.⁶⁵ While an interest embodying all of these characteristics will likely be “property,” an interest may only share one or two of these traits and still qualify as “property.”⁶⁶

b. Individual Property Rights to Human Organs

As a general rule, courts have shown reluctance to grant an individual property rights in his own body parts or tissues.⁶⁷ At a glance, it appears that body parts lack many of the characteristics common to property.⁶⁸ Because the federal government has prohibited the sale of body organs or tissue, they cannot be transferred for any valuable consideration and they do not come under the jurisdiction of a bankruptcy court.⁶⁹ Further, an organ cannot be levied upon to satisfy a judgment,⁷⁰ and, while the UAGA does allow an individual to make an anatomical gift to a designated recipient, the terms of the gift are governed by the UAGA, not the usual state probate system.⁷¹

increasing individual liberty. *Id.* Finally, personhood theories of personal property assert that property is an inherent part of an individual's personality and identity and that when people become bound up with external things, they should have the liberty to control those things. *Id.* at 214.

⁶⁴ *First Victoria*, 620 F.2d at 1103–04.

⁶⁵ *Id.* at 1104.

⁶⁶ *Id.*

⁶⁷ William Boulier, Note, *Sperm, Spleens, and Other Valuables: The Need To Recognize Property Rights in Human Body Parts*, 23 HOFSTRA L. REV. 693, 704 (1995) (noting that there is a long tradition of courts resisting classifying human body parts as property). Boulier, along with other scholars, is troubled by the reluctance of courts to recognize property rights in the human body. *Id.* at 697; see also Bray, *supra* note 63, at 211 (proposing a market-inalienable property right in the human body).

⁶⁸ See *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 481–82 (Cal. 1990) (noting that the extensive body of California law dealing with the disposal of human organs and tissues indicated that organs could not be subject to standard legal doctrine dealing with conversion of personal property).

⁶⁹ See 42 U.S.C. § 274e (2000).

⁷⁰ See *Morgan v. Richmond & Cook Funeral Home, Inc.*, 336 So. 2d 342, 343 (La. App. 1976) (holding that a funeral home could not refuse to release a body until embalming fees had been paid).

⁷¹ See *Moore*, 793 P.2d at 489 n.22.

In one of the few cases dealing directly with the issue of personal property rights to human organs and tissues, the California Supreme Court expressly denied the opportunity to recognize property rights to human organs in *Moore v. Regents of the University of California*,⁷² holding that there could be no conversion claim for the appropriation of a human spleen and other tissues.⁷³ Moore, who underwent spleen removal surgery after he was diagnosed with sickle cell leukemia, brought a conversion suit against his physicians and hospital after he discovered that his physicians created a patented cell line from cells removed from his body.⁷⁴ In order to determine whether Moore could maintain a claim for conversion, the court first had to evaluate exactly what type of interest Moore had in the organs removed from his own body.⁷⁵

The California Supreme Court held that Moore could not sustain a cause of action for conversion of his spleen, essentially stating that, due to certain limitations imposed by California law, Moore had no ownership interest in his own body organ.⁷⁶ In examining the limitations imposed by California law, the court specifically noted that the strict infrastructure imposed by the UAGA, the prohibition on the sale of body organs, and the laws regulating the disposition of dead bodies all suggested that in Moore's situation the laws governing tissues

⁷² 793 P.2d 479 (Cal. 1990).

⁷³ *Id.* at 489-90.

⁷⁴ *Id.* In 1976, John Moore was diagnosed with having hairy-cell leukemia, and he was informed that his spleen would have to be removed to slow the progression of the disease. *Id.* at 481. Moore consented to the operation and allowed doctors to take samples of blood, blood serum, skin marrow aspirate, and sperm at various follow-up visits. *Id.* Unbeknownst to Moore, his doctors discovered that he had a unique cell type, from which they created and patented a cell line. *Id.* at 481-82. Upon realizing the doctors' actions, Moore brought suit against his physicians and the university hospital, alleging conversion of his spleen and other cells as well as a breach of his physician's duty to disclose his economic interest in Moore's spleen and other cells. *Id.* at 482.

⁷⁵ *Moore v. Regents of the Univ. of Cal.*, 249 Cal. Rptr. 494, 507 (Cal. Ct. App. 1988). The California Court of Appeals found for Moore, recognizing that a patient does have a property right in his or her own body and holding that Moore could recover damages for conversion of his cells. *Id.*

⁷⁶ *Moore*, 793 P.2d at 488-89. The court relied on three separate principles for denying Moore's conversion claim: the lack of any prior judicial decisions in support of Moore's claim that human cells and organs are property; the limitations imposed by California on the use of human cells and tissues; and the fact that the cell line was the product of the doctor's "inventive effort" to which Moore could have no claim. *Id.* at 482, 493. The court did hold Moore's physicians liable for their failure to disclose their economic interest in harvesting his cells. *Id.* at 486; *see also* *Greenberg v. Miami Children's Hosp. Research Inst., Inc.*, 264 F. Supp. 2d 1064, 1075 (S.D. Fla. 2003) (holding that once a sample of tissue had been voluntarily given, plaintiffs possessed no property interest in the body tissue and genetic material donated under a theory of conversion, even if the tissue was used in a manner inconsistent with the defendant's expressed purposes).

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and organs do not fall within the general law governing property.⁷⁷ In addition, the court reasoned that the strict guidelines imposed by the state of California for the disposition of human cells and tissues so drastically limited Moore's ability to control their disposal that he could not expect to retain a property interest in his spleen or tissue cells.⁷⁸

However, while *Moore* suggests that an individual does not have a personal property right in his own tissues or organs, a later California decision, *Hecht v. Superior Court*,⁷⁹ suggests that individuals do have a property interest in their bodily fluids.⁸⁰ In *Hecht*, William Kane's adult children contested the validity of a clause in Kane's will that bequeathed fifteen vials of Kane's sperm to Deborah Hecht, his longtime girlfriend, in the event that she wished to have his child via artificial insemination.⁸¹ In response, the probate court issued a ruling ordering that the sperm be destroyed.⁸² However, because the probate court dealt only with the distribution of the assets of an estate, jurisdiction would only be proper if Kane had some sort of ownership or possessory interest in his sperm once it left his body.⁸³ Therefore, the court distinguished *Moore*, holding that while frozen sperm vials may not fall within the general category of property law, Kane had a sufficient ownership interest in his sperm to bring it within the jurisdiction of the probate court.⁸⁴ The court specifically noted that while Moore clearly did not expect to retain possession of his cells following their removal, Kane's contract with the sperm bank was a clear indication of his anticipation that he would

⁷⁷ *Moore*, 793 P.2d at 488-89.

⁷⁸ *Id.* at 491-92. For a more thorough analysis of the reasoning of the California Supreme Court, see Bray, *supra* note 63, at 209, 233-36.

⁷⁹ 20 Cal. Rptr. 2d 275 (Cal. Ct. App. 1993).

⁸⁰ *Id.* at 280; see also *Green v. Comm'r*, 74 T.C. 1229, 1234 (1980). In *Green*, the court held that for tax purposes, the sale of blood plasma was the sale of a product. *Id.* Thus, the plaintiff could deduct expenses associated with blood donation, such as transportation and iron-rich foods, as an ordinary and necessary business expense on her tax return. *Id.*

⁸¹ *Hecht*, 20 Cal. Rptr. 2d at 276. In 1991, William Kane committed suicide in a Las Vegas hotel. *Id.* Prior to his death, Kane deposited fifteen vials of his sperm at a Los Angeles sperm bank, where he signed an agreement stating that in the event of his death, he wished the sperm to be released to Deborah Hecht, his longtime girlfriend. *Id.* at 276-77. Kane included a similar clause regarding his sperm in his will. *Id.* at 276. Kane's children contested, arguing that permitting Hecht to use the sperm would disrupt the family unit to further a desire of their father that they characterized as "egotistical and irresponsible." *Id.* at 279.

⁸² *Id.* The probate court provided virtually no legal basis for asserting jurisdiction over Hecht's sperm. *Id.* at 279 n.3. When asked for a legal basis for the decision to order the sperm destroyed, the probate court stated: "It really does not matter, does it? If I am right, I am right and if I am wrong, I am wrong." *Id.*

⁸³ *Id.* at 281.

⁸⁴ *Id.* at 283.

retain control over his sperm after it was deposited with the sperm bank.⁸⁵ Finally, the court found that the unique characteristics of sperm as reproductive material further demonstrated that Kane assumed he would retain authority to use the sperm for his own purposes, indicating that his interest was sufficient to constitute “property” within the meaning of the California Probate Code.⁸⁶

c. *Property Rights of Family Members and the “Quasi-property” Interest*

While the above cases suggest that body organs or tissues cannot be definitively classified as “property,” state common law clearly indicates that the relatives of a decedent do have a “quasi-property” interest in the body of a deceased relative for the purposes of burial and internment.⁸⁷ Under English ecclesiastical law, every person, with the exception of traitors and criminals, had the right to be buried in the parish churchyard under the direction of the church or the ecclesiastical court.⁸⁸ As a result of this rule, English courts developed the “no-property” rule, whereby dead bodies were not considered property, as the church had the ultimate responsibility for their disposal.⁸⁹ This rule was incorporated into the American common law, but soon became impracticable due to the lack of ecclesiastical courts in the American system.⁹⁰ Therefore, American courts devised a way around the no-property rule by declaring that relatives of a decedent have a quasi-property interest in the body of a deceased relative for the purposes of burial and internment.⁹¹

One of the clearest definitions of the quasi-property interest that relatives have in the body of a decedent is given in the early Rhode

⁸⁵ *Id.* at 281.

⁸⁶ *Id.* at 283; *see also* Green v. Comm’r, 74 T.C. 1229, 1234 (1980) (holding that the profits derived from the sale of blood to a blood bank were not a capital gain, but were profits from the sale of a tangible product, such as human hair, hen’s eggs, bee’s honey, cow’s milk, or sheep’s wool).

⁸⁷ Boulter, *supra* note 67, at 704–05.

⁸⁸ Pierce v. Proprietors of Swan Point Cemetery, 10 R.I. 227, 236 (1872).

⁸⁹ Boulter, *supra* note 67, at 705–07. Boulter gives a detailed history of English case law developing the “no property” rule, noting that the rule appears to stem from a case where the issue of a human body of property never arose. *Id.* When taken in the context of the early British theocracy, it makes sense that the Church’s exclusive control over dead bodies would preempt any private property rights. *See* Chad D. Naylor, Note, *The Role of the Family in Cadaveric Organ Procurement*, 65 IND. L.J. 167, 170 (1989). As the Christian Church teaches that all souls go either to hell or heaven to await the coming resurrection, the Church has a natural interest in retaining control over dead bodies. *Id.*

⁹⁰ Boulter, *supra* note 67, at 707.

⁹¹ Silver, *supra* note 16, at 690.

Island case of *Pierce v. Proprietors of Swan Point Cemetery*.⁹² The court explained:

That there is no right of property in a dead body, using the word in its ordinary sense, may well be admitted. Yet the burial of the dead is a subject which interests the feelings of mankind to a much greater degree than many matters of actual property. There is a duty imposed by the universal feelings of mankind to be discharged by some one towards the dead; a duty, and we may also say a right, to protect from violation; and a duty on the part of others to abstain from violation; it may therefore be considered as a sort of *quasi* property, and it would be discreditable to any system of law not to provide a remedy in such case.⁹³

Thus, while American common law clearly retains the history of the no-property rule, statutes in each state provide that the next of kin have a right to bury the body of a decedent in an appropriate manner.⁹⁴ However, while this interest is termed a quasi-property interest, it is for the purposes of burial and internment only.⁹⁵ The right has no pecuniary value, but is held as a "sacred trust" whereby the holder of the right is not the owner, but the guardian of the trust for the benefit of all family or friends who may have an interest in seeing the decedent peacefully laid to rest.⁹⁶ As observed by the court in *Carney v. Knollwood Cemetery Ass'n*,⁹⁷ courts often recognize quasi-property interests in a dead body when it is clear that a body has been treated in a manner likely to cause severe mental anguish to the relatives of a decedent, but there is no obvious legal theory to compensate the relatives for their mental

⁹² 10 R.I. at 237-38.

⁹³ *Id.* (citations omitted).

⁹⁴ Silver, *supra* note 16, at 691 ("[W]hile the English no-property rule still walks American soil in some ghostly form, the early common law allowed, and today unquestionably provides, that the decedent has a right by will or contract to avoid the fate of her body, and that if she does not avail herself of this right her spouse and next of kin succeed to it").

⁹⁵ See *Pierce*, 10 R.I. at 237-38.

⁹⁶ *In re Donn*, 14 N.Y.S. 189, 191 (N.Y. App. Div. 1891); see *Renihan v. Wright*, 25 N.E. 822, 844 (Ind. 1890).

⁹⁷ 514 N.E.2d 430 (Ohio Ct. App. 1986).

distress.⁹⁸ Consequently, a court will often develop some sort of property right for which it may award compensatory damages.⁹⁹

Regardless of the logic behind recognizing a quasi-property interest in the internment of the bodies of deceased relatives, the right takes on a new level of importance when certain religious beliefs regarding burial are affected.¹⁰⁰ Many systems of religion, including both Judaism and Islam, have detailed and sacred rites regarding the preparation of a body for burial.¹⁰¹ Although specific rites vary among Islamic sects, Islamic doctrine requires that a corpse be respected, dictating that a body not be subject to cremation, post-mortem examination, or dissection.¹⁰² Similarly, traditional Jewish law prohibits mutilation of the dead and requires that a person be buried with all body parts in tact.¹⁰³ Prior to the decision of the Supreme Court in *Employment Division, Department of Human Resources v. Smith*,¹⁰⁴ Free Exercise Clause jurisprudence required a state actor to demonstrate a compelling interest to interfere with the body of the decedent where the state interest in a dead body and private religious beliefs were in conflict.¹⁰⁵ However, post-*Smith*, it is unlikely that a court would find removal of an organ by a state actor pursuant to

⁹⁸ *Id.* at 434. The court noted that when people bring a cause of action regarding interference with the body of a deceased relative, “[q]uasi-property’ seems to be . . . simply another convenient ‘hook’ upon which liability is hung, — merely a phrase covering up and concealing the real basis for damages, which is mental anguish.” *Id.*

⁹⁹ See *supra* note 98 and accompanying text.

¹⁰⁰ See, e.g., *Snyder v. Holy Cross Hosp.*, 352 A.2d 334, 340 (Md. Ct. Spec. App. 1976) (holding that when a person has religious beliefs regarding the burial of a relative, the state may only abridge those practices by showing a compelling government interest).

¹⁰¹ Kahlil Jaafar Khalil, Comment, *A Sight of Relief: Invalidating Cadaveric Corneal Donation Laws Via the Free Exercise Clause*, 6 DEPAUL J. HEALTH CARE L. 159, 160–63 (2002). Khalil argues that any organ donation laws that presume consent to donation should be held invalid under the Free Exercise Clause of the First Amendment. *Id.*

¹⁰² *Id.* at 160.

¹⁰³ *Id.* at 161.

¹⁰⁴ 494 U.S. 872 (1990).

¹⁰⁵ Prior to the Court’s decision in *Smith*, the *Sherbert* test required government actions that substantially burdened a religious practice to be justified by a compelling government interest. *Smith*, 494 U.S. at 883 (citing *Sherbert v. Verner*, 374 U.S. 398, 402–03 (1963)). For an example of a case applying the *Sherbert* analysis to a situation involving the rights of the next of kin in the body of a decedent, see *Snyder*, 352 A.2d at 340. The court in *Snyder* acknowledged that a Jewish father had a quasi-property right to possess the body of his son for the purposes of burial and internment. *Id.* at 340–41. The court further recognized that this right was rendered even more critical by the father’s religious beliefs. *Id.* at 337. However, because the state had a compelling interest in determining the cause of the son’s death, it was justified in performing an autopsy contrary to the father’s wishes. *Id.* at 341.

a neutral policy of general applicability in violation of the Free Exercise Clause.¹⁰⁶

In addition to having a quasi-property right to the decedent's body for burial purposes, a relative of a decedent may be able to assert that the UAGA also conveys a property right in the body organs of a decedent by giving relatives the right to consent to organ donation.¹⁰⁷ However, it is not absolutely clear that the right to consent to organ donation is synonymous with a personal property right. On one hand, the UAGA gives a decedent or his relatives a certain amount of control over his body, allowing either the decedent or his relatives to dictate how his body organs should be disposed.¹⁰⁸ On the other hand, the congressional passage of NOTA and section ten of the 1987 UAGA, which prohibit the sale of organs for transplant, appear to be a legislative retreat from any attempt to characterize human bodies or organs as personal property.¹⁰⁹

2. State Interests in a Decedent's Body and Organs

While Part II.C.1 indicates that the relatives of a decedent do have a certain level of control over a decedent's body, as a general rule, the state

¹⁰⁶ The Court in *Smith* rejected application of the *Sherbert* test to neutral state policies of general application, later clarifying in *Church of Lukumi Babalu Aye Inc. v. City of Hialeah* that state policies placing a burden on religious beliefs violate the Free Exercise Clause only if religious beliefs or practices are specifically targeted. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993); *Smith*, 494 U.S. at 879. Although *Smith* likely eliminated the majority of Free Exercise Clause claims that could be brought under generally applicable neutral state policies regarding autopsies, many states have enacted statutory guidelines dictating when an autopsy may be performed on a body contrary to a decedent's or family member's beliefs. See, e.g., R.I. GEN. LAWS § 23-4-4.1 (2004). The Rhode Island statute provides that when a medical examiner believes that there is a compelling public necessity for an autopsy but he knows or has reason to know that an autopsy or dissection would be contrary to the religious beliefs of the deceased, he must provide notice of intent to perform a dissection or autopsy at least forty-eight hours before the procedure is actually performed. *Id.* This provision allows any objecting party the opportunity to file an action in the Superior Court contesting the propriety of the dissection or autopsy. *Id.* § 23-4-4.1(d).

¹⁰⁷ See UNIF. ANATOMICAL GIFT ACT (1987) § 3(a).

¹⁰⁸ Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 382-83 (2000). Rao asserts that the UAGA essentially affords individuals a "future interest" in their own bodies after death, which they may transfer to others or allow to descend to their heirs. *Id.* In allowing this transfer, the UAGA appears to treat body organs as personal property. *Id.*

¹⁰⁹ Boulter, *supra* note 67, at 712-13 (noting that while the statutory recognition of body parts as "gifts" is indicative of the tendency to treat body parts as personal property, NOTA leaves many issues concerning the ownership of body parts unresolved).

does not retain any interest in the body or body organs of a decedent.¹¹⁰ However, each of the fifty states have enacted statutes dictating that in certain circumstances, the coroner or medical examiner must take possession of a dead body to determine the cause of death and to gather evidence for any criminal action that the state plans to initiate.¹¹¹ This

¹¹⁰ See *Gurganious v. Simpson*, 197 S.E. 163, 164 (N.C. 1938) (holding that an unauthorized autopsy to determine a cause of death when foul play is not suspected violates the rights of the next of kin to bury or intern the decedent).

¹¹¹ See ALA. CODE §§ 15-4-2 to -3 (2004) (requiring the county coroner to examine a body to determine cause of death when a person died unattended by a physician, and authorizing the coroner to summon a physician or surgeon to determine the cause of death via an autopsy if necessary); ALASKA STAT. §§ 12.65.005, 12.65.020 (Michie 2004) (requiring any person having knowledge of a death to notify the state medical examiner when the death appears to have been caused by criminal means; occurred under suspicious circumstances; the decedent was in good health and died suddenly; the decedent had been unattended by a practicing physician; the death was associated with a diagnostic or therapeutic procedure; the death resulted from a disease constituting a threat to public health; the death was the result of an employment disease, injury, or toxic agent; the death occurred in a jail or corrections facility; the death occurred in a foster home; the death occurred while the person was being taken into custody by the state or a division thereof; or the death was of a child in the custody of the state, and authorizing the medical examiner to perform a full investigation, including an autopsy); ARIZ. REV. STAT. §§ 11-593 to -594 (2004) (requiring reporting of a death whenever the death occurred without the care of a physician; resulted from violence; occurred suddenly when the deceased was in apparent good health; occurred in prison or the death was of a prisoner; occurred in a suspicious, unusual, or unnatural manner; resulted from a disease or accident believed to be related to occupation or employment; is believed to present a public health hazard; or occurred during anesthetic or surgical procedures, and authorizing the medical examiner to perform an autopsy when a public health risk is believed, there is evidence of a crime, there is evidence of inadequate health care, or there is no clinically evident cause of death); ARK. CODE ANN. § 12-12-315 (Michie 2003) (requiring notification of a death to the county coroner whenever the death appears to be caused by violence, homicide, suicide, or accident; a result of drugs or poison; a result of a motor vehicle accident or the body was found near a roadway or railroad; occurs in a state mental institution and there is no explanation of death; occurs in a penal institution; appears to be the result of a fire or explosion; appears to indicate child abuse prior to death; appears to be the result of drowning; is of an infant or minor child with no previous history to explain death; the manner of death appears to be unnatural; is sudden and unexplained; occurs at a work site; is due to a criminal abortion; occurs when a physician was not present prior to death; occurs in the home; occurs within twenty-four hours of admission to an emergency room; when skeletal remains are discovered; or an unidentified deceased person is discovered); CAL. GOV'T CODE § 27491 (West 2004) (giving the coroner the duty to investigate and determine the circumstances of all violent, sudden or unusual deaths; unattended deaths; deaths where the deceased has not been attended by a physician within twenty days; deaths related to an actual or suspected criminal abortion; deaths related to a suspected homicide, suicide, or accidental poisoning; deaths relating to an old or related accident or injury; deaths due to drowning, fire, hanging, gunshot, stabbing, cutting, exposure, starvation, acute alcoholism, drug addiction, strangulation, aspiration, or sudden infant death syndrome; death by criminal means; deaths in prison or while under sentence; deaths associated with an alleged rape or crime against nature; deaths due to a contagious

disease or constituting a public hazard; deaths related to occupational diseases or hazards; or deaths of patients in state mental hospitals or hospitals for the disabled); COLO. REV. STAT. § 30-10-606 (2003) (requiring the coroner to make any proper inquiry, including autopsy if deemed necessary, in all deaths related to external violence, an unexplained cause or other suspicious circumstances; when no physician is in attendance or is unable to certify the cause of death; from thermal, chemical, or radiation injury; criminal abortion; a disease hazardous to the public health; an industrial accident; when in the custody of law enforcement officials; or when death was sudden and happened to a person in good health); CONN. GEN. STAT. § 19A-406 (2003) (requiring the chief medical examiner to investigate, and giving the examiner the discretion to order an autopsy if necessary, for deaths in the following categories: violent deaths, sudden or unexpected deaths not caused by a recognizable disease, deaths under suspicious circumstances, deaths where the body is to be cremated or otherwise disposed of in such a way as to make them unavailable for a later examination, deaths related to a disease resulting from employment, or deaths related to a disease constituting a threat to public health); DEL. CODE ANN. tit. 29, § 4706 (2004) (requiring the chief medical examiner to investigate all deaths related to violence, while under anesthesia, by an abortion or suspected abortion, poison, an undiagnosed cause, occurring suddenly when in apparent good health, when a physician is not present at death, when occurring in penal custody, in any suspicious or unusual manner, related to a disease caused by employment, or related to a disease that is a threat to public health); FLA. STAT. ANN. §§ 382.011, 406.11 (West 2003) (requiring medical examiner to make an examination and authorizing him to perform an autopsy when any person dies of violence; by accident; by suicide; suddenly when in apparent good health; unattended by a physician; in any prison or penal institution; in police custody; in any suspicious or unusual circumstance; by criminal abortion; by poison; by disease constituting a threat to public health; by disease, injury, or toxic agent relating to employment; when a dead body is brought into the state without medical certification; or when a body is to be cremated, dissected, or buried at sea); GA. CODE ANN. § 45-16-24 (2004) (requiring inquiry when a person dies as a result of violence; by suicide or casualty; suddenly when in apparent good health; when unattended by a physician; in any suspicious or unusual manner; after birth, but before seven years of age if death is unexpected or unexplained; as a result of a death penalty execution; as an inmate of a state hospital or penal institution; or after having been admitted to the hospital in an unconscious state and not regaining consciousness within twenty-four hours of admission); HAW. REV. STAT. ANN. § 841-3 (Michie 2003) (requiring the coroner to make inquiry upon notice of any death occurring as the result of violence, any accident, by suicide, suddenly when in apparent health, unattended by a physician, in prison, in a suspicious or unusual manner, or within twenty-four hours after admission to a hospital or institution); IDAHO CODE §§ 19-4301 to -4301B (Michie 2004) (requiring any person finding or having custody of a body that is dead as a result of violence, a suspicion of violence, or when the body was not supervised by a physician during his last illness to notify the coroner, and authorizing the coroner to order an autopsy whenever it is "deemed necessary accurately and scientifically to determine the cause of death"); 55 ILL. COMP. STAT. ANN. 5/3-3015 (West 2004) (authorizing the coroner to perform an autopsy where the circumstances of death are suspicious, obscure, mysterious, or otherwise unexplained, and in the opinion of the coroner, the cause of death cannot be established except by autopsy, or authorizing an autopsy where the death has occurred when being pursued, apprehended, or in the custody of a law enforcement agency); IND. CODE ANN. § 36-2-14-6 (Michie 2004) (requiring the coroner to conduct an investigation, and giving him discretion to perform an autopsy in cases where a person has died by violence; by casualty; when apparently in good health; in an apparently suspicious, unusual, or unnatural manner; or has been found dead); IOWA CODE § 331.802 (2003) (requiring the medical examiner to make an investigation and providing him discretion to perform an

autopsy whenever a "death affecting the public interest" occurs); KAN. STAT. ANN. § 22A-231 (2003) (requiring notification to a coroner whenever a death is caused by violence; death occurs suddenly when decedent is in good health; death occurs and the decedent was not under the care of a physician; death occurs in an unusual or suspicious manner; when the decedent is in police custody, jail, or a correctional institution; or when determination of death is deemed to be in the public interest, and authorizing the coroner to determine if a medical examination or autopsy are necessary); KY. REV. STAT. ANN. § 72.025 (Michie 2004) (requiring post mortem examination whenever death is caused by homicide, violence, suicide, drugs, poison, the result of a motor vehicle accident, a fire or explosion, drowning, or sudden infant death syndrome; occurs in a state mental institution and there is no previous medical history to explain; occurs in a jail; appears to indicate child abuse; occurs in a person under the age of forty with no medical history to explain death; occurs at a work site and there is no apparent cause of death; where a body is to be cremated with no apparent cause of death; or where human skeletal remains are found); LA. REV. STAT. ANN. § 33:1563 (West 2003) (requiring coroner to make an investigation, and giving him discretion to perform an autopsy whenever a case involves suspicious, unexpected, or unusual deaths; sudden or violent deaths; deaths due to unknown or obscure causes; bodies found dead; deaths without a physician attending thirty-six hours prior to death; deaths due to suspected suicide or homicide; deaths where poison is suspected; a death occurring in a hospital within twenty-four hours of admission; deaths due to drowning, hanging, burns, electrocution, gunshot wounds, stabbings or cuttings, lightning, starvation, radiation, exposure, alcoholism, addiction, tetanus, strangulation, suffocation or smothering; deaths due to trauma; deaths due to criminal means; deaths in prison; or deaths due to contagious diseases); ME. REV. STAT. ANN. tit. 22, § 3025 (West 2003) (establishing that a "medical examiner case" may exist whenever death is caused by physical injury, death occurs suddenly when a person is in good health, death occurs during diagnostic or therapeutic procedures, death occurs in state penal custody, death occurs while a resident of a state behavioral residential care facility, death is suspected of being a threat to the public health, death is suspected of not being certified, or death is by sudden infant death syndrome); MD. CODE ANN., HEALTH-GEN. § 5-309 (2003) (requiring the medical examiner to investigate deaths occurring by violence, suicide, casualty, occurring suddenly if the deceased was in good health, or occurring in any suspicious or unusual manner); MASS. GEN. LAWS ANN. ch. 38, § 3 (West 2004) (requiring notification to the medical examiner if death occurred by criminal violence; accident or unintentional injury; suicide; suspicious or unusual circumstances; as a result of an unlawful abortion; related to occupational illness or injury; in custody of a correctional or mental health facility; where there is a suspicion of child, family, or elder abuse; due to poison; occurred when the decedent was in apparent good health; was associated with diagnostic or therapeutic procedures; occurred within twenty-four hours of admittance to a hospital or nursing home; in any children or fetus under eighteen years of age; in any public or private conveyance; occurred in any emergency treatment facility; when skeletal remains are found; or a person is found dead); MICH. COMP. LAWS § 52.202 (2004) (requiring investigation by the county medical examiner in any death where an individual dies by violence, the individual's death is unexpected, the individual dies without medical attention, the individual dies as a result of an abortion, a prisoner dies while imprisoned, or the individual is a child under the age of two whose death was sudden or unexpected); MINN. STAT. ANN. § 390.11 (West 2003) (requiring coroner to make an investigation, and perform an autopsy if necessary, when deaths are due to violence, deaths are under unusual or mysterious circumstances, deaths are of persons whose bodies are to be cremated or buried at sea, or deaths are of inmates of public institutions not hospitalized for organic disease); MISS. CODE ANN. § 41-61-59 (2004) (requiring reporting of and empowering medical examiner to investigate all deaths "affecting the public interest"); MO.

REV. STAT. § 58.451 (2004) (requiring coroner to investigate whenever there is reasonable belief that a person died as a result of violence by homicide, suicide or accident, criminal abortion, an unforeseen sudden occurrence and the deceased was not attended by a physician within thirty-six hours of death, in any unusual or suspicious manner, or the person died in confinement); MONT. CODE ANN. § 46-4-122 (2004) (requiring the coroner to make inquiry into all deaths caused by an injury remote or recent in origin; as a result of any act or omission; an agent, disease or medical condition that is a threat to public health; or the death occurred while the deceased was incarcerated, during or as a result of the deceased's employment, less than twenty-four hours after the deceased was admitted to a medical facility, unattended or unwitnessed while the decedent was not in the care of a physician, the decedent is to be cremated, or under suspicious circumstances); NEB. REV. STAT. §§ 23-1822 to -1824 (2003) (providing the coroner authority to perform an autopsy whenever he receives notice of a death of a person in confinement and determines the autopsy necessary to establish the cause of death, and requiring the coroner to perform an autopsy on any decedent under the age of nineteen who dies suddenly); NEV. REV. STAT. § 259.050 (2004) (requiring the coroner to make reasonable investigation whenever he is informed that a person has been killed, committed suicide, or has suddenly died under circumstances to suspect that death was unnatural); N.H. REV. STAT. ANN. § 611:3 (2003) (requiring the medical examiner to make investigation in all "medicolegal" cases); N.J. STAT. ANN. § 52:17B-88.1 (West 2004) (authorizing performance of an autopsy when there is "compelling public necessity," when the decedent is the victim of a homicide, when the determination of death is necessary for the public interest, when the death was of a person confined, or when the death was of a child under the age of twelve suspected of having been abused or neglected); N.M. STAT. ANN. § 24-11-7 (Michie 2004) (requiring the medical examiner to order an autopsy whenever he suspects that the death was caused by a criminal act or omission or when the cause of death is obscure); N.Y. COUNTY LAW §§ 671, 673 (Consol. 2004) (requiring the coroner or medical examiner to make inquiry into all unnatural deaths in his county as prescribed by law as well as all deaths of inmates in a correctional facility); N.C. GEN. STAT. § 130A-383 (2004) (requiring the medical examiner to be notified and investigate whenever a death occurs from violence; poison; accident; suicide; homicide; suddenly when a person was in good health; in a correctional institution or state custody; or in any suspicious, unusual, or unnatural circumstance); N.D. CENT. CODE §§ 11-19.1-07, -11 (2003) (requiring reporting deaths to coroner of decedents suspected of dying by violent means, casualty, suicide, accidentally, or suddenly when in apparent good health, and providing that the coroner may take custody of a body if he deems an autopsy necessary); OHIO REV. CODE ANN. § 313.12 (Anderson 2004) (requiring notice to the coroner of any violent, suspicious, unusual, or sudden death; any suicide; any death of a child under the age of two in apparent good health; or any death of a mentally retarded or developmentally disabled person); OKLA. STAT. tit. 63, § 938 (2004) (requiring investigation of all deaths due to violence; under suspicious, unusual, or unnatural circumstances; related to a disease that may constitute a threat to the public health; unattended by a licensed physician; occurring after an unexplained coma; that are medically unexpected in the course of therapeutic procedure; occurring in a place of penal incarceration; or when a decedent is to be cremated or buried at sea); OR. REV. STAT. § 146.090 (2003) (requiring the medical examiner to investigate all deaths apparently homicidal, suicidal, or occurring under suspicious circumstances; resulting from unlawful use of controlled substances; occurring while incarcerated; apparently accidental; by disease, injury, or toxic agent arising from employment; while not under the care of a physician immediately prior to death; or related to a disease constituting a threat to the public health); 16 PA. CONS. STAT. § 1237 (2004) (requiring the coroner to investigate all facts to determine if an autopsy is necessary in instances of sudden deaths, deaths not certified by a physician, deaths occurring under suspicious circumstances, deaths as result of violence, deaths in which

duty to investigate almost always comes into play when a person has died as a result of violence, and this duty is similarly required by some states if death occurs in a suspicious, unusual, or unnatural manner; if a

drug overdose or reaction to drugs played a role, operative and peri-operative deaths, deaths suspected of occurring as a result of a contagious disease constituting a public hazard, deaths where the body is unknown or unclaimed, deaths occurring in prison, deaths of persons whose bodies are to be cremated or buried at sea, sudden infant deaths, and stillbirths); R.I. GEN. LAWS § 23-4-7 (2004) (requiring reporting to the medical examiner all deaths suggesting the possibility of a criminal act, as a result of violence or suicide, from a criminal abortion, or in any suspicious or unusual manner); S.C. CODE ANN. § 17-5-530 (Law. Co-op. 2003) (requiring the coroner or medical examiner to make inquiry when a person dies from violence, as a result of suicide, when in apparent good health, when unattended by a physician, occurring in a suspicious or unusual manner, while an inmate of a correctional institution, or as a result of stillbirth when unattended by a physician); S.D. CODIFIED LAWS § 23-14-18 (Michie 2004) (requiring the coroner to investigate a death if the cause and manner of that death is a matter of the public interest); TENN. CODE ANN. §§ 38-7-108, -109 (2004) (requiring the medical examiner to make investigation of any death occurring suddenly; by casualty; by suicide; when the decedent is found dead; in prison; under suspicious, unnatural, or unusual circumstances; or where the body is to be cremated); TEX. CRIM. PROC. CODE ANN. § 49.25 (Vernon 2004) (requiring medical examiner to hold an inquest whenever a person dies within twenty-four hours of admission to a hospital, institution, prison, or jail; a person dies an unnatural death or dies without a reliable witness; there is suspicion that death was by unlawful means; or a person dies as the result of suicide); UTAH CODE ANN. § 26-4-7 (2004) (requiring medical examiner to perform an investigation if death was by violence; sudden while in good health; unattended; under suspicious or unusual circumstances; a result of overdose or poisoning; resulting from diseases that may constitute a threat to public health; resulting from disease in the scope of employment; due to sudden infant death syndrome; occurred while in a state prison, jail, hospital, or police custody; or associated with diagnostic or therapeutic procedures); VT. STAT. ANN. tit. 18, § 5205 (2003) (requiring notification to the medical examiner whenever a person dies from violence; when in apparent good health; when unattended by a physician; in a jail, prison, or mental institution; by casualty or suicide; in an unnatural or suspicious manner; or in circumstances involving a hazard to public health); VA. CODE ANN. § 32.1-283 (Michie 2004) (requiring the medical examiner to make investigation upon the death of any person from trauma, injury, violence, poisoning, accident, suicide, or homicide; suddenly when in good health; in jail; in a mental health facility; as a result of fire; as a result of sudden infant death syndrome; or in any suspicious, unusual, or unnatural manner); WASH. REV. CODE § 68.50.010 (2004) (providing the coroner jurisdiction over the bodies of deceased persons who die by violence or various enumerated unnatural means); W. VA. CODE § 61-12-8 (2004) (requiring the medical examiner to make an investigation when any person dies from violence; suicide; suddenly when in good health; unattended by a physician; while an inmate of a public institution; from a disease threatening the public health; or in any suspicious, unnatural, or unusual manner); WIS. STAT. § 979.01 (2003) (requiring reporting to the coroner of all deaths in which there are unexplained, unusual, or suspicious circumstances; all homicides; all suicides; all deaths following an abortion; all deaths due to poisoning; all deaths following accidents; when there was no physician in attendance; or when a physician refuses to sign the death certificate); WYO. STAT. ANN. § 7-4-201 (Michie 2003) (requiring the coroner to conduct an investigation in any case he suspects to be a coroner's case).

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person died suddenly while in good health; or if a person is found dead.¹¹²

In most cases, if the coroner is informed that a death has occurred by violence or that unusual circumstances are involved and he is unable to determine the cause of death from an external medical examination, it is within the coroner's discretion to order an autopsy.¹¹³ In some cases, the coroner may even be obliged to order the autopsy, and he receives immunity from the state from any lawsuit brought as a result of his actions.¹¹⁴ However, this immunity does not extend to cases where it is apparent that a person died from natural causes.¹¹⁵ In these situations, the coroner or medical examiner has no right to interfere with the quasi-property rights of family members to dispose of a relative's body in accordance with their own wishes or beliefs.¹¹⁶

In addition to the state's interest in investigating the cause of death, the state may also be able to assert some claim to a decedent's body organs as a means of furthering the state interest in the preservation of human life.¹¹⁷ As established in *Cruzan v. Director, Missouri Department of Health*,¹¹⁸ regardless of quality of life, the state has an unqualified interest in the preservation of human life.¹¹⁹ However, while the state interest in preserving life may vary by situation, the Supreme Court has reiterated that this interest is not sufficiently compelling to trump claims of individual liberty.¹²⁰ Often discussed in cases dealing with abortion

¹¹² See *supra* note 111 and accompanying text.

¹¹³ See *Gahn v. Leary*, 61 N.E.2d 844, 846 (Mass. 1945); *Tillman v. Detroit Receiving Hosp.*, 360 N.W.2d 275, 279 (Mich. Ct. App. 1984); 18 AM. JUR. 2D *Coroners or Medical Examiners* § 10 (2004).

¹¹⁴ See *Gahn*, 61 N.E.2d at 846. The court in *Gahn* specifically noted that Massachusetts law did grant a wife possession of her husband's body for burial purposes. *Id.* at 847. However, the court further noted that this possessory interest was also subject to some public interests, including the ability of the coroner to perform an autopsy. *Id.* Because the interest of the wife was subject to the interest of the coroner, the coroner did not have to obtain the wife's consent before taking possession of her husband's body. *Id.*

¹¹⁵ See, e.g., *Coty v. Baughman*, 210 N.W. 348, 349 (S.D. 1926) (holding that when it was apparent that an infant died by natural causes, the coroner did not have the authority to perform an autopsy over the objection of the infant's parents).

¹¹⁶ *Id.*

¹¹⁷ See *Planned Parenthood v. Casey*, 505 U.S. 833, 873 (1992); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 282 (1990).

¹¹⁸ 497 U.S. 261 (1990).

¹¹⁹ *Id.* at 282.

¹²⁰ *Casey*, 505 U.S. at 857 (citing *Cruzan*, 497 U.S. at 278) (noting that "a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims"); *Riggins v. Nevada*, 504 U.S. 127, 135 (1992); *Washington v. Harper*, 494 U.S. 210 (1990); *Rochin v. California*, 342 U.S. 165 (1952); *Jacobson v. Massachusetts*, 197 U.S. 11, 24-

rights, the Supreme Court has consistently held that although a state may not ultimately abridge a woman's right to choose an abortion, a state may apply various restrictions on abortions to promote the state's interest in protecting prenatal life.¹²¹

In the area of organ donation, some states chose to promote their interest in preserving and improving life by passing statutes that presume consent to certain types of organ donation.¹²² Instead of requiring that physicians attempt to obtain consent to organ donation, the majority of presumed consent laws automatically assume that individuals are organ donors unless the individual has signed some sort of "opt-out" form during his lifetime or the physician receives notice that the decedent's next of kin object to organ donation.¹²³ While most of the presumed consent laws in the United States are "partial" presumed consent laws to cornea or pituitary gland donation, several European countries have increased organ donation rates by as much as 186% by enacting laws that presume consent to all types of organ donation,

30 (1905)). The reluctance of the Court to rule that the state interest in life is sufficiently compelling to override a protected liberty interest may be in part due to the absence of a duty to rescue in American jurisprudence. See *Developments in the Law – Medical Technology and the Law*, 103 HARV. L. REV. 1519, 1570 (1990) (discussing *McFall v. Shimp*, 10 Pa. D. & C.3d 90, 91 (1978), which held that a man could not be forced by court order to submit to a bone marrow transplant to save the life of his cousin); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-10 (2d ed. 1988) (asserting that the state may not force a party to donate his or her organs, even if doing so would save the life of another).

¹²¹ *Casey*, 505 U.S. at 873. The Court in *Casey* overturned the trimester framework established in *Roe v. Wade* whereby the state could not attempt to interfere with a woman's decision to have an abortion in any way during her first trimester. *Id.* The Court noted that in practice, the trimester framework undervalued the State interest in potential life, and it concluded that "[s]tates are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning." *Id.*

¹²² See, e.g., GA. CODE ANN. § 31-23-6 (2000). Like many presumed consent statutes, the Georgia statute applies only to corneas and provides that if an eye bank is in need of transplantable corneas, a physician or coroner may remove the corneas from any recently deceased person. The physician must know of no objections to organ donation made by the decedent during his lifetime or by any surviving family members listed in the statute. *Id.*

¹²³ Samantha A. Wilcox, Note, *Presumed Consent Organ Donation in Pennsylvania: One Small Step for Pennsylvania, One Giant Leap for Organ Donation*, 107 DICK. L. REV. 935, 938-39 (2003). Wilcox describes various systems of presumed consent organ donation, noting the difference between several "strong" consent statutes enacted in Europe, where the wishes of family members are not considered, and "weak" consent statutes, where family members may object to organ donation even if the decedent has not chosen to "opt-out" of the presumed consent system. *Id.*

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suggesting that presumed consent laws are a powerful tool in asserting the state interest in the preservation of human life.¹²⁴

D. Cases Analyzing Due Process Claims in the Organ Donation Process

Both state and federal courts differ greatly in how they weigh the varying interests that state officials and the relatives of a decedent have in a dead body.¹²⁵ While earlier decisions recognize that the relatives of a decedent have a quasi-property right to his corpse for purposes of burial and internment, courts tend to ultimately conclude that this interest does not equate to any property or liberty interest, ending any due process analysis.¹²⁶ Conversely, later decisions conclude that the next of kin have a protected property interest in the body of a deceased relative and that they may bring a due process claim if a coroner or medical examiner removes any body organs or tissues without consent.¹²⁷

In *Fuller v. Marx*,¹²⁸ Thomas Fuller died while incarcerated in an Arkansas prison.¹²⁹ Dr. Marx, the state medical examiner, performed an autopsy as required by state law and determined that the cause of death was heart failure.¹³⁰ Although Dr. Marx returned the body to the Fuller family for burial, it was missing most of the body organs, as the policy of the medical examiner's office was to either incinerate organs after autopsy or provide them to medical students for research purposes.¹³¹ Mrs. Fuller brought suit against Dr. Marx under 42 U.S.C. § 1983, alleging that she had been deprived of her property interest in her

¹²⁴ *Id.* This 186% increase was seen in Belgium after it enacted a "weak" presumed consent statute. *Id.* (explaining "strong" and "weak" consent statutes). Other countries have seen even more impressive results after enacting "strong" presumed consent statutes, including Austria, which presumes that an individual has consented to organ donation unless a written objection accompanies the body. *Id.* It is no surprise that Austria has the highest rate of cadaveric donation in Europe at fifty-seven million donors per million population per year. *Id.* Similarly, Singapore saw an increase in kidney donation from five per year to thirty-one per year after enacting a "partial" presumed consent statute for kidney donation. *Id.*

¹²⁵ See, e.g., *Newman v. Sathyavaglswaran*, 287 F.3d 786 (9th Cir. 2002); *Whaley v. County of Tuscola*, 58 F.3d 1111 (6th Cir. 1995); *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991); *Fuller v. Marx*, 724 F.2d 717 (8th Cir. 1984); *Ga. Lions Eye Bank, Inc. v. Lavant*, 335 S.E.2d 127 (Ga. 1985).

¹²⁶ See *Fuller*, 724 F.2d at 719; *Ga. Lions*, 335 S.E.2d at 128.

¹²⁷ See generally *Newman*, 287 F.3d 786; *Whaley*, 58 F.3d 1111; *Brotherton*, 923 F.2d 477.

¹²⁸ 724 F.2d 717 (8th Cir. 1984).

¹²⁹ *Id.* at 718.

¹³⁰ *Id.*

¹³¹ *Id.* at 719.

husband's body organs without due process of law.¹³² The Eighth Circuit Court of Appeals held that while Mrs. Fuller had a quasi-property interest in her husband's body for purposes of burial and internment, she did not have a constitutionally protected property interest in his body organs.¹³³ The court reasoned that no Arkansas case extended the quasi-property interest in a dead body to all of the body's organs, indicating that so long as the body was returned to Mrs. Fuller in an acceptable condition, her quasi-property interest was fulfilled.¹³⁴ Furthermore, Arkansas law provided that she could have taken possession of the organs by making a written request to the medical examiner, suggesting that even if Mrs. Fuller did have a constitutionally protected property interest in her husband's body organs, she was afforded adequate process through Arkansas law.¹³⁵

Similarly, in *Georgia Lions Eye Bank v. Lavant*,¹³⁶ eye bank officials removed the corneas from a victim of sudden infant death syndrome without obtaining the consent of the infant's parents.¹³⁷ In removing the infant's corneas, the eye bank acted pursuant to a "presumed consent" statute authorizing removal of corneal tissue so long as no objection was made by the decedent or his next of kin.¹³⁸ While the infant's parents had not made an objection to removal, they received no notice of the intended removal, and the eye bank admitted that there was no realistic opportunity to object.¹³⁹ In a suit brought by the infant's mother against the hospital and eye bank, the Supreme Court of Georgia concluded that the mother's due process rights were not violated, holding that she had

¹³² *Id.* Mrs. Fuller also asserted that the State infringed upon her First Amendment rights by denying her the opportunity to bury her husband in what she felt to be a proper Christian manner. *Id.* at 720.

¹³³ *Id.* at 719.

¹³⁴ *Id.*; see also *Arnaud v. Odom*, 870 F.2d 304, 307, 310 (5th Cir. 1989) (holding that because state tort law provided adequate post-deprivation process, there was no constitutional invasion of a property right when a county coroner performed a gruesome medical experiment on a victim of Sudden Infant Death Syndrome by dropping her body from a height of three feet onto a concrete surface to study the resultant skull fractures); *Lawyer v. Kernodle*, 721 F.2d 632, 635 (8th Cir. 1983) (holding that even if a coroner performed an autopsy negligently, so long as the next of kin received the body for burial, the coroner violated no established statutory or constitutional rights of the next of kin).

¹³⁵ *Fuller*, 724 F.2d at 719. The court further reasoned that this ability to reclaim her husband's organs through a written request afforded Mrs. Fuller the opportunity to bury her husband in a "Christian" manner. *Id.* at 720. Therefore, Mrs. Fuller's First Amendment claim also failed. *Id.*

¹³⁶ 335 S.E.2d 127 (Ga. 1985).

¹³⁷ *Id.* at 128.

¹³⁸ *Id.* at 127-28.

¹³⁹ *Id.* at 128.

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no constitutionally protected property interest in her child's body.¹⁴⁰ The court observed that the common law strictly adhered to the no-property rule in human bodies and noted that American courts developed the quasi-property rule as a sort of legal fiction to protect the rights of the next of kin to bury or intern deceased relatives.¹⁴¹ Because this quasi-property right extended no further than the right to bury or intern, the courts reasoned that the relatives of a decedent had no constitutionally protected interest in his or her body.¹⁴²

Conversely, in *Brotherton v. Cleveland*,¹⁴³ the Sixth Circuit Court of Appeals held that a medical examiner acting pursuant to an Ohio presumed consent statute, which was virtually identical to the law in *Georgia Lions*, violated the Due Process Clause of the Constitution when he removed a set of corneas against the wishes of a decedent's next of kin.¹⁴⁴ Although Deborah Brotherton would not consent to remove her deceased husband's organs, the coroner was not aware of her refusal and removed Mr. Brotherton's corneas to be used as anatomical gifts.¹⁴⁵

¹⁴⁰ *Id.* The trial court originally found that the mother had a protected property interest in her child's body and that the Georgia presumed consent statute deprived her of this right without due process of law. *Id.*

¹⁴¹ *Id.* at 128. In *Tillman v. Detroit Receiving Hospital*, a situation similar to that in *Georgia Lions* occurred when the county medical examiner removed the eyes of Mary Catherine Tillman during the course of an autopsy pursuant to a presumed consent statute. *Id.* The statute provided that "[t]he county medical examiner . . . or any person authorized by the county medical examiner to remove the cornea of a deceased person, shall not be liable in a civil action if it is subsequently alleged that authorization for the removal was required of the next of kin." 360 N.W.2d 275, 276-77 (Mich. Ct. App. 1984) (citing MICH. COMP. LAWS § 333.10203 (1984)). Upon discovery that her daughter's eyes had been removed without her permission, Ms. Tillman brought suit against the medical examiner, arguing that removal was an unconstitutional violation of her right of privacy, as Michigan courts previously ruled that the next of kin have no property right to a dead body. *Id.* at 277 (citing *Deeg v. Detroit*, 76 N.W.2d 16 (Mich. 1956)). In this case, the privacy right asserted was the "fundamental right to bury her decedent's body without mutilation." *Id.* The court rejected Ms. Tillman's argument, holding there is no privacy right in the body of a decedent. *Id.* The court reasoned that while the constitutional privacy right encompasses the right to make decisions regarding one's own body, the right disappears with the death of the person to whom the right has value, and it cannot be claimed by her estate or next of kin. *Id.*

¹⁴² *Ga. Lions*, 335 S.E.2d at 128. Although it does not officially include it as a part of its analysis, the court draws attention to the positive effect that the presumed consent laws had on organ transplant rates, noting that prior to the enactment of the presumed consent law in 1978, twenty-five corneal transplants were performed in Georgia. *Id.* In 1984, more than 1,000 corneal transplant operations were performed. *Id.*

¹⁴³ 923 F.2d 477 (6th Cir. 1991).

¹⁴⁴ *Id.* at 478.

¹⁴⁵ *Id.* After Steve Brotherton was found "pulseless" in his automobile and pronounced dead upon arrival at the hospital, Deborah Brotherton was asked by hospital staff if she would like to donate her husband's organs. *Id.* She declined the opportunity and her

Upon discovery of the coroner's actions, Deborah Brotherton brought suit pursuant to 42 U.S.C. § 1983, alleging that her husband's corneas were removed without due process of law.¹⁴⁶

The Sixth Circuit held that Ohio law provided a constitutionally protected property interest in the body of a decedent and that Deborah Brotherton was deprived of this interest without due process of law.¹⁴⁷ The court reasoned that "property" is not a physical object, but a

answer was noted in her husband's medical records. *Id.* However, because it was not coroner's policy to review medical records prior to performing an autopsy, he had no actual notice of Mrs. Brotherton's objection to organ donation. *Id.* The coroner acted pursuant to Ohio's presumed consent statute, which provided that:

A county coroner who performs an autopsy, pursuant to section 313.13 of the Revised Code, may remove one or both corneas of the decedent, or a coroner may authorize a deputy coroner, physician or surgeon . . . [or] embalmer . . . to enucleate eyes, or eye technician to remove one or both corneas of a decedent whose body is the subject of an autopsy performed pursuant to section 313.13 of the Revised Code, if all of the following apply:

- (1) The corneas are not necessary for the successful completion of the autopsy or for evidence;
- (2) An eye bank official has requested the removal of corneas and certified to the coroner in writing that the corneas will be used only for corneal transplants or other medical or medical research purposes;
- (3) The removal of the corneas and gift to the eye bank do not alter a gift made by the decedent or any other person authorized under this chapter to an agency or organization other than the eye bank;
- (4) The coroner, at the time he removes or authorizes the removal of the corneas, has no knowledge of an objection to the removal by any of the following:
 - (a) The decedent, as evidenced in a written document executed during his lifetime;
 - (b) The decedent's spouse;
 - (c) If there is no spouse, the decedent's adult children;
 - (d) If there is no spouse and no adult children, the decedent's parents;
 - (e) If there is no spouse, no adult children, and no parents, the decedent's brothers or sisters;
 - (f) If there is no spouse, no adult children, no parents, and no brothers or sisters, the guardian of the person of the decedent at the time of death;
 - (g) If there is no spouse, no adult children, no parents, no brothers or sisters, no guardian of the person of the decedent at the time of death, any other person authorized or under obligation to dispose of the body.

OHIO REV. CODE ANN. § 2108.60(B) (West 1984).

¹⁴⁶ *Brotherton*, 923 F.2d at 478. Like the court in *Georgia Lions*, the district court dismissed the complaint, reasoning that Deborah Brotherton did not have a constitutionally protected property interest in the body of her husband. *Id.* at 479.

¹⁴⁷ *Id.* at 482.

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“bundle of rights” recognized in that object, including the right to possess, use, exclude, profit, and dispose.¹⁴⁸ Thus, to show a property right in her husband’s body, Deborah Brotherton would have to demonstrate a sufficient number of rights rising to the level of a legitimate claim of entitlement.¹⁴⁹ Under Ohio law, the court determined that while Deborah Brotherton’s quasi-property right to possess her husband’s body for burial may not have been “property” in an official sense, it provided her the “right which resides at the very core of a property interest: the right to possess.”¹⁵⁰ Further, the court interpreted the provision of the Ohio Anatomical Gift Act giving Deborah Brotherton the right to consent to organ donation as additional evidence that she had the right to control the disposal of her husband’s body.¹⁵¹ Therefore, the court reasoned that even though the rights regarding dead bodies are extremely limited, the State of Ohio granted Deborah Brotherton a sufficient “aggregate of rights” to rise to the level of a “legitimate claim of entitlement.”¹⁵² Although the court recognized that the State had an interest in promoting organ donation, it concluded that

¹⁴⁸ *Id.* at 481.

¹⁴⁹ *Id.* at 480.

¹⁵⁰ *Id.* at 481. Price notes that by recognizing a property interest in the body organs of the decedent, the Sixth Circuit opens up the possibility that state procurement of these organs may also have to be compensated by the Takings Clause of the Fifth Amendment. DAVID PRICE, LEGAL AND ETHICAL ASPECTS OF ORGAN TRANSPLANTATION 129 (Cambridge 2000). However, compensation would be illegal pursuant to NOTA, which prohibits direct payments for any body organ. *Id.*

¹⁵¹ *Brotherton*, 923 F.2d at 482. The court also recognized that with advancements in science, it was no longer so easy to deny the value of the human body, stating that “[t]he importance of establishing rights in a dead body has been, and will continue to be, magnified by scientific advancements. The recent explosion of research and information concerning biotechnology has created a market place in which humans are routinely sold to and by scientists, physicians and others.” *Id.* at 481 (citing Roy Hardiman, Comment, *Toward the Right of Commerciality: Recognizing Property Rights in the Commercial Value of Human Tissue*, 34 U.C.L.A. L. REV. 207, 219 (1986)).

¹⁵² *Id.* at 482. The Sixth Circuit upheld this determination in *Whaley v. County of Tuscola*, 58 F.3d 1111 (6th Cir. 1995). As in *Brotherton*, the plaintiffs alleged that their procedural due process rights were violated when the corneas or eyeballs of their deceased relatives were removed without their permission pursuant to a presumed consent statute. *Id.* at 1112. The only major difference in the facts was that removal of the corneas took place in Michigan instead of Ohio. *Id.* at 1114. Thus, the only question for the court to determine was whether Michigan law differed from Ohio law in the expectation of entitlement provided to the next of kin in the body organs of the decedent. *Id.* Although the Michigan Supreme Court previously held that a corpse is not technically property, Michigan law provided the next of kin with similar expectations of control over a dead body as in Ohio, including the right to possess the body for burial and internment and the right to consent to organ donation through its Anatomical Gift Act. *Id.* at 1115–16. Because the statutory guarantees in Michigan and Ohio were essentially the same, the court concluded that the plaintiffs had a protected property interest in the decedent’s body organs. *Id.* at 1116.

this interest was not sufficient to allow the State to “consciously disregard those property rights which it has granted” without any sort of predeprivation process.¹⁵³

More recently, in *Newman v. Sathyavaglswaran*, the Ninth Circuit held that the parents of children whose corneas were removed by the coroner without consent had a sufficient property interest in their children’s bodies to bring a claim pursuant to the Due Process Clause.¹⁵⁴ As in the above cases, the removal was authorized by a California statute presuming consent to organ donation.¹⁵⁵ Like the court in *Brotherton*, the Ninth Circuit recognized that the identification of a property interest depends on the substance of the interest, not the label provided by the state.¹⁵⁶ Therefore, regardless of whether California termed the right to possess a body for burial purposes as a “property” or “quasi-property” interest, the court reasoned that this right, when combined with the right of parents to “transfer” their children’s organs under the California UAGA, rose to the level of the constitutionally protected property interest established in *Brotherton*.¹⁵⁷ The court rejected any arguments that the prohibition of the sale of organs for profit undermines any property right that the next of kin may have, reasoning that the Supreme

¹⁵³ *Brotherton*, 923 F.2d at 482. The court did not establish the type or extent of pre-deprivation process required, holding only that “the policy and custom of the Hamilton County coroner’s office is an established state procedure necessitating pre-deprivation process.” *Id.* The court noted that the timing of any required hearing would depend on the importance of the private interest, the finality of the deprivation, and the magnitude of the government interest. *Id.* (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982)). Four years later, in *Whaley*, the Sixth Circuit reiterated that “[r]egardless of the legal label the State places on the rights in a dead body it chooses to create, these rights nevertheless exist. Moreover, they closely correspond with the ‘bundle of rights’ by which property has been traditionally defined.” 58 F.3d at 1117.

¹⁵⁴ *Newman v. Sathyavaglswaran*, 287 F.3d 786, 796–97 (9th Cir. 2002).

¹⁵⁵ *Id.* at 795.

¹⁵⁶ *Id.* at 797.

¹⁵⁷ *Id.* at 796–97; see also *Crocker v. Pleasant*, 778 So. 2d 978 (Fla. 2001). In *Crocker*, the court dealt not with the property interests implicated in a single organ, but an entire body. *Id.* at 980. The City of Miami Shores buried the Crocker’s son, who was found dead, without first attempting to locate his next of kin. *Id.* The Crockers brought suit against the City, alleging that the City had deprived them of their property interest in their son’s body without due process of law. *Id.* As in *Newman*, the court held that the Crockers did have a constitutionally protected property interest in their son’s body. *Id.* at 988. Even though the case dealt with an entire body instead of individual organs, the court relied on Florida’s statutory adoption of the UAGA as well as the common law quasi-property right the next of kin have in the body of the decedent to determine that the Crocker’s had a “legitimate claim of entitlement” to control the body of their son. *Id.* at 986–87.

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Court has never held that an item is not property simply because it lacks economic value.¹⁵⁸

However, while the court held that the parents had a protected property interest under the Due Process Clause, it did not specify the amount of predeprivation process to which the parents were entitled.¹⁵⁹ The court recognized that central to the police power of the state is the right to protect and improve the health of its citizens, in this case, by promoting organ donation.¹⁶⁰ Therefore, the court remanded for further proceedings to evaluate both the interests of the next of kin and state interests in organ donation.¹⁶¹

The above-mentioned cases suggest that depending on the time and place, courts are likely to take vastly different views as to whether the relatives of a decedent have any sort of constitutionally protected interest in a decedent's body organs.¹⁶² In the earlier cases, such as *Fuller* and *Georgia Lions*, the courts clearly state that any quasi-property interest that the relatives of a decedent may have in his body does not rise to the level of a constitutionally protected property interest.¹⁶³ In later cases, such as *Brotherton* and *Newman*, this same quasi-property interest appears to play a critical role in the courts' determination that relatives have enough of an expectation of control over the body of a deceased family member to amount to a property interest protected by the Constitution.¹⁶⁴ Even more troublesome is the fact that while these courts find that a property interest exists in the body of a decedent, the courts give little indication as to what process is due before a state official may interfere with this newly-vested property right.¹⁶⁵

¹⁵⁸ *Newman*, 287 F.3d at 797.

¹⁵⁹ *Id.* at 799.

¹⁶⁰ *Id.* at 786, 799 (quoting *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 282 (1990) (stating that in some instances the state may "simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual")).

¹⁶¹ *Newman*, 287 F.3d at 799-800.

¹⁶² See *supra* Part II.D (describing the varying approaches taken to property rights in dead bodies in *Fuller*, *Georgia Lions*, *Brotherton*, and *Newman*).

¹⁶³ See *Fuller v. Marx*, 724 F.2d 717, 719 (8th Cir. 1984); *Ga. Lions Eye Bank, Inc. v. Lavant*, 335 S.E.2d 127, 128 (Ga. 1985).

¹⁶⁴ See *Newman*, 287 F.3d at 796-98; *Brotherton v. Cleveland*, 923 F.2d 477, 482 (6th Cir. 1991).

¹⁶⁵ See *Newman*, 287 F.3d at 799 (remanding to determine if the process provided before seizing children's corneas was sufficient, emphasizing that "[w]e do not hold that California lacks significant interests in obtaining corneas or other organs of the deceased in order to contribute to the lives of the living"); *Brotherton*, 923 F.2d at 482 ("This court does not at this time need to establish the type or extent of predeprivation process required by

Therefore, the following Part further explores whether the relevant law indicates that the relatives of a decedent should have a protected property interest in his or her body organs, and if so, what amount of process is required to protect this interest.¹⁶⁶

III. ANALYSIS: DETERMINING DUE PROCESS RIGHTS IN THE ORGAN DONATION PROCESS

As the previous Part indicates, the extent to which relatives of a decedent have a constitutionally protected property or liberty interest in his body organs for organ donation purposes is unclear.¹⁶⁷ This Part analyzes the reasoning used in the due process cases discussed above and applies this reasoning to determine the level of due process protection required in two likely fact scenarios involving state action and organ donation. First, Part III.A examines the due process ramifications in situations where a state actor removes an organ from the body of a decedent without consent or with presumed consent, identifying the advantages and disadvantages of the approaches taken in *Fuller*, *Georgia Lyons*, *Brotherton*, and *Newman*.¹⁶⁸ Next, Part III.B.1 attempts to determine if any liberty or property rights established in cases where the coroner removes an organ without consent also apply to cases where the relatives of a decedent wish to donate his organs but are unable to do so because of the actions of a state official.¹⁶⁹ Finally, Part III.B.2 examines the extent of process that may be required if a court determines that the relatives of a decedent who are unable to donate an organ have a protected property interest in organ donation.¹⁷⁰

A. Due Process Rights of Family Members When Organs Are Removed Without Consent

In order for the next of kin to bring a successful due process claim against a state official who removes a body organ of the deceased without consent, the next of kin must demonstrate that they had a protected property interest in that body organ and that they were

the due process clause; we merely hold that the policy and custom of the Hamilton County coroner's office is an established state procedure necessitating predeprivation process.").

¹⁶⁶ See *infra* Part III-IV.

¹⁶⁷ See *supra* Part II.D.

¹⁶⁸ See *infra* Part III.A. This Part essentially deals with situations similar to the Butler family's scenario at the beginning of this Note.

¹⁶⁹ See *infra* Part III.B.1. This scenario is akin to the hypothetical at the beginning of this Note dealing with the Wilkes family.

¹⁷⁰ See *infra* Part III.B.2.

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deprived of that interest without due process of law.¹⁷¹ Therefore, Part III.A.1 examines decisions of the courts in *Fuller*, *Georgia Lyons*, *Brotherton*, and *Newman* to determine the benefits and drawbacks of recognizing a protected property interest in the body organs of a decedent.¹⁷² As discussed in Part III.A.2, if the next of kin enjoy a protected property interest in the body organ of a decedent, the degree of process they are due is determined by weighing this interest against any asserted government interest in organ donation and the burden that process places on the state.¹⁷³

1. The Ramifications of Recognizing a Protected Property Interest in the Body Organs of a Decedent

Under *Fuller* and *Georgia Lions*, determining the level of due process protection afforded to the relatives of a decedent whose organs are removed without consent is simple, as both courts decline to recognize any sort of constitutionally protected property right in the body of a decedent.¹⁷⁴ In many respects, this conclusion appears valid. Although the courts in both *Fuller* and *Georgia Lions* do recognize a quasi-property interest in the body of the decedent, early American court decisions make it clear that this property right was often thought of as a “fiction,” the sole purpose of which was to protect the feelings of the survivors and to provide a basis for compensation for the emotional distress caused when a relative was unable to provide the deceased with what they felt to be a proper burial.¹⁷⁵ Because one of the main purposes of recognizing the quasi-property right was to find closure through burial or internment in the manner that that next of kin saw fit, recognizing a right to each individual organ does little to further this interest so long as the next of kin receive the body as a whole.¹⁷⁶

¹⁷¹ See *supra* Part II.C.

¹⁷² See *infra* Part III.A.1.

¹⁷³ See *supra* Part II.C; *infra* Part III.A.2.

¹⁷⁴ *Fuller v. Marx*, 724 F.2d 717, 719 (8th Cir. 1984); *Ga. Lions Eye Bank, Inc. v. Lavant*, 335 S.E.2d 127, 128 (Ga. 1985).

¹⁷⁵ *Ga. Lions*, 335 S.E.2d at 128. Concerning quasi-property rights, the court noted that “[i]t seems reasonably obvious that such ‘property’ is something evolved out of thin air to meet the occasion, and that in reality the personal feelings of the survivors are being protected, under a fiction likely to deceive no one but a lawyer.” *Id.* (quoting W.L. PROSSER & W.P. KEETON, PROSSER AND KEETON ON TORTS 63 (5th ed. 1984)); see also *Carney v. Knollwood Cemetery Ass’n*, 514 N.E.2d 430, 434 (Ohio Ct. App. 1986).

¹⁷⁶ See *Fuller*, 724 F.2d at 719. The court noted that “Mrs. Fuller received the body in what appeared to be acceptable condition. We know of no Arkansas cases which extend this quasi-property right to all of the body’s organs.” *Id.*

By refusing to recognize a constitutionally protected property right in human bodies, the courts in *Fuller* and *Georgia Lions* also helped to protect the state interest in preserving and improving life through presumed consent statutes.¹⁷⁷ As a practical matter, it is logical to infer that the fewer rights the relatives of a decedent have regarding his body, the more likely that physicians can retrieve organs under presumed consent laws with a minimal number of legal “hassles.”¹⁷⁸ Therefore, these decisions tend to provide organ procurement organizations with the greatest amount of leeway in promoting the state interest in increasing organ donation.¹⁷⁹

However, by failing to assign a property interest in the individual body organs of a decedent, the courts in *Fuller* and *Georgia Lions* also tend to undermine the quasi-property interest and the occasional First Amendment interest that the next of kin have in burying a decedent in a manner that they see fit.¹⁸⁰ As previously mentioned, sects of multiple religions, including Judaism and Islam, require that a body be buried with all body organs intact.¹⁸¹ *Smith* suggests that the next of kin will have little recourse under the First Amendment if a coroner removes an organ pursuant to a neutral policy of general applicability, but the religious interest in organ donation is even further eroded if the state refuses to recognize a property interest in the body organs of a decedent.¹⁸² While the court in *Fuller* reasoned that Arkansas law provided Mrs. Fuller the opportunity to reclaim her husband’s organs if her religious beliefs required her to do so,¹⁸³ the court in *Georgia Lions* acknowledged that the parents of the infant whose corneas were

¹⁷⁷ See *Ga. Lions*, 335 S.E.2d at 129. Although the court in *Fuller* did not directly deal with a presumed consent statute, the court in *Georgia Lions* specifically noted that the presumed consent statute at issue in the case drastically increased the number of cornea donations, reasoning that “[c]ertainly, the General Assembly has it within its power, in the interest of public welfare, to authorize [presumed consent to cornea donation], which yearly benefits hundreds of Georgians.” *Id.* at 129.

¹⁷⁸ Melissa A.W. Stickney, Note, *Property Interests in Cadaverous Organs: Changes to Ohio Anatomical Gift Law and the Erosion of Family Rights*, 17 J.L. & HEALTH 37, 64 (2002/2003). Stickney observes that critics of the Sixth Circuit’s decision in *Brotherton*, in which the court recognized a property right in human organs, ultimately base their conclusions on a moral position that places the needs of organ procurement organizations and organ recipients above any rights that may be claimed by the next of kin. *Id.*

¹⁷⁹ *Id.* at 64.

¹⁸⁰ See *supra* note 105 (discussing the increased importance of the quasi-property right when First Amendment rights are involved, and describing various state methods employed to ensure that First Amendment rights are given proper respect).

¹⁸¹ See *supra* Part II.C.1.c.

¹⁸² See *supra* notes 105–06 and accompanying text.

¹⁸³ *Fuller v. Marx*, 724 F.2d 717, 719–20 (8th Cir. 1984).

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removed had no realistic opportunity to object to removal.¹⁸⁴ By refusing to recognize any property interests in a decedent's body organs, the *Georgia Lions* court upheld a statutory framework that provided the next of kin with little to no opportunity to voice their religious objections to the removal of organs or to bury their relative in accordance with their religious beliefs.¹⁸⁵

Conversely, by holding that the relatives of a decedent have a constitutionally protected property interest in the body organs of a decedent, the courts in *Brotherton* and *Newman* help ensure that family members receive a certain amount of process before a state official deprives them of their ability to bury their relatives in accordance with their own personal views or beliefs.¹⁸⁶ However, while recognizing that family members have a property interest in the body organs of a decedent tends to increase the level of protection given to the rights of family members, this approach also increases the risk that living individuals will be deprived of their ability to make a gift of their organs in accordance with the UAGA.¹⁸⁷ Although the UAGA specifically provides that any anatomical gift made prior to the death of a decedent becomes irrevocable upon death, in practice, many physicians and hospitals will not remove organs if they know of objections by the next of kin.¹⁸⁸ While several reasons for this phenomenon exist, a major

¹⁸⁴ Ga. *Lions Eye Bank, Inc. v. Lavant*, 335 S.E.2d 127, 128 (Ga. 1985).

¹⁸⁵ *Id.* at 127-29. Although the court clearly recognized that "there was no notice of the intended removal, nor any realistic opportunity to object [to removal]," the court went on to hold that "it can be seen that in Georgia, there is no constitutionally protected right in a decedent's body," further reasoning that "the General Assembly has it within its power, in the interest of the public welfare, to authorize this procedure." *Id.*

¹⁸⁶ See *Newman v. Sathyavaglswaran*, 287 F.3d 786, 797 (9th Cir. 2002) (noting that "'to give a man a property' interest in a thing, there must be 'a mandate prohibiting persons at large from meddling with it'" (quoting JEREMY BENTHAM, *THE LIMITS OF JURISPRUDENCE* DEFINED 164 (Charles Warren Everett ed., Greenwood 1945))).

¹⁸⁷ See generally Leonard H. Bucklin, *Woe Unto Those Who Request Consent: Ethical and Legal Considerations in Rejecting a Deceased's Anatomical Gift Because There is No Consent by the Survivors*, 78 N.D. L. REV. 323, 339 (2002) (noting that when the legal accountability of the hospital to family members exceeds the legal accountability to the deceased patient, the hospital will be unlikely to act in conflict with the wishes of the next of kin, giving the next of kin a veto power over any desired organ donation). Interestingly, state court decisions granting the next of kin a quasi-property interest in the body of a decedent do not define who exactly qualifies as next of kin. See, e.g., *Renihan v. Wright*, 25 N.E. 822, 824 (Ind. 1890); *In re Donn*, 14 N.Y.S. 189, 191 (N.Y. Sup. Ct. 1891). Conversely, the UAGA gives a detailed listing of the order of preference for determining next of kin. See *supra* note 37 and accompanying text.

¹⁸⁸ The UAGA provides that "[a]n anatomical gift that is not revoked by the donor before death is irrevocable and does not require the consent or concurrence of any person after the donor's death." UNIF. ANATOMICAL GIFT ACT (1987) § 2(h), 8A U.L.A. 25 (2003). Even though all fifty states provide immunity to physicians or hospitals that remove an organ in

contributor is that, in a practical sense, many doctors already refer to the body of a decedent as the "property" of the next of kin.¹⁸⁹ In an era when hospitals and doctors continue to face increasing amounts of litigation, doctors will be even less likely to act in accordance with the wishes of a decedent if they know that the family members of a decedent have a constitutionally protected property interest in his or her body organs.¹⁹⁰

accordance with this UAGA provision, virtually no OPO will remove organs from a decedent without consent from the next of kin. Bucklin, *supra* note 188, at 324, 334, 337.

¹⁸⁹ Bucklin, *supra* note 188, at 333. Bucklin observes that in the medical community, the term "donor" has no legal significance. *Id.* at 329. Instead, the medical community equates the word "donor" with the word "source," taking both to mean "a dead body." *Id.* Because this terminology implies that donation is not an act that can occur during the life of a decedent, it seems correct to obtain consent from the next of kin before removing any organs. *Id.* In addition to the tendency of the medical community to view an organ donor as inanimate property, Bucklin also hypothesizes that on an emotional level, it is far easier for a doctor to act in accordance to, rather than against, the wishes of a grieving family. *Id.* at 342. He states that:

It is emotionally easier to say, "I am sorry your husband died. Tell me what you want me to do?" It is more difficult to say, "Before you got here we checked with the driver's license bureau; and we are doing what your husband wanted done." It is even more difficult to say, "We waited three hours after your husband was declared brain-dead, and you were not available so we had the coroner give consent to remove his organs, which we have already done."

Id.

Similarly, Machado hypothesizes that cognitive dissonance among the players in the organ donation system, primarily physicians, nurses, and next of kin, further decreases the level of action taken by hospital staff. MACHADO, *supra* note 17, at 122-24. Machado notes that physicians have the ultimate authority to determine when a person is "dead," but that the physicians are often under pressure to take into count various legal and ethical considerations that determine how death is understood and will be held accountable for their actions by other physicians and the legal system. *Id.* at 123. While nurses are often told that a patient has reached "brain death" and is therefore dead, they must often care for a decedent as if he or she is still alive and see certain bodily reflexes that indicate life. *Id.* at 124. These nurses interact with the next of kin, who often have the authority to donate organs but usually have little understanding of the concept of brain death. *Id.* at 124. Thus, the next of kin are likely to question a diagnosis of death when a relative does not "look dead enough." *Id.*

¹⁹⁰ Bucklin, *supra* note 188, at 323, 339. This fear of litigation by family members is so strong that in many cases, even if a decedent has made a valid anatomical gift under the UAGA and the hospital knows of no objections by any family members, if the hospital cannot contact the next of kin to obtain consent, the hospital will refuse to authorize removal of the organs, allowing silence alone to halt the progression of a valid anatomical gift. *Id.* at 337. Shortly after the decision of the court in *Brotherton*, Ohio recognized this concern and passed a law stating that when a decedent made a previously valid anatomical gift, the donee receives a property right in that organ upon death, effectively extinguishing any property right that family members may have had in directing the disposal of that organ. Stickney, *supra* note 179, at 39 (citing S. 188, 123rd Gen. Assem., Reg. Sess. (Ohio

In addition to the fact that recognizing familial property interests in the body organs of a decedent may have a chilling effect on the retrieval of valid anatomical gifts, many critics also argue that recognizing protected property interests in dead bodies is a dangerous step on the road to organ commodification.¹⁹¹ Although NOTA continues to prohibit the buying and selling of organs on the open market, critics of recognizing property rights in organs argue that the harm of commodification comes not only from the sale of human bodies' organs, but also from the "inferior conception of personhood" that is created when human organs and bodies are referred to in the same context as more commonly traded goods and materials.¹⁹² To refer to the human body in the language of property invokes images of slavery or prostitution, and regardless of intent, this manner of reference devalues the true worth of the human person.¹⁹³

However, these arguments are less troublesome when considering that the constitutionally protected property right recognized by the courts in *Brotherton* and *Newman* extends only to the ability of the next of kin to dispose of a body in a manner that they see fit.¹⁹⁴ These decisions do not give family members the ability to use the body or body organs of a decedent for any purpose they desire, but allow only possession for the

1999–2000) (enacted)). While there are currently no cases on record, it will be interesting to see if granting a possessory right to the donee will serve to decrease litigation or merely to change the party bringing suit.

¹⁹¹ See Goodwin, *supra* note 28, at 360–61 (describing the arguments of the critics of recognizing property rights in human organs and examining the impact of acknowledging private property rights on various racial groups).

¹⁹² *Id.* (quoting Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1936 (1987)). See *supra* note 25 for the text of NOTA prohibiting the sale of human organs for valuable consideration and *supra* note 63 for a discussion of other theories regarding property rights and personhood. See also MACHADO, *supra* note 17, at 102–03 (discussing the progressive depersonalization of dead bodies, ranging from "the deceased," which continues to suggest a name, relatives, testaments, and property, to "corpse," which is a stage further from humanness, emphasizing the biological aspects of death and describing both humans and animals).

¹⁹³ Goodwin, *supra* note 28, at 360–61.

¹⁹⁴ See *Newman v. Sathyavaglswaran*, 287 F.3d 786, 796 (9th Cir. 2002) (holding that "serving a duty to protect the dignity of the human body in its final disposition that is deeply rooted in our legal history and social traditions, the parents had exclusive and legitimate claims of entitlement to possess, control, dispose and prevent the violation of the corneas and other parts of the bodies of their deceased children"); *Brotherton v. Cleveland*, 923 F.2d 477, 482 (6th Cir. 1991) (describing the property right held by Deborah Brotherton in the body of her husband to be "extremely regulated" and for purposes of "disposal").

purposes of burial and disposal in an attempt to protect the dignity of the human body in its final disposition.¹⁹⁵

Furthermore, although the relatives of a decedent may not possess every “twig” in the bundle of rights associated with personal property, the reasoning in *Brotherton* and *Newman* effectively demonstrate that both common law and the UAGA grant the next of kin a sufficient number of “twigs” to establish a “legitimate claim of entitlement” to the body and body organs of a decedent as protected by the Due Process Clause of the Constitution.¹⁹⁶ Although termed a quasi-property interest, common law clearly provides that the relatives of a decedent have a right to possess his body for the purposes of burial and internment.¹⁹⁷ Additionally, the UAGA establishes that unless there are prior indications of the decedent’s wishes, the next of kin have the exclusive right to make, or refuse to make, an anatomical gift of the decedent’s body organs so long as they know of no contrary indications by the decedent.¹⁹⁸ Regardless of what these rights are called, they indicate that the relatives of a decedent have two of the critical rights of property: the right to possess and control to the exclusion of others and the right to transfer to others.¹⁹⁹ Because the relatives of a decedent can reasonably expect to possess the decedent’s body for the purposes of burial and to determine whether or not to transfer the decedent’s organs pursuant to the UAGA, the courts in *Brotherton* and *Newman* correctly determined that the next of kin have a sufficient number of rights regarding the decedent’s body to establish a legitimate claim of entitlement that is protected by the Due Process Clause.²⁰⁰

2. The Process Required To Remove Body Organs Without Consent if a Constitutionally Protected Property Interest Exists

Assuming that the courts in *Brotherton* and *Newman* correctly determined that the next of kin do have a protected property interest in

¹⁹⁵ *Newman*, 287 F.3d at 796. This interest could also be termed a “liberty interest” as well as a property interest.

¹⁹⁶ See Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972) (explaining that to have a property right protected by the Due Process Clause, a plaintiff must demonstrate a “legitimate claim of entitlement”); *supra* Part II.C.1.a (describing the “bundle of rights” theory of property).

¹⁹⁷ See *supra* Part II.C.1.c (giving the history of the common law quasi-property interest in the body of a decedent).

¹⁹⁸ UNIF. ANATOMICAL GIFT ACT (1987) § 3(b), 8A U.L.A. 34 (2003).

¹⁹⁹ See *Brotherton*, 923 F.2d at 481 (describing the “bundle of rights” associated with property, which includes the right to possess, use, exclude, profit, and dispose).

²⁰⁰ See *supra* Part II.D for a detailed description of the reasoning followed by the courts in *Brotherton* and *Newman*.

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the body of a decedent, the amount of process that they are entitled to can be determined by weighing this property interest against any competing interests that the government may have and the burden faced by the government in providing greater process.²⁰¹ In both of these cases, the state asserted an interest in the preservation or improvement of life through the implementation of a presumed consent organ donation program.²⁰² However, while the court in *Brotherton* found that this state interest is not substantial enough to allow for a deprivation of the property rights of the next of kin, the court in *Newman* declined to hold that the state of California lacks a significant interest in obtaining corneas or other organs for the purpose of improving the life of its citizens.²⁰³

In the context of the Supreme Court decisions involving the state interest in life and abortion rights, it appears that the approach taken by the *Brotherton* court is correct.²⁰⁴ As demonstrated in *Planned Parenthood v. Casey*, while the state may assert its interest in the life of a fetus by promulgating various regulations regarding the procedure a woman must follow to obtain an abortion, the state's interest in preserving life is not sufficient to override a woman's constitutionally protected decision to have an abortion.²⁰⁵ This statement suggests that while a state may pass regulation encouraging organ donation and even require hospitals to approach all eligible family members about the option to donate organs, the state interest in life is not likely sufficient to absolutely override the protected property interest that a family member has in the body of a decedent.²⁰⁶ In addition, the failure of American common law to establish a duty to rescue further suggests that it is inappropriate to compel people to sacrifice their own constitutionally protected interest in

²⁰¹ *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2646 (2004); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); see also *supra* Part II.C (describing the steps of due process analysis).

²⁰² *Newman v. Sathyavaglswaran*, 287 F.3d 786, 799 (9th Cir. 2002); *Brotherton*, 923 F.2d at 482. The magnitude of this asserted interest can also vary. In both *Brotherton* and *Newman*, the asserted state interest was simply the improvement of life through corneal transplant. *Newman*, 287 F.3d at 799; *Brotherton*, 923 F.2d at 482. In some cases, the state interest could actually be saving another life, as in the case of a heart, lung, or kidney transplant. See *supra* Part II.C.2 (discussing the state's interests in the body organs of a decedent).

²⁰³ *Newman*, 287 F.3d at 799; *Brotherton*, 923 F.2d at 482.

²⁰⁴ See *supra* Part II.C.2 (discussing the analysis used in cases where the state interest in life is weighed against the right of a woman to choose an abortion).

²⁰⁵ *Planned Parenthood v. Casey*, 505 U.S. 833, 873 (1992).

²⁰⁶ The UAGA provides an excellent example of a regulation that attempts to increase organ donation by assigning hospital employees a statutory duty to approach family members regarding organ donation if no prior indication of the wishes of the decedent exists. UNIF. ANATOMICAL GIFT ACT (1987) § 5(a).

order to save or improve the life of a complete stranger.²⁰⁷ If a person is under no obligation to throw a drowning stranger a rope from his boat, what authority does the state have to compel the next of kin to sacrifice his own property or liberty interest and provide a dying person with an anatomical gift?

Even if the state has a sufficient interest in obtaining organs to override the property interest of the next of kin, no case or statutory law indicates what sort of predeprivation process the state must provide before seizing the body organ of a decedent.²⁰⁸ When the state seizes an organ from the body of a decedent, it virtually destroys the ability of the next of kin to possess, control, or prevent the violation of the decedent's body or body organs.²⁰⁹ Thus, at a minimum, meaningful process must allow the next of kin to voice their objections to organ donation before any removal occurs, which suggests that the presumed consent laws that place no duty on the coroner or hospital to check the decedent's medical records for any prior indications of intent or to obtain the consent of the next of kin are invalid.²¹⁰

As demonstrated above, advantages and disadvantages arise when recognizing a constitutionally protected property interest for the next of kin in the decedent's body and body organs.²¹¹ On one hand, recognizing a protected interest runs the risk of having a chilling effect on the rate of organ donation and contributing to the commodification of the human body.²¹² On the other hand, both the common law and the UAGA provide relatives of a decedent with rights that clearly indicate a "legitimate claim of entitlement" to make certain decisions regarding the decedent's body.²¹³ Therefore, when a person has made no prior indication of his wish to donate an organ and a state actor removes an organ without attempting to obtain consent from the next of kin, the

²⁰⁷ See *supra* note 120 (discussing the absence of a duty to rescue in American law and noting that compelled state organ donation is likely unconstitutional).

²⁰⁸ See *Newman*, 287 F.3d at 799 (remanding to the district court to determine the amount of process a state must provide before seizing the corneas of a decedent).

²⁰⁹ *Newman*, 287 F.3d at 798.

²¹⁰ See *id.* at 799 ("Postdeprivation remedies do not satisfy due process where a deprivation of property is caused by conduct pursuant to established state procedure, rather than random and unauthorized action." (quoting *Hudson v. Palmer*, 468 U.S. 517, 532 (1984))). Because presumed consent statutes allow little to no opportunity to consent to organ removal, any realistic process provided would likely be post-deprivation, which does not satisfy due process requirements if adopted pursuant to a state policy such as presumed consent. See *id.*

²¹¹ See *supra* Part III.A.1.

²¹² See *supra* Part III.A.1.

²¹³ See *supra* Part III.A.1.

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relatives of a decedent should be able to bring a successful claim for the deprivation of their property interest without due process of law.

B. Due Process Rights of the Next of Kin When the State Prevents a Desired Organ Donation

As it appears that *Brotherton* and *Newman* correctly determine that the relatives of a decedent have a protected property interest in the decedent's body, the question follows: How far does this right extend? If a state official violates this right when he removes a body organ without consent, does he also violate this right when he steps in to prevent organ donation from occurring? If this protected property interest extends to these situations, how much process is due? Part III.B.1 addresses the first of these questions, examining the ramifications of extending the *Newman-Brotherton* property interest to situations where a state official steps in to prevent a desired organ donation.²¹⁴ The latter question is addressed in Part III.B.2, which explores the amount of process required before a state official may deprive a family member of any right they have to donate the decedent's organs.²¹⁵

1. Extending the *Newman-Brotherton* Protected Property Interest to Situations Where a State Official Prevents a Desired Organ Donation

In many respects, the facts in this type of situation can be distinguished from those in *Newman* and *Brotherton*. In both *Newman* and *Brotherton*, the plaintiffs argued and the courts partially based their findings of a constitutionally protected property interest on the premise that removal of an organ violated the common law right of the next kin to preserve the dignity of the human body and possess the entire body for purposes of burial or internment.²¹⁶ While these cases deal with the right to possess the entire human body, the situation described above deals solely with the right to possess and control a single organ, a right that is not a part of the traditional quasi-property interest.²¹⁷ The relatives in this situation do not assert their rights to the organ for the purposes of burial, but to transfer a single organ to another person for

²¹⁴ See *infra* Part III.B.1.

²¹⁵ See *infra* Part III.B.2.

²¹⁶ See *Newman v. Sathyavaglswaran*, 287 F.3d 786, 798 (9th Cir. 2002) (observing that as a result of the coroner's actions, "the parents could no longer possess, control, dispose or prevent the violation of those parts of their children's bodies"); *Brotherton v. Cleveland*, 923 F.2d 477, 482 (6th Cir. 1991).

²¹⁷ See, e.g., *Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227, 237-38 (1872) (describing the quasi-property right as a means of protecting a dead body from "violation").

transplantation. Unlike the facts in *Newman* or *Brotherton*, families in these situations will eventually receive these organs when they take possession of the body as a whole; the problem is that most organs are viable for transplant for only a short period of time and must be removed within hours of death.²¹⁸

However, in both *Brotherton* and *Newman*, the courts referred not solely to the right of the next of kin to possess a decedent's body for burial purposes, but also the right to "dispose" of his remains in a manner that the next of kin deems fit.²¹⁹ By broadly interpreting the meaning of "dispose" to include organ donation, the relatives of a decedent could argue that the right to donate organs is included in the quasi-property right to dispose of a body in a manner that they see fit. In addition, the UAGA provides the relatives of a decedent with the right to control a decedent's individual body organs by allowing family members to consent, or refuse to consent, to organ donation and if desired, to specify a recipient for each organ.²²⁰ Even if the quasi-property right to "dispose" of a body does not include organ donation, the statutory guarantees of the UAGA likely provide relatives of a decedent with enough of a "legitimate claim of entitlement" in donating organs to establish a constitutionally protected property interest.²²¹

2. The Amount of Process Required for a State Official To Deprive a Family Member of His Right To Donate the Decedent's Organs

Even if *Brotherton* and *Newman* establish a constitutionally protected property interest in situations where a state official prevents organ

²¹⁸ The amount of time that certain organs are viable for transplant varies greatly, as illustrated by the following examples: the heart has a five-hour viability period, the lung is viable for six hours, the liver is viable for thirty-four hours, the pancreas is viable for twenty hours, the kidney is viable for seventy-two hours, corneas are viable up to ten days, heart valves are viable for five years or more, skin is viable for five years or more, and bone is viable for five years or more. MACHADO, *supra* note 17, at 19, tbl. 1; *see also* New York v. Eulo, 472 N.E.2d 286, 292-93 (N.Y. 1984) (hypothesizing that one of the major policy considerations in adopting brain death as a legal criterion for death rather than cessation of heart function was to increase the supply of donable organs, as most organs swiftly deteriorate and lose transplant value once blood has stopped flowing); New York v. Bonilla, 95 A.D.2d 396, 404 (N.Y. App. Div. 1983) (noting that swift removal and transplant is essential to success in the organ donation process).

²¹⁹ *Newman*, 287 F.3d at 798 (noting that "parents could no longer possess, control, *dispose* or prevent the violation . . . of their children's bodies") (emphasis added); *Brotherton*, 923 F.2d at 482 ("The next of kin have a 'quasi-property' right in the decedent's body for purposes of burial or other lawful disposition.") (emphasis added).

²²⁰ UNIF. ANATOMICAL GIFT ACT (1987) §§ 3, 6(b).

²²¹ *See supra* Part II.C for a description of constitutionally protected property interest under the Due Process Clause.

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donation, the amount of predeprivation process required is not likely to be the same as when an organ is removed without consent. In both *Brotherton* and *Newman*, the sole interest of the state was, ironically, the preservation of life through organ donation.²²² Here, in any case where a person dies by violence or unusual means, the state has an interest in performing an investigation into the cause of death and potentially recovering evidence for use in a criminal case.²²³ In many circumstances, the cause of death must be determined and any pertinent evidence must be gathered before the body is altered by the removal of organs for donation.²²⁴ The information gathered is often critical in criminal cases where the perpetrator is still at large, and it may play a crucial role in any pending trial. Herein lies the ultimate problem, as many organs remain viable for only a few hours after death but it is simply not feasible to conduct a detailed investigation in this amount of time.²²⁵

The importance of this state interest indicates that in some instances, the interest of the state in conducting an investigation must take precedence over the family interest in donating organs.²²⁶ Because time is of the essence, immediate action is necessary when a conflict arises between the interest of a state investigator and the family's interest in organ donation.²²⁷ As the costs of sustaining a body in preparation for organ transplantation can be prohibitive, adequate process could be

²²² *Newman*, 287 F.3d at 799; *Brotherton*, 923 F.2d at 482.

²²³ See *supra* note 111 and accompanying text (providing a list of state statutes charging the coroner or medical examiner with a duty to investigate violent or suspicious deaths). The UAGA also recognizes the interest of a coroner, and it provides that organ donation may not occur if it will interfere with an autopsy or investigation. UNIF. ANATOMICAL GIFT ACT (1987) § 4(a)(5). The UAGA does not, however, specify the criteria for determining what constitutes a sufficient interference with an investigation, nor does it provide any procedure for family members to follow when a coroner determines that removal will interfere with an autopsy. *Id.*

²²⁴ See, e.g., *Stath v. Williams*, 367 N.E.2d 1120, 1124 (Ind. Ct. App. 1977) (describing the importance of the coroner's ability to determine the cause of death from the corpse itself rather than from extrinsic evidence).

²²⁵ See *supra* note 219 and accompanying text.

²²⁶ See *supra* Part II.C.2 (describing the state interests involved in a decedent's body and organs).

²²⁷ If there is any delay in providing process, organs may not be viable for transplantation, effectively depriving the family of any property interests that may have in organ donation, which therefore violates the Due Process Clause requirements. See *Newman*, 287 F.3d at 799 (explaining that absent extraordinary circumstances, the state must provide pre-deprivation process before a right is lost).

provided by a procedure as informal as a consultation with the coroner or medical investigator, either in person or over the telephone.²²⁸

In sum, the decedent's family members have a constitutionally protected property interest in his body organs, whether they wish to preserve the organs for the purposes of burial, internment, or to make an anatomical gift of the organs under the UAGA.²²⁹ However, while the state interest in preserving life is not likely sufficient to override this property interest in a presumed consent system of organ donation, the state will likely have the right to prevent a desired organ donation from occurring if doing so is necessary to a medical or criminal investigation.²³⁰ Yet, even if a sufficient state interest exists, the state must provide some sort of process before irrevocably depriving the next of kin of their right to consent to organ donation.²³¹ Establishing a constitutionally protected property interest for the next of kin in the body organs of the decedent and clarifying the process due to the next of kin before the state may deprive them of this right can be effectively achieved by amending the provisions of the Uniform Anatomical Gift Act.²³²

IV. ESTABLISHING THE DUE PROCESS RIGHTS OF THE NEXT OF KIN THROUGH AMENDMENTS TO THE UNIFORM ANATOMICAL GIFT ACT

As stated previously, current law suggests that the next of kin have a constitutionally protected property interest in disposing the individual body organs of a decedent in a manner they deem to be fit, including organ donation.²³³ However, as the decisions in *Fuller* and *Georgia Lyons* indicate, this property right is not unilaterally established.²³⁴ Therefore, any amendment ensuring that the next of kin receive due process protection before the state seizes the body organ(s) of a decedent must first establish that the next of kin have a "legitimate claim of entitlement" to control the disposition of those organs.²³⁵ In addition, the amount of process to which the next of kin are entitled before the state may seize an

²²⁸ See *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (suggesting that when the necessity of quick action by the State or the impracticality of providing any predeprivation process arises, process may take the form of an informal meeting or consultation).

²²⁹ See *supra* Parts III.A-B.

²³⁰ See *supra* Parts III.A-B.

²³¹ See *supra* Parts III.A-B.

²³² See *infra* Part IV.

²³³ See *supra* Part III.

²³⁴ See *supra* Part III.A.1.

²³⁵ See *supra* Part II.C.

organ is necessarily varied, depending on the circumstances surrounding the state action.²³⁶

In those situations where the state seizes an organ contrary to the wishes of the next of kin for the purposes of organ donation, the state interest in preserving life should not outweigh the property interest of the next of kin and such action should be strongly discouraged or prohibited.²³⁷ Conversely, where the state prevents a desired organ donation from occurring due to an investigation or autopsy, this state interest will often override the interest of the family in donating organs, provided that any amendment establishes the proper procedural framework to ensure that family members are not unjustly deprived of their established property rights.²³⁸ With these goals in mind, the following amendments to the UAGA are proposed:

§ 3. Making, Revoking, and Objecting to Anatomical Gifts, by Others

(a) Any member of the following classes of persons, in the order of priority listed, may make an anatomical gift of all or a part of the decedent's body for an authorized purpose, unless the decedent, at the time of death, has made an unrevoked refusal to make that anatomical gift:

- (1) the spouse of the decedent;
- (2) an adult son or daughter of the decedent;
- (3) either parent of the decedent;
- (4) an adult brother or sister of the decedent;
- (5) a grandparent of the decedent; and
- (6) a guardian of the person of the decedent at the time of death.

(b) Any member of the preceding class of persons listed in section (a) may make an anatomical gift of all or part of the decedent's body for an authorized purpose, unless:

²³⁶ See *supra* Parts III.A.2, III.B.2.

²³⁷ See *supra* Part III.A.2.

²³⁸ See *supra* Part III.B.2.

(1) a person in a prior class is available at the time of death to make an anatomical gift;

(2) the person proposing to make an anatomical gift knows of a refusal or contrary indications by the decedent; or

(3) the person proposing to make an anatomical gift knows of an objection to making an anatomical gift by a member of the person's class or a prior class.

(c) An anatomical gift made by a person authorized under subsection (a) must be made by (i) a document of a gift signed by that person or (ii) the person's telegraphic, recorded telephonic, or other recorded message, or other form of communication from the person that is contemporaneously reduced to writing and signed by the recipient.

(d) An anatomical gift by a person authorized under subsection (a) may be revoked by any member of the same or a prior class if, before procedures have begun for the removal of a part from the body of the decedent, the physician, surgeon, technician, or enucleator removing the part knows of the revocation.

(e) If no prior consent has been given by the decedent, no organ may be removed for donation and transplant purposes without making a good faith effort to obtain the consent of a qualified person listed in subsection (a). If any objections by a qualified person in subsection (a) are known, no organ may be removed for donation and transplant purposes.

§ 4a. Release of Organ for Transplant by Coroner, Medical Examiner, or Other Local Public Health Official

(a) The coroner or medical examiner shall attempt to accommodate requests by the decedent or next of kin as detailed in § 3 to remove and release an organ(s) for donation and transplant, unless, as determined by his discretion, removal will interfere with an investigation or autopsy.

(b) If the coroner or medical examiner withholds an organ for the purposes listed in subsection (a) contrary to the wishes of

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*next of kin, the coroner, medical examiner, or his representative must provide the next of kin with a verbal or written statement briefly explaining why organ donation would interfere with an investigation or autopsy, and the informing individual must allow those parties wishing to donate an opportunity to contest the decision of the coroner or medical examiner, either telephonically or in person.*²³⁹

A. *Establishing the Next of Kin's Property Interest in a Decedent's Body Organs*

In many respects, the UAGA already suggests that the decedent's relatives have a property interest in his body organs.²⁴⁰ However, proposed section 3(a) ensures that this interest rises to the level of "legitimate expectation" of control required to qualify as a property interest under the Due Process Clause.²⁴¹ While the current UAGA provides that the next of kin *may* make an anatomical gift if no prior indications by the decedent exist, the proposed amendment establishes that, absent any contrary indications by the decedent, the right to control the disposal of the decedent's organs lies *solely* with the next of kin.²⁴² The concern that recognizing a property interest in the next of kin will undermine the wishes of the deceased is largely unfounded when the proposed amendment is viewed in tandem with current provisions of the UAGA. The UAGA already provides that any anatomical gift previously made by the decedent becomes irrevocable upon death, curtailing the ability of the next of kin to donate those organs that the decedent has already pledged elsewhere.²⁴³ Proposed section 3(a) similarly curtails the ability of the next of kin to donate organs if they know of any refusal on the decedent's part to donate organs. Read together, these provisions ensure that the wishes of the decedent regarding his or her own body take precedent over the wishes of the next of kin.²⁴⁴

²³⁹ The Note's contribution is in italicized text. The text in regular font is taken from the existing UNIF. ANATOMICAL GIFT ACT (1987) § 3.

²⁴⁰ See UNIF. ANATOMICAL GIFT ACT (1987) § 3(a) (providing the next of kin with the ability to consent to organ donation).

²⁴¹ See *supra* Part II.C for a discussion of due process analysis.

²⁴² See UNIF. ANATOMICAL GIFT ACT (1987) § 3(a).

²⁴³ UNIF. ANATOMICAL GIFT ACT (1987) § 2(h).

²⁴⁴ See *supra* Part III.A.1 for a discussion of the policy implications of recognizing a property interest in the body organs of a decedent.

B. Due Process Requirements To Remove an Organ for Donation Purposes

Because *Cruzan* and *Casey* suggest that the government interest in preserving life is not sufficiently compelling to override a constitutionally protected property or liberty interest, the government's interest in organ donation should not be sufficient to remove an organ over the objections of the next of kin.²⁴⁵ Removing an organ without the permission of the next of kin would irrevocably deprive them of their constitutionally protected property interest in the decedent's body organs without due process of law. To this end, proposed section 3(e) prohibits both removal of an organ for donation purposes without first making a serious effort to obtain the consent of the next of kin and removal of an organ if any objections by the next of kin are known. Therefore, this section invalidates those presumed consent laws that assign no duty to investigate the decedent's medical records or to contact the next of kin. This provision ensures that family members are not erroneously deprived of their interest in the decedent's body organs.

It is important to note that this requirement applies only to removal for the purposes of organ donation. Often, the state may also need to remove an organ or disturb a body for the purposes of an autopsy or investigation.²⁴⁶ While this procedure also interferes with the right of the next of kin to control the decedent's body organs, the government purpose is compelling and the deprivation minimal, as the next of kin will ultimately obtain custody of the body and organs for burial purposes.²⁴⁷ The process required in these types of situations is adequately outlined by statutes in most states.²⁴⁸

C. Due Process Requirements When the State Withholds an Organ from Donation

The property ramifications of withholding a body or body organs for the purposes of an autopsy or investigation differ when the next of kin

²⁴⁵ See *supra* Part III.A.2.

²⁴⁶ See *supra* Part III.B.2.

²⁴⁷ On some level, it seems illogical to say that the government does not always have a sufficiently compelling interest in preserving the life of another, but that it does have a compelling interest in determining cause of death for a criminal investigation. However, ultimately, a criminal investigation may prove to be critical in maintaining order in society and apprehending a potentially violent criminal. See *supra* note 111 and accompanying text (providing a list of state statutes providing the coroner with discretion to conduct a criminal investigation).

²⁴⁸ See *supra* note 111 and accompanying text.

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are deprived of their ability to donate the organs of the decedent.²⁴⁹ The state often has a compelling interest in performing an investigation or autopsy, but when a state actor withholds the decedent's body, the next of kin are irrevocably denied their right to dispose of the decedent's organs through the organ donation process.²⁵⁰ Therefore, absent extraordinary circumstances, the state must provide at least some informal process before depriving family members of their right to dispose the body organs of a decedent through organ donation.²⁵¹

Proposed section 4a(a) recognizes the importance of the state interest in performing an autopsy or investigation as well as the interest of next of kin in donating organs because it requires the coroner to accommodate requests for organ donation but allows the coroner to deny the request if he determines that it will interfere with an autopsy or investigation. Proposed section 4a(b) ensures that the rights of family members are protected by at least some procedural safeguards, requiring that the coroner, medical examiner, or their representative provide the next of kin with a brief explanation as to why organ donation will interfere with an autopsy or investigation and allow family members to voice their concerns. This communication puts a very small burden on the state, as it may be informal, even occurring over the telephone, but it provides the next of kin with at least some procedural safeguards before they are irrevocably deprived of their property right in the organ donation process.

In total, these proposed amendments to the UAGA serve three important purposes. First, section 3(a) resolves any discrepancies in existing law regarding property rights in the organ donation process by providing the next of kin with the legitimate expectation of the ability to control disposal of the decedent's organs through organ donation or other means. Section 3(e) further protects this property interest by providing that the state may not assert its interest in organ donation without making a good faith effort to obtain consent from the next of kin. Finally, section 4a outlines the predeprivation process required when the state's compelling interest in performing an autopsy or investigation outweighs the interests of the next of kin, ultimately protecting the interests of both the state and the next of kin.

²⁴⁹ See *supra* Part III.B.1.

²⁵⁰ See *supra* Part III.B.2.

²⁵¹ See *supra* Part III.B.2.

V. CONCLUSION

In sum, current law and policy both indicate that the relatives of a decedent should have a constitutionally protected property interest in the body organs of the deceased. While the state interest in preserving life through organ donation is not likely to be sufficiently compelling to deprive the next of kin of this protected property interest, a state actor may deprive the next of kin of their right to donate organs if removal would interfere with an investigation or autopsy so long as adequate procedural safeguards are provided. This framework is good news for the Butler family from Part I, who would likely be successful in bringing a due process claim against the county coroner for the removal of Bonnie's corneas without their consent. The fictional Ashley Wilkes may not be so lucky. Because the coroner determined that removal of Melanie's organs would interfere with his autopsy of her body, he was justified in refusing to release her organs for donation. However, because Ashley Wilkes had a protected interest in Melanie's organs, he was entitled to some degree of process before the coroner seized Melanie's body. If the coroner simply seized Melanie's body without explanation, Mr. Wilkes could likely bring a successful claim under the Due Process Clause. Ultimately, these respective outcomes strike a balanced compromise, protecting both the compelling state interest in performing an autopsy or investigation and the right of the next of kin to dispose of the body organs of a decedent in a manner they deem best honors the memory of the deceased.

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