

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

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I. INTRODUCTION AND PROBLEM STATED

“We do not have a shortage of organs [for transplants], we only have a shortage of organs recovered.”¹ The shortage is serious and the problem gets worse each year. In 1988, four persons died per day while waiting on a list for an organ transplant.² In 1998, twelve persons died per day while waiting for an organ.³ In 2002, sixteen persons die each day.⁴ Through a combination of cadaver organ donation, living donation, and effective clinical management, the number that die each day is stabilizing at about sixteen, but the number of patients waiting for transplants keeps rising.⁵ The waiting list for organ transplants has steadily grown because more patients are added to the list each year than die or receive transplants.⁶ In 2002, about 80,000 patients are listed as needing organ transplants.⁷

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1. Letter from Theodore A. Latour, Patient Representative, UNOS Kidney & Pancreas Allocation Committee, to Daniel Hayes, MD, Chairman of the OPTN/UNOS Kidney & Pancreas Transplantation Committee (July 7, 2000) (on file with author).

2. J.R. JOHNSON, A STUDY OF THE UNITED STATES ORGAN DONOR PROGRAMS FOR THE PRESUMED CONSENT SUB-COMMITTEE OF THE UNOS ETHICS COMMITTEE tbl.1 (May 14, 1993).

3. UNITED NETWORK FOR ORGAN PROCUREMENT, ORGAN AND TISSUE DONATION: A REFERENCE GUIDE FOR CLERGY I-1 (4th ed., 2000) [hereinafter A REFERENCE GUIDE FOR CLERGY].

4. “Each day about 63 people receive an organ transplant, but another 16 people on the waiting list die because not enough organs are available.” Organ Donation, *available at* <http://www.organdonor.gov> (last visited June 20, 2002).

5. *Id.*; Arthur Caplan, *Organ Procurement and Transplantation: Ethical & Practical Issues*, *available at* http://www.upenn.edu/ldi/issuebrief2_5.html (last visited July 29, 2002).

6. A REFERENCE GUIDE FOR CLERGY, *supra* note 3, at I-1.

7. Extramural Support Program for Projects to Increase Organ Procurement, 67 Fed. Reg. 31,349, 31,350 (May 9, 2002); UNOS, *Snapshot of Patient Registrations on the National Transplant Waiting List*, *available at* <http://www.unos.org> (last modified June 30, 2002).

Studies routinely find that the pool of cadaveric donors is sufficient to provide enough transplant organs.⁸ About 15,000 persons die each year under circumstances that make them suitable for organ donation.⁹ But only about 6,000 of these deaths result in the donation of an organ.¹⁰ An average of about 3.37 organs per donor can be recovered.¹¹ If we used all 15,000 available donors, a pool of more than 50,000 organs would be created. This is probably enough to substantially fulfill the requirements of the persons waiting for transplants.¹² Yet there still is a shortage of organs recovered.¹³

One reason for the shortage of recovered organs is the standard practices of numerous organ procurement organizations (OPOs) in procuring organs for transplant.¹⁴ Many, and perhaps most, OPOs refuse to recover organs validly donated by a decedent before death unless consent is given by a next of kin and no other next of kin objects.¹⁵ One survey found only four states take advantage of the Uniform Anatomical Gift Act (UAGA)

8. *E.g.*, Gina Kolata, *Organ Shortage Clouds New Transplant Era*, SCIENCE, July 1, 1983, at 32.

9. LEWIN GROUP, INC., ROLES AND TRAINING IN THE DONATION PROCESS: A RESOURCE GUIDE 8 (2000). Currently the federal government's Department of Health and Human Services estimates 8,000 to 15,000 potential donors are available. Extramural Support Program for Projects to Increase Organ Procurement, *supra* note 7, at 31,350. To the contrary, "[s]tudies conducted by the Centers for Disease Control of the U.S. Public Health Service suggest that at least 12,000 [based upon an age range of brain-dead donors from five to fifty-five years] and perhaps as many as 27,000 [based upon an age range of brain-dead donors from birth to age sixty-five]" donors are available. UNIF. ANATOMICAL GIFT ACT (1987) § 4 Comment, 8A U.L.A. 44 (1993) (quoting HASTINGS CENTER REPORT OF THE PROJECT ON ORGAN TRANSPLANTATION, ETHICAL, LEGAL AND POLICY ISSUES PERTAINING TO SOLID ORGAN PROCUREMENT (Oct. 1985)). These estimates depend on the observer's definition of what is a "useable" organ.

10. LEWIN GROUP, INC., *supra* note 9, at 8.

11. Theresa J. Shafer et al, *Impact of Medical Examiner/Coroner Practices on Organ Recovery in the United States*, 272 JAMA 1607, 1607 (1994). We speak here of the solid internal organs, kidney, pancreas, liver, intestine, lung, and heart. Jeffery M. Prottas, *Organ Procurement in Europe and the United States*, 63 MILBANK MEMORIAL FUND Q. 94, 96 (1985). In addition to the solid internal organs, corneas, bone, skin, and other body parts are also needed and recovered. *Id.*

12. It would be sufficient because approximately 5,000 new patients are added to the list each year. Shafer et al., *supra* note 11, at 1609 tbl.2. Over time, if 50,000 more organs were available, the list would be whittled down to a point where supply could easily meet demand. *Id.*

13. Only about 18,000 organs are recovered each year. Theresa J. Shafer et al, *Ethical Analysis of Organ Recovery Denials by Medical Examiners, Coroners, and Justices of the Peace*, 9 J. OF TRANSPLANT COORDINATION 232, 233 tbl.1 (1999).

14. Dave Wendler & Neal Dickert, *The Consent Process for Cadaveric Organ Procurement*, 285 JAMA 329, 329, 333 (2001). Organ procurement organizations (OPOs) have essentially monopoly powers to procure organs within a geographical jurisdiction. OPOs receive funds from the federal government to perform their functions. 42 U.S.C. § 273(b)(1)-(2)(c) (1994).

15. UNIF. ANATOMICAL GIFT ACT (1987) § 2(h), 8A U.L.A. 34 (1993). "In situations in which family members could not be located, less than twenty-five percent of the respondents said they would proceed with organ procurement despite the presence of a written directive." *Id.* at § 2(h) Comment, 8A U.L.A. 37 (quoting HASTINGS CENTER REPORT OF THE PROJECT ON ORGAN TRANSPLANTATION, ETHICAL, LEGAL AND POLICY ISSUES PERTAINING TO SOLID ORGAN PROCUREMENT (Oct. 1985)).

provisions by retrieving organs solely on the authority of a donor document.¹⁶ In 1985, the Hastings Center stated, “The key problems that hinder organ donation include: . . . 4. Failure on the part of medical personnel to recover organs on the basis of written directives.”¹⁷

The law and ethics involved in the organ procurement process need to be addressed. A call has even been made for a national discussion addressing the ethical considerations that an OPO should use in deciding whether to ask for consent by a decedent’s next of kin.¹⁸ Therefore, this article is a review of both legal and ethical considerations in the reported “[f]ailure on the part of medical personnel to recover organs on the basis of written directives.”¹⁹ This article will examine whether it is legally improper and unethical for an OPO to refuse a decedent’s organ gift *on the basis* that a next of kin has not given consent.

II. THE LEGAL BASIS OF THE GIFT OF THE DECEDENT

A. THE PROBLEM OF THE COMMON LAW: WHO OWNS THE DEAD BODY?

“Property” that can be given away is a concept that depends on “rights of ownership.”²⁰ In common parlance, a person does not “own property” unless he has most of the possible rights of ownership.²¹

As early as 1749, it was decided in England that after death no one had a “property” right of “ownership” in a dead body.²² During the 19th century, a number of English cases repeated the idea that no one owns a dead

16. Thomas D. Overcast et al., *Problems in the Identification of Potential Organ Donors*, 251 JAMA 1559, 1561 (1984). Since January 1, 2001, with the encouragement of a statutory amendment, Virginia is also taking advantage of the UAGA provisions. Conversation with Bruce Nicely, RN, CPTC, LifeNet Transplant Services (Jan. 22, 2001).

17. UNIF. ANATOMICAL GIFT ACT (1987) Prefatory Note, 8A U.L.A. 20 (quoting HASTINGS CENTER REPORT OF THE PROJECT ON ORGAN TRANSPLANTATION, ETHICAL, LEGAL AND POLICY ISSUES PERTAINING TO SOLID ORGAN PROCUREMENT (Oct. 1985)).

18. Wendler & Dickert, *supra* note 14, at 333.

19. UNIF. ANATOMICAL GIFT ACT (1987) Prefatory Note, 8A U.L.A. 20 (quoting HASTINGS CENTER REPORT OF THE PROJECT ON ORGAN TRANSPLANTATION, ETHICAL, LEGAL AND POLICY ISSUES PERTAINING TO SOLID ORGAN PROCUREMENT (Oct. 1985)).

20. *E.g.*, LAWRENCE C. BECKER, PROPERTY RIGHTS 18 (Routledge & Kegan Paul 1977).

21. TONY HONORE, MAKING LAW BIND 165-79 (Oxford Univ. Press 1987); JUDITH J. THOMPSON, THE REALM OF RIGHTS 57 (Harvard Univ. Press 1990).

22. PDG Skegg, *Medical Uses of Corpses and the ‘No Property’ Rule*, 32 MED. SCI. & L. 311, 311 (1992). *Exelby v. Handyside* was tried at Common Pleas in 1749 (Matthews, 1983) and was reported in 2 East’s Pleas of the Crown 652 as having held that there were no property rights in corpses. *Id.*

body.²³ Now, “[i]t has long been accepted that in English law the dead body . . . does not have an owner, and is not the subject of property.”²⁴

It has been speculated that there were no property rights in a dead body for several reasons.²⁵ The first basic reason was jurisdictional.²⁶ Corpses were normally buried in church ground and became entities over which the ecclesiastical courts had control.²⁷ As a result, the common law courts had no jurisdiction to determine property rights in corpses.²⁸ The second basic reason was social.²⁹ Judges did not want a body devalued by treating it as mere property.³⁰ There was also a fear that if any person had property rights in a corpse, then body parts would be bought and sold in the market.³¹

But whatever the reason, the common law of “no owner of a dead body” seems to have been unchallenged in England.³² The common law of England became the basis of decision in most American cases.³³ The theory of “no owner” had negative implications for transplanting organs.³⁴ For example, if there is no property ownership after death, people may not issue binding instructions on what should be done with their own bodies after death.³⁵ Also, if parents gave their child’s body to a hospital for burial, the parents no longer had any rights in the body.³⁶ The parents then could not complain about the treatment of the body, its mutilation, or the manner of burial, even if it was contrary to their expressed desire.³⁷

23. See, e.g., *Foster v. Dodd* (1867) LR 3 QB 67, 77. “A dead body by law belongs to no one.” *Id.*

24. Skegg, *supra* note 22, at 311.

25. *Id.* at 312.

26. *Id.* at 312-13.

27. *Id.* at 314.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. Daniel E. Gadzala, *Anatomical Gifts: Considerations and Critiques*, MED. TRIAL TECHNIQUE Q. 464, 467-68 (1992); see also R.F. Martin, Annotation, *Corpse-Removal and Reinterment*, 21 A.L.R.2D 472, 476-79 (1952).

33. 25A C.J.S. *Dead Bodies* § 2 (1966); see also Gadzala, *supra* note 32, at 467-68. A few American courts ruled that although there was no property right in a dead body, a person still could, by will, dispose of his body as he deemed appropriate. 25A C.J.S. *Dead Bodies* § 2.

34. Gadzala, *supra* note 32, at 467-68.

35. *Williams v. Williams* (1881-82) LR 20 Ch. D. 659, 663. “[T]here can be no property in the dead body of a human being. . . . It follows that a man cannot by will dispose of his dead body.” *Id.* at 662-63, 665; Paul Matthews, *Whose Body? People as Property*, 36 CURRENT LEGAL PROBS. 193, 210 (1983). Although there was no property right in a dead body, a few American courts ruled that a person could use a will to dispose of a dead body as he wished. *E.g.*, *Meagher v. Driscoll*, 99 Mass. 281, *3 (Mass. 1868); see also Martin, *supra* note 32, at 484.

36. *McCoy v. Ga. Baptist Hosp.*, 306 S.E.2d 746, 746-48 (Ga. Ct. App. 1983).

37. *Id.* at 748.

All that most courts did was to declare a right of the executor or next of kin to possession of the body prior to burial, and this right existed only for the purpose of burial.³⁸ Most courts did not call the limited right to bury a body a property right, but only went so far as to use the words, "privilege," "right," or "quasi-property right."³⁹ Even the respected American Law Institute, in its *Restatements of the Law*, could find no definition for property in a body.⁴⁰

"It seems reasonably obvious that the word 'quasi-property' [was] something evolved out of thin air to meet the occasion, and that in reality the personal feelings of the survivors [were] being protected, under a fiction likely to deceive no one but a lawyer."⁴¹ This vague interest in controlling the body for the purpose of burial had only vague legal protection, and the interest of the next of kin in regards to preventing organ removal was equally vague.⁴²

B. THE UNIFORM ANATOMICAL GIFT ACT: A SOLUTION FOR THE TRANSPLANT COMMUNITY

This lack of clarity in the ownership of corpses caused indecision in the transplant community. Therefore, the National Conference of Commissioners on Uniform State Laws (Conference) set out to solve the indecision of the transplant community regarding the rights to a deceased's body.⁴³

38. *Fuller v. Marx*, 724 F.2d 717, 718-20 (8th Cir. 1984); *O'Donnell v. Slack*, 55 P. 906, 906-08 (Cal. 1899); *Anderson v. Acheson*, 110 N.W. 335, 336-40 (Iowa 1907); *Burney v. Children's Hosp.* In Boston, 47 N.E. 401, 401-02 (Mass. 1897); *Nichols v. Cent. Vt. Ry. Co.*, 109 A. 905, 906 (Vt. 1919).

39. *See, e.g., Fuller*, 724 F.2d at 718-20 (finding next of kin have quasi-property right in a dead body). There are some courts that find a person having burial rights to have "property" in the body. *See, e.g., Larson v. Chase*, 50 N.W. 238, 238-40 (Minn. 1891); D. W. MEYERS, *THE HUMAN BODY AND THE LAW* 101-02 (Stanford Univ. Press, 2d ed. 1990) (discussing limited property rights).

40. RESTATEMENT (SECOND) OF TORTS § 868 (1977). The Restatement avoided the definition problem of "property in a body" by stating the "right" of the next of kin in reverse fashion, thus: "One who intentionally . . . operates upon the body of a dead person . . . is subject to liability to a member of the family of the deceased who is entitled to the disposition of the body." *Id.*

41. W. PAGE KEETON ET AL., *PROSSER & KEETON ON TORTS* § 12 (5th ed. 1984).

42. *See* Daniel G. Jardine, *Liability Issues Arising Out of Hospitals' and Organ Procurement Organizations' Rejection of Valid Anatomical Gifts: The Truth and Consequences*, 1990 WIS. L. REV. 1655, 1660 (1990) (stating that "the common law was ill-equipped to provide guidance in the unique area of organ procurement and transplantation").

43. *See* UNIF. ANATOMICAL GIFT ACT (1987) Prefatory Note, 8A U.L.A. 22 (1993) (recognizing the need for a comprehensive act addressing organ donation, and concluding that the UAGA, wherever enacted, would eliminate uncertainty and protect all parties); *see also* Gloria J. Banks, *Legal and Ethical Safeguards: Protection of Society's Most Vulnerable Participants in a Commercialized Organ Transplantation System*, 21 AM. J.L. & MED. 45, 67 (1995) (stating that the UAGA as amended in 1987, better addresses the concern over providing an "encouraged volunteerism" system with teeth, which is needed to increase the supply of transplantable organs); E.

In 1968, the Conference drafted and sent to state legislatures the Uniform Anatomical Gift Act (1968 UAGA).⁴⁴ All fifty states enacted the 1968 UAGA.⁴⁵ The core of the statute was simple: create new, clear, and definite statutory law allowing a living person to donate body organs upon death, and make that right superior to the rights of anyone else.⁴⁶ The next of kin or other custodian of the body could only make such an anatomical gift if the deceased made no organ gift before death.⁴⁷ Thus, the 1968 UAGA established a legal right for competent people to donate their organs upon death that would prevail over any supposed property rights of their next of kin, and this right had priority over the family's privileges to bury the body and priority over its wishes regarding transplantation.⁴⁸

The small legal step involved was that the 1968 UAGA treated organs of a living person as an asset of the living person.⁴⁹ The 1968 UAGA was contrary to the common law, and it resolutely allowed living persons to distribute their bodies upon death.⁵⁰ The 1968 UAGA only went so far as needed to allow donations of organs for transplantation.⁵¹ It did not go so far as to call the body of a living or dead person "property."⁵² It did not address creating an interest sufficient for sale of body parts, but simply made a legally clear statement of a process and a right for persons to donate their organs, after death, to an OPO for organ transplants.⁵³

The medical community refused to give full effect to the law.⁵⁴ The problem did not lie in legal theory, adverse court interpretations, or ambi-

Blythe Stason, *The Uniform Anatomical Gift Act*, 23 BUS. LAW. 919, 921-24 (1968) (recognizing legal uncertainties of organ donation laws during the pre-UAGA era as providing the major basis for the adoption of the model act).

44. UNIF. ANATOMICAL GIFT ACT (1968) § 8, 8A U.L.A. 15-16 (1983).

45. UNIF. ANATOMICAL GIFT ACT (1987) Prefatory Note, 8A U.L.A. 20 (1993). Particular state laws may vary, but it is beyond the scope of this article to address the particular variations between the states.

46. *Id.* at 20-22.

47. *Id.* §§ 2(h), 3, 3 Comment, 8A U.L.A. 34, 40-41.

48. *Id.* § 2(h), 8A U.L.A. 34.

49. UNIF. ANATOMICAL GIFT ACT (1968) § 2(a), 8A U.L.A. 34 (1983); *see also* L.B. Andrews, *The Body as Property: Some Philosophical Reflections-A Response to J.F. Childress*, 24 TRANSPLANTATION PROCS. 2149, 2150-51 (1992).

50. UNIF. ANATOMICAL GIFT ACT (1968) § 2(a), 8A U.L.A. 34; Andrews, *supra* note 49, at 2150-51.

51. UNIF. ANATOMICAL GIFT ACT (1968) § 3, 8A U.L.A. 41.

52. *See generally id.* §§ 1-11, 8A U.L.A. 15-67; UNIF. ANATOMICAL GIFT ACT (1987) §§ 1-17, 8A U.L.A. 19-132 (1993).

53. *See generally* UNIF. ANATOMICAL GIFT ACT (1987) §§ 1-17, 8A U.L.A. 19-132.

54. *Id.* Prefatory Note, 8A U.L.A. 22; *see also* Jardine, *supra* note 42, at 1661.

guity of the statute, but in the perception of the medical community about what was needed to get organs from the “donor.”⁵⁵

After many years working in the medical and legal transplant communities, I have observed that the medical community and the legal community do not use the word “donor” in the same sense. That difference may be the root of the problem of the medical community’s insistence on a next of kin signing something after the death of a person who made a valid organ gift while alive. To the medical community, “donor” and “source” are identical—a dead body—and “donor” has no special legal significance. The medical community seems to think in terms of a “donation” of organs only coming from a dead body; therefore, it seems natural in that community to ask for consent from a presently living person regarding the dead body. Likewise, the transplant community commonly calls the patient getting the organ the “donee,” not realizing that to lawyers, the “donee” is the OPO first obtaining the organ.⁵⁶

To the contrary, in the legal community, the “donor” and the “source” are not necessarily identical, and the terms do have different legal significance.⁵⁷ To the legal community, the “donor” is the person who made the gift while alive.⁵⁸ The “source” is the body from which the gift is taken.⁵⁹ If the “source” died without making an anatomical gift, the next of kin has an opportunity to become a “donor” of a part of the “source.”⁶⁰ Moreover, the OPO is the “donee” of the gift from the donor.⁶¹ To the courts, the “donee” of a UAGA gift is not the organ recipient patient.⁶² So, to lawyers the matter of organ donation can be done before death and is completed by the “donee” OPO simply accepting the gift.⁶³

55. UNIF. ANATOMICAL GIFT ACT (1987) Prefatory Note, 8A U.L.A. 22; *see also* Jardine, *supra* note 42, at 1661.

56. UNIF. ANATOMICAL GIFT ACT (1968) § 3, 8A U.L.A. 41; Jardine, *supra* note 42, at 1664 n.50.

57. A donor is “an individual who makes an anatomical gift of all or part of the individual’s body.” UNIF. ANATOMICAL GIFT ACT (1987) § 1(4), 8A U.L.A. 30 (1993). Source is defined as “the originator or primary agent of an act, circumstance, or result.” BLACK’S LAW DICTIONARY 1401 (7th ed. 1997). The law’s conceptual framework of “gift” has a living person, the “donor,” who has done everything necessary to make a gift, before his death, of something which in the future will be the primary agent of a result, i.e., a transplanted organ. If he has not done everything necessary to make the gift, he is not an organ donor, although his dead body may still be a “source.”

58. UNIF. ANATOMICAL GIFT ACT (1987) § 1(4), 8A U.L.A. 30.

59. *See* BLACK’S LAW DICTIONARY 1401 (7th ed. 1997).

60. UNIF. ANATOMICAL GIFT ACT (1968) § 2(b), 8A U.L.A. 34 (1983).

61. *Id.* § 3, 8A U.L.A. 41; Jardine, *supra* note 42, at 1664 n.50.

62. UNIF. ANATOMICAL GIFT ACT (1987) § 6, 8A U.L.A. 53 (1993); *see also* Jardine, *supra* note 42, at 1664 n.50 (discussing *Williams v. Hoffman*, 223 N.W.2d 844, 846 (Wis. 1974)).

63. UNIF. ANATOMICAL GIFT ACT (1987) § 2(h), 8A U.L.A. 34 (1993); UNIF. ANATOMICAL GIFT ACT (1968) § 2(a)-(e), 8A U.L.A. 34-35.

By 1987, the Uniform Laws Commissioners recognized that the medical community was confused about who was the donor, who was the donee, and the ability of a decedent to make an effective donation.⁶⁴ Hence, the Commissioners prepared a revised UAGA (1987 UAGA)⁶⁵ with word changes to remove the uncertainty of the medical community.⁶⁶ The core language of the 1987 UAGA is bold, and the official comments are the legal equivalent of hitting people with a two-by-four to get their attention.⁶⁷

SECTION 8. RIGHTS AND DUTIES AT DEATH. (a) Rights of a donee [e.g., OPO] created by an anatomical gift are superior to rights of others except with respect to autopsies under Section 11(b). A donee may accept or reject an anatomical gift. . . . After removal of the part, custody of the remainder of the body vests in the person under obligation to dispose of the body.⁶⁸

COMMENT. In subsection (a) the first sentence is a restatement of Section 2(e) of the original Act . . . [which] recognizes and gives legal effect to *the right of the individual to dispose of his own body without subsequent veto by others* . . . *If the donee [e.g., OPO] accepts the gift, absolute ownership vests in him.*⁶⁹

The prefatory note to the revised 1987 UAGA went on to emphasize the purpose of the revisions. It stated, “[t]he proposed amendments . . . require that the intentions of a donor be followed. For example, no witnesses are required on the document of gift (Section 2(b)) and *consent of next of kin*

64. See UNIF. ANATOMICAL GIFT ACT (1987) § 1 Comment, 8A U.L.A. 30-31.

65. See *id.* Prefatory Note, 8A U.L.A. 20.

66. See *id.* § 1(3), 8A U.L.A. 30.

The 1987 Act explicitly states that medical attendants can rely upon a ‘document of gift.’ No other person needs to consent to taking organs. This express language does not really change the 1968 Act, but relieves the anxieties of those in the medical setting who could not quite bring themselves to believe that the 1968 Act really allowed them to rely on the ‘document of gift.’

National Conference of Commissioners on Uniform State Laws, *available at* http://www.nccusl.org/nccusl/uniformact_summaries/uniformacts-s-aga87.asp (last visited May 20, 2002).

Concern had been expressed that donee organizations and hospitals had in some cases been reluctant to rely on a donor card or document of gift if relatives were opposed to the donation. Section 2(h) of the Act makes clear that a gift not revoked by the donor prior to death is irrevocable and does not require the consent or agreement of any person after the donor’s death.

Martin D. Begleiter, *The Uniform Anatomical Gift Act*, PROB. & PROP. 51, 51-52 (Mar.-Apr. 1989).

67. UNIF. ANATOMICAL GIFT ACT (1987) § 1 Comment, 8A U.L.A. 30-31 (1993).

68. *Id.* § 8, 8A U.L.A. 55-56.

69. *Id.* § 8 Comment, 8A U.L.A. 56 (emphasis added).

*after death is not required if the donor has made an anatomical gift (Section 2(h)).*⁷⁰

The 1987 Commissioners reiterated their original (1968) intent by using stronger legislative language.⁷¹ The language reiterated that the intentions of the donor be followed.⁷² The language stressed that the donor's intentions could not be revoked by any other person after the donor's death.⁷³ The 1987 language should remove any uncertainty that exists within an OPO in the states that have adopted the 1987 UAGA. The 1987 UAGA addressed the transplant community's consent requirement.⁷⁴ It specified that a donor's gift "does not require the consent or concurrence of any person."⁷⁵ The Commissioners thought it was clear: the legislation gave legally supreme and binding effect to donors' rights to donate their own body parts without veto by others.⁷⁶

As of September 30, 2000, twenty-three states had revised their UAGA statutes by adopting the 1987 version.⁷⁷ As we have seen, this version of the UAGA only put the 1968 UAGA rights into stronger language. As we will see in later portions of this article, the courts have not hesitated to apply the law of either the 1968 or 1987 UAGA to uphold a donor's gift over the asserted rights of surviving kin.⁷⁸

Like the Conference, the Council on State Governments also noted the hesitancy of the transplant community to utilize the 1968 UAGA provisions present in all states.⁷⁹ Consequently, it has urged the remaining states to adopt additional legislative revisions such as the 1987 UAGA,⁸⁰ and some states have enacted various modifications to their versions of the UAGA.⁸¹ The latest appears to be Kentucky, which amended its statutes to prohibit next of kin from interfering with a known decision of a decedent to donate

70. *Id.* Prefatory Note, 8A U.L.A. 22 (emphasis added).

71. *Id.* § 2(h) Comment, 8A U.L.A. 36.

72. *Id.*

73. *Id.*

74. *Id.* § 2(h), 8A U.L.A. 34.

75. *Id.*

76. *Id.* § 2(h) Comment, 8A U.L.A. 36 (1993).

77. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 2000-2001 REFERENCE BOOK 116-20 (Chicago, 2000). The states are Arizona, Alaska, California, Connecticut, Hawaii, Idaho, Illinois, Indiana, Iowa, Minnesota, Montana, Nevada, New Mexico, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, Virginia, Washington, and Wisconsin. *Id.*

78. *See* cases cited *infra* note 112.

79. Committee on Suggested State Legislation, 56 Suggested State Legislation 123, 123 (1997) available at <http://ssl.csg.org/dockets/dockpolfles/97vol56.pdf> (last visited May 20, 2002).

80. *See id.* (recommending the Pennsylvania version of the 1987 UAGA, as adopted by Pennsylvania in 1995, which points out that consent of the next of kin is not necessary).

81. *See, e.g.*, KY. REV. STAT. ANN. § 311.237 (Michie 2001).

organs.⁸² The driving force or pressure behind the legislation does not seem to have been a mob of next of kin shouting in the hallways of hospitals. Instead, it is more likely that there has been a legislatively perceived need to reassure local OPOs that they indeed have the power they already had under the 1968 UAGA.⁸³

The 1987 revision removed the requirement of witnesses to the donor's decision, which was present in the 1968 UAGA.⁸⁴ The unverified donor's signature, by itself, is sufficient under the 1987 UAGA to establish an organ gift.⁸⁵ Under the 1987 UAGA, an imprint on a driver's license, based on a donor's decision communicated to the driver's license agency, suffices as a document of gift.⁸⁶ In short, the OPOs in states that have adopted the 1987 UAGA no longer need to worry about the formalities by which the donor's decision to donate organs was recorded.⁸⁷

The 1987 UAGA is so strongly in support of retrieval of organs, and against any obstruction by next of kin, that it has limited the time period given a next of kin to appear.⁸⁸ The medical profession often seems unaware that the public coroner or the public health officer may donate an organ if no document indicating the donor's intent can be found and no next of kin is available within a reasonable time period.⁸⁹ As the 1987 UAGA comments state:

Subsection (a)(2) [the right of the coroner to donate the organs] seeks to balance societal and family interests, that is, to increase the size of the donor pool and to give the family the opportunity to make or refuse to make an anatomical gift. The balance in this subsection is on the side of increasing the size of the donor pool. The duty to search the medical record or to inform next of kin is limited to 'a reasonable effort taking into account the useful life of the part . . . ' This reflects a concern expressed in the Comments to the original Act: '. . . the very limited time available following

82. *See id.* (stating "the individual's family members . . . shall not have any legal standing or authority to modify the decedent's wishes or deny the anatomical gift from being made"). This statute became effective in July 2000. *Id.*

83. UNIF. ANATOMICAL GIFT ACT (1987) Prefatory Note, 8A U.L.A. 22 (1993).

84. *Id.* § 2 Comment, 8A U.L.A. 35.

85. *Id.*

86. *Id.* § 2(c), 8A U.L.A. 34.

87. Committee on Suggested State Legislation, *supra* note 79, at 123.

88. UNIF. ANATOMICAL GIFT ACT (1987) § 4(a)(2), 8A U.L.A. 43 (authorizing an official to procure an organ if he "has made a reasonable effort, taking into consideration the useful life of the [organ], to . . . inform [next of kin] of their option to . . . object to making, an anatomical gift").

89. *Id.* § 4(a).

death for the successful recovery of such critical tissues . . . ‘ The time will vary depending upon the part involved. In the case of corneal tissue, the time is within six hours after death. In the case of organs, the need, availability, and efficacy of life support systems must be considered. If removal must be immediate and there is no medical or other record and no person specified in Section 3(a) is present, the . . . [coroner may donate the organs].⁹⁰

In short, the 1987 UAGA gives coroners and public health officials the right to systematically remove any body part for transplantation within a few hours after death if they have no knowledge of any decedent’s or qualifying relative’s objection.⁹¹ This has been considered a legislative taking without consent, overriding any actual, but unknown, objection by the decedent or next of kin.⁹² On legal challenge to such a governmental action, the Florida Supreme Court held that the family’s interest in the disposition of the corpse was not a protected liberty, due process, or property interest.⁹³ This case shows that the UAGA means what it says—where there is a signed donor card, there is no legal basis for an OPO to seek consent of the next of kin.⁹⁴ The state has granted authority for the gift, and the family has no superior interest.⁹⁵

However, misperception by the medical community still persists.⁹⁶ For example, Kathryn Schroeter in advising nurses that they need to ask for “consent” for organ removal, says, “The body of a dead person becomes the property of the next of kin, guardian, or medical examiner.”⁹⁷ This is simply not true. First, the body of a dead person does not become the property of anyone.⁹⁸ Second, if there is a signed donor card by the decedent, the limited privilege of the next of kin to later get the body for burial is subject to the superior right of the OPO to the body.⁹⁹ Medical personnel should be told that, under the UAGA, the decedent donor has already made an effective donation of an asset to the OPO.¹⁰⁰ Immediately upon the death of the

90. *Id.* § 4(a) Comment, 8A U.L.A. 44-45.

91. *Id.* § 4(a), 8A U.L.A. 43.

92. *State v. Powell*, 497 So. 2d 1188, 1189 (Fla. 1986).

93. *Id.* at 1193.

94. *Id.*; Kathryn Schroeter & Gloria J. Taylor, *Ethical Considerations in Organ Donation for Critical Care Nurses*, 19 CRITICAL CARE NURSE 60, 64 (Apr. 1999).

95. *Powell*, 497 So. 2d at 1189, 1193-94.

96. *See supra* note 15 and accompanying text.

97. Schroeter & Taylor, *supra* note 94, at 66.

98. *See supra* Part II.A.

99. *See supra* text accompanying note 48.

100. Schroeter & Taylor, *supra* note 94, at 64.

decedent donor, the OPO is the *donee*.¹⁰¹ The next of kin cannot interfere with the donation that has already been made.¹⁰²

Anecdotal evidence shows that it is only the OPOs that do not seem to get the message.¹⁰³ People outside the organ business believe designating *Organ Donor* on their driver's license is sufficient to complete the donation.¹⁰⁴ Indeed, they would likely be surprised to find that OPOs seem to think the next of kin needs to consent to their own act of signing a donor card.

The statutory language of the 1987 UAGA is clear: "An 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."¹⁰⁵ Still, OPOs continue to require the consent of next of kin after the donor's death.¹⁰⁶ There is a startling difference between legal reality and the perception of legality by the OPOs that seek consent from the next of kin of a deceased donor.

III. THE PROTECTED LEGAL STATUS OF AN OPO IN RECEIPT OF THE GIFT

In all fifty states the OPO is not liable in a civil action for taking an organ without consent of the next of kin provided the OPO attempts to act in accordance with the UAGA.¹⁰⁷ "A hospital, physician, surgeon, . . . or other person, *who acts in accordance with this [Act]* or with the applicable anatomical gift law of another state . . . or attempts in good faith to do so is not liable for that act in a civil action or criminal proceeding."¹⁰⁸ Courts have consistently given the broadest possible reading to this grant of protection to the medical community.¹⁰⁹ The immunity has been decided by

101. *Id.*

102. *See* Overcast et al., *supra* note 16, at 1561.

103. *Id.* at 1561-62.

104. THEODORE A. LATOUR, HOW TO IMPROVE THE ORGAN RECOVERY SYSTEM 4 (2000) (on file with author); *see also* Jardine, *supra* note 42, at 1666.

105. UNIF. ANATOMICAL GIFT ACT (1987) § 2(h), 8A U.L.A. 34 (1993).

106. Overcast et al., *supra* note 16, at 1562.

107. UNIF. ANATOMICAL GIFT ACT (1987) § 11(c), 8A U.L.A. 59-60.

108. *Id.* (emphasis added).

109. *See, e.g.,* Mitchell v. Forsyth, 472 U.S. 511, 526 (1985); Rahman v. Mayo Clinic, 578 N.W.2d 802, 805 (Minn. Ct. App. 1998); Kelly-Nevils v. Detroit Receiving Hosp., 526 N.W.2d 15, 19 (Mich. Ct. App. 1995); Brown v. Del. Valley Transplant Program, 615 A.2d 1379, 1383 (Pa. Super. Ct. 1992); Nicoletta v. Rochester Eye & Human Parts Bank, Inc., 519 N.Y.S.2d 928, 931 (N.Y. Sup. Ct. 1987).

courts, not by juries, soon after the suits have been brought.¹¹⁰ The language of the Minnesota Court of Appeals is typical:

The UAGA insulates individuals involved in the organ procurement process from civil and criminal liability, so long as they act in good faith. . . . That statute provides immunity from suit, not simply a defense to liability. . . . Whether actions constitute good faith is a question of law, properly resolved on summary judgment.¹¹¹

The UAGA immunity clause has never been successfully attacked.¹¹² It is well drafted to do just what the transplant industry wanted done. The author of an article for attorneys on the possible rights that exist under the UAGA properly concluded: "The Uniform Anatomical Gifts Act represents the ultimate union of medical and legal ingenuity in a document which serves, without compromise of either, to preserve our expectations to both life and justice."¹¹³

An extreme case for immunity protection, *Ramirez v. Health Partners of Southern Arizona*,¹¹⁴ has already been adjudicated. In *Ramirez*, a hospital worker mistakenly harvested bones from a decedent when the next of kin had specifically refused consent to harvest bones.¹¹⁵ The decedent's family sued the hospital for negligence, battery, and breach of contract.¹¹⁶ The Arizona State Constitution provided that the right to sue for negligence would never be abrogated.¹¹⁷ Nevertheless, the court protected the OPO by holding that the statutory immunity against suit was absolute, barring the negligence claim by the next of kin for mutilation of the body.¹¹⁸

110. See, e.g., *Rahman*, 578 N.W.2d at 805; see also *Mitchell*, 472 U.S. at 526 (concluding that because qualified immunity was immunity from suit rather than a mere defense to liability, it is appropriately resolved at the summary judgment phase); *Kelly-Nevils*, 526 N.W.2d at 19 (holding the question of good faith under the UAGA is properly a matter of law for the court to decide); *Nicoletta*, 519 N.Y.S.2d at 931 (concluding the issue of whether a hospital acted in good faith is a question of law appropriate for the court to act on by summary judgment); *Brown*, 615 A.2d at 1385 (concluding that the undisputed facts established the good faith of the hospital as a matter of law).

111. *Rahman*, 578 N.W.2d at 805.

112. See *State v. Powell*, 497 So. 2d 1188, 1194 (Fla. 1986) (upholding a statute authorizing medical examiners to remove corneal tissue without consent of next of kin); *Ga. Lions Eye Bank Inc. v. Lavant*, 335 S.E.2d 127, 128 (Ga. 1985) (upholding a statute authorizing cornea removal); *Nicoletta*, 519 N.Y.S.2d at 933 (stating that good faith compliance with the UAGA provides immunity to retrieving eyes); *Williams v. Hoffman*, 223 N.W.2d 844, 849 (Wis. 1974).

113. *Gadzala*, *supra* note 32, at 478.

114. 972 P.2d 658 (Ct. App. 1998).

115. *Ramirez*, 972 P.2d at 659-60.

116. *Id.* at 660.

117. *Id.* at 664.

118. *Id.* at 665-67.

Thus, any lingering doubt by OPOs as to legal liability should be swept away by the immunity section of the UAGA.¹¹⁹ The language of one court in upholding the statutory immunity is instructive; it stated, “limitation on liability contained in [UAGA of 1968 section 7(c)] . . . is justified by the legitimate public purpose of encouraging doctors to participate in the removal of organs following death, and therefore increasing their supply.”¹²⁰

Another court has said:

To require further action on the part of the defendant would not only impose an unreasonable duty upon the Hospital, but would also run afoul of public policy considerations, as such a decision would tend to jeopardize the whole process of organ donation by causing unnecessary delays, thereby frustrating the entire intent of the Uniform Anatomical Gift Act.¹²¹

No physician has ever been successfully sued for accepting an organ donation.¹²² The courts uniformly have recognized the validity of the statutory immunity provided by the UAGA.¹²³ The latest data, from a survey of all OPOs, shows eight of the sixty-one total OPOs in the United States have been sued in the last five years.¹²⁴ The OPOs that have been sued “report either 1 or 2 suits in the previous 5 years, none of which an OPO has lost. . . . OPOs have approximately a 1 in 2500 chance of being sued. . . and essentially no chance of losing such suits.”¹²⁵

Thus, the data reflects what a lawyer would predict. An OPO does not have to fear losing a lawsuit for taking a decedent’s gift without consent of next of kin or even against the wishes of the next of kin.¹²⁶

119. UNIF. ANATOMICAL GIFT ACT (1987) § 11(c), 8A U.L.A. 59-60 (1993).

120. *Williams v. Hoffman*, 223 N.W.2d 844, 848-49 (Wis. 1974); *see also* *Jardine*, *supra* note 42, at 1663 & n.41.

121. *Nicoletta v. Rochester Eye & Human Parts Bank, Inc.*, 519 N.Y.S.2d 928, 933 (N.Y. Sup. Ct. 1987).

122. *See* *Jardine*, *supra* note 42, at 1666 (citing Jeffrey M. Prottas, *The Rules for Asking and Answering; The Role of Law in Organ Donation*, 63 U. Det. L. Rev. 183 (1985)); *see also* cases cited *supra* note 112.

123. *See* cases cited *supra* note 112. *See generally* Thomas R. Trenkener, Annotation, *Tort Liability of Physician or Hospital in Connection with Organ or Tissue Transplant Procedures*, 76 A.L.R.3d 890 (1977).

124. *Wendler & Dickert*, *supra* note 14, at 332.

125. *Id.*

126. *Id.*

IV. THE CONTINUED PRACTICE OF REFUSING ORGAN GIFTS

In 1985, Jeffrey Prottas reported:

No organ procurement agency will procure organs from a deceased against the wishes of that deceased's next of kin, notwithstanding the presence of a signed donor card. Indeed, virtually no OP[O] will retrieve cadaveric organs when they cannot locate the next of kin. Thus, even silence is usually sufficient to stop an organ retrieval despite an individual's compliance with the terms of the Uniform Anatomical Gift Act.¹²⁷

In 1990, Peter Singer reported: "In practice, physicians usually accept the family's wishes when they are in conflict with the donor card."¹²⁸ In 2001, Wendler and Dickert reported: "[31% of] OPOs reported that they follow the deceased's wishes, . . . (31 %) follow the next of kin's wishes, . . . (21%) procure organs if neither party objects."¹²⁹ Although it may be concluded that the trend is away from consent, the data show that a majority of OPOs continue to refuse a decedent's gift unless ratified by consent of a next of kin and no other next of kin objects.¹³⁰

OPOs and the transplantation community use the term "consent" to describing what they seek to obtain before taking an organ.¹³¹ The term "consent" is not a legally correct term for the practice of OPOs.¹³² OPOs that request next of kin "consent" to an existing organ donation perhaps do not understand the legal definition of a gift.¹³³ A person receiving a gift from a donor does not need the "consent" of anyone except himself in order to receive the gift.¹³⁴ An OPO which says they as a donee will not take a gift from a donor unless they get "consent" from a third party is in the legal po-

127. Jeffrey M. Prottas, *The Rules for Asking and Answering: The Role of Law in Organ Donation*, 63 U. DET. L. REV. 183, 186 (1985) (citing Jeffrey M. Prottas, *Organ Procurement in Europe and the United States*, 63 MILBANK MEMORIAL FUND Q. 94, 101-02 (1985)).

128. Peter A. Singer, *A Review of Public Policies to Procure and Distribute Kidneys for Transplantation*, 150 ARCHIVES OF INTERNAL MED. 523, 523 (1990).

129. Wendler & Dickert, *supra* note 14, at 329.

130. *Id.*

131. Prottas, *supra* note 11, at 100.

132. See Jardine, *supra* note 42, at 1658 (stating that "'consent' is a misnomer").

133. See Prottas, *supra* note 11, at 190 (stating a physician's fear of liability may stem from not understanding the law); see also Jardine, *supra* note 42, at 1666.

134. RESTATEMENT (SECOND) OF PROP. § 31.1 (1992). The only consent necessary in a gift of an organ is the consent of the donor. UNIF. ANATOMICAL GIFT ACT (1987) § 2, 8A U.L.A. 33-34 (1993). It is generally presumed that a donee will accept a gift that is beneficial, and the receipt of an organ is beneficial to both the organ recipient and the OPO. RESTATEMENT (SECOND) OF PROP. § 31.1 Comment *l*. Only acceptance by the donee of a gift is necessary for a gift to be complete. *Id.* § 31.1.

sition of rejecting the gift.¹³⁵ The gift, once rejected, legally might no longer exist, and the donee OPO may have lost its absolute right to take the valid gift and see that someone on the waiting list benefits.

So, if an OPO knows there is a gift, but seeks to obtain the gift from a next of kin, the OPO is in the precarious position of having refused the anatomical gift.¹³⁶ Having refused the decedent's gift, the OPO is in the position of then asking the next of kin to make the gift by "consent." Legally, the OPO is asking the next of kin to make a new gift of the same item that the OPO has already once refused.

The immunity clause of the UAGA is for persons acting "in accordance" with the statute.¹³⁷ Plainly, accepting a valid organ gift of a decedent is acting "in accordance" with the statute.¹³⁸ But what of an OPO that seeks consent when the comments to the 1987 statute clearly show that both the 1968 and the 1987 UAGA do not want "consent" sought?¹³⁹ At least one court has found delaying organ procurement to seek unnecessary consent is contrary to public policy.¹⁴⁰ In my opinion, an OPO's rejection of a valid gift under the state's UAGA and then seeking "consent" for a new gift of the identical item is not "in accordance" with the statutory provisions.¹⁴¹ Such a rejection does not follow the statute, make legal sense, or make good practical sense.

The surprising nature of an OPO's rejection of a decedent's gift is emphasized if we consider what an OPO's reaction would be if that same decedent gave an OPO one million dollars in a document that took effect upon death. An OPO given a million-dollar gift would not likely first reject the gift and then go to a next of kin and ask for "consent" to receive the bequest. Yet OPOs do just that when they reject a decedent's anatomical gift and instead seek consent from a next of kin. It would be no more dangerous for the OPO or hospital to take the gift of an organ than it would be to take a gift of a million dollars from the decedent, even against the wishes of the next of kin.

What are the reasons given by OPOs for their interpretation of the UAGA? A typical statement in the literature of the transplant community

135. Jardine, *supra* note 42, at 1658.

136. *Id.*

137. UNIF. ANATOMICAL GIFT ACT (1987) § 11(c), 8A U.L.A. 59-60 (1993).

138. *Id.* § 4(a)(1)-(7), 8A U.L.A. 43.

139. *See supra* Part II.B.

140. *Nicoletta v. Rochester Eye & Human Parts Bank, Inc.*, 519 N.Y.S.2d 928, 932-33 (N.Y. Sup. Ct. 1987).

141. *See Jardine, supra* note 42, at 1664.

expresses some of the common reasons given by OPOs for seeking consent of the next of kin:

[A]lthough disposition authority lies with the deceased, most hospitals are unwilling to ignore the fact that legal accountability to living family members far exceeds that accorded to deceased patients. The threat of litigation and bad publicity effectively establishes a family's veto power concerning disposition of organs, which can override even the written wishes of the deceased.¹⁴²

This typical statement is wrong in what it describes as a "fact" and in what it describes as "veto power." It gives two "excuses" for an OPO's rejection of a donation by a decedent. The first excuse is that an OPO might be sued.¹⁴³ But if sued, the OPO would not likely be liable.¹⁴⁴ The actual reported data of suits and the legal analysis made above show that this excuse is unfounded.¹⁴⁵ It is just not correct to say there is great legal accountability to next of kin.¹⁴⁶ No one should ever say that there is any real threat of a suit for taking an organ pursuant to a donor card as long as no one appeared prior to the organ removal to claim that the decedent revoked the decision before death.¹⁴⁷ Hopefully, statements that legal liability could flow from accepting a decedent's gift and ignoring a survivor's objection will be removed from the transplant community's literature.

Indeed, as this article sets out in Section V, the real threat of suit is the threat that an OPO will be sued in a class action by all those on the transplant list in their region for refusing to accept the gifts of decedents.¹⁴⁸

Excuse number two is the bad publicity excuse.¹⁴⁹ Since most Americans approve of organ donation,¹⁵⁰ it is difficult to imagine a newspaper's editor siding with a next of kin who wants to prevent his deceased relative's decision to make an organ donation. It is more likely that the newspaper

142. Laura A. Siminoff & Mathew D. Leonard, *Financial Incentives: Alternatives to the Altruistic Model of Organ Donation*, 9 J. TRANSPLANT COORDINATION 250, 251 (1999).

143. *Id.*; see also Jardine, *supra* note 42, at 1666.

144. See *supra* notes 110-26 and accompanying text.

145. *Id.*

146. *Id.*; see also Siminoff & Leonard, *supra* note 142, at 251 (stating it is the threat of litigation from living family members that causes hospitals to ignore the deceased's organ donation wishes).

147. UNIF. ANATOMICAL GIFT ACT (1987) § 2(k), 8A U.L.A. 34 (1993).

148. See *infra* Part V.

149. Siminoff & Leonard, *supra* note 142, at 251; see also Jardine, *supra* note 42, at 1666 (stating that the medical profession is concerned "that there will be a backlash of public sentiment").

150. REPORT OF THE TASK FORCE ON ORGAN TRANSPLANTATION, ORGAN TRANSPLANTATION: ISSUES AND RECOMMENDATIONS 37-38 (1986); see also Jardine, *supra* note 42, at 1666.

would paint the next of kin as a person trying to frustrate a decedent's dying wish and call the OPO a hero for implementing the moral act of the decedent. As a proper moral exercise by the person whose organs are donated, transplantation is supported by all major religions.¹⁵¹ Therefore, bad publicity is *not* likely from an OPO's acceptance of the decedent's gift of life.

There is often another excuse given by OPOs when seeking consent for an organ gift—the lack of an easy procedure to check whether the deceased really made a donor decision.¹⁵² When investigated, this excuse can only mean that an adequate procedure has not been set up between the particular OPO and the government bureau involved. The UAGA statutes of all states allow driver's license registration of donors.¹⁵³ The states make it a requirement, in diverse ways, that the driver's license bureau allows donor information to be given to OPOs.¹⁵⁴ Driver's license information about organ donation consent *must* be, by statute, given to the OPO.¹⁵⁵ It is not an insurmountable task for OPOs to get donor information. In today's world of faxes and computers, it is possible for the state to respond in minutes to a request by an OPO for donor information. The officials on both sides—OPO and government bureau—just need to get together to set up a format for quick exchange of the information. In this day of computers, there is no reason why a simple file of driver's license names and decisions to donate cannot be accessed by an authorized individual at any time.

The practice of the New Mexico OPO may be typical. The New Mexico OPO will not rely or even follow-up on the symbol on a New Mexico driver's license that declares the person has signed a donor instrument.¹⁵⁶ The OPO takes the position that it must see a copy of the actual document

151. A REFERENCE GUIDE FOR CLERGY, *supra* note 3, V-2 to V-5.

152. Overcast et al., *supra* note 16, at 1561.

153. Prottas, *supra* note 11, at 185 n.1 (citing the Report to the Health Resources and Service Administration in 1985). All states use driver's licenses, but the approach is uncoordinated across the states. JOHNSON, *supra* note 2, tbl.9.

154. See JOHNSON, *supra* note 2, at 12-13.

155. Although the different states use different formats, some typical provisions are: Virginia Code at section 32.1-292.1(B): "Any law-enforcement officer may conduct an administrative search of the subject's Department of Motor Vehicles driver record to determine the person's authorization for organ donation or refusal of organ donation." VA. CODE ANN. § 32.1-292.1(B) (2001). Another example is found in Florida Statutes section 732.915(4):

The registry shall be maintained in a manner which will allow, through electronic and telephonic methods, immediate access to organ and tissue donation documents 24 hours a day, 7 days a week. Hospitals, organ and tissue procurement agencies . . . shall be allowed access through coded means to the information stored in the registry.

FLA. STAT. ANN. § 732.915(4) (West Supp. 2002).

156. Conversation with Laurie S. Garretson, Executive Director, New Mexico Donor Services (Oct. 25, 2001). I use New Mexico as an example, not because it is especially bad, but rather because it is not a special case. It is a typical experience that I have had in talking with the executive directors of OPOs that still insist on consent from the next of kin.

signed by the donor even if it sees the organ donor imprint on the decedent's license.¹⁵⁷ Generally, it is not possible for the OPO to see a copy of the document possessed by the driver's license bureau; therefore, the decedent's gift is rejected in favor of seeking consent by the next of kin.¹⁵⁸

The legislation of New Mexico is typical.¹⁵⁹ Its statutes declare that a "document of gift" may be a statement "imprinted on a motor vehicle driver's license";¹⁶⁰ that the OPO shall make "a reasonable search for a document of gift";¹⁶¹ that on request of any interested person, "the person in possession *shall* allow the interested person to examine or copy the document of gift";¹⁶² and that any employee of the motor vehicle division who acts *in accordance* with the Uniform Anatomical Gift Act is not liable for that act.¹⁶³

The conclusion that people can make is that either the New Mexico OPO is not making a reasonable search (e.g., phoning the motor vehicle division and asking to be faxed a copy of the document of gift), or that the motor vehicle department is an administrative system in which the need or inclination to follow complex procedures impedes effective action by not giving the New Mexico OPO access to donor information. Highway patrolmen ordinarily can obtain the information on drivers' licenses. Surely, if the police can communicate with the driver's license department, the OPO and the driver's license department of New Mexico can find a way to communicate information regarding donor designation. The New Mexico legislature has specified that the OPO should have on-line computer access to the driver's license department's donor lists and documents of gift.¹⁶⁴ What seems to be lacking is the desire to use the decedent's decision as the basis for the OPO's decision.

157. *Id.*

158. *Id.*

159. N.M. STAT. ANN. § 24-6A (Michie 1978 & Supp. 2002).

160. *Id.* § 24-6A-1(B).

161. *Id.* § 24-6A-9.1(C).

162. *Id.* § 24-6A-7(B) (emphasis added).

163. *Id.* § 24-6A-11(C) (emphasis added).

164. *Id.* § 66-5-10(B) (1978).

The department shall mark the donor status on each person's driver's license record and shall retain each application form or its image of a person who wishes to be a donor. The department shall create and maintain a statewide donor registry and shall provide on-line computer terminal access to the donor registry to organ procurement agencies and procurement organizations, as defined in the Uniform Anatomical Gift Act. Authorized hospital or organ and tissue donor program personnel, immediately prior to or after a donor's death, may request verification of the donor's status from the department and may obtain a copy of the application from the department.

Id.

I suspect the real, but unstated, reason for an OPO's refusal of a valid organ donation if the next of kin does not "consent" is a human reflex to give priority to the living person.¹⁶⁵ 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." It is possible that medical personnel want to both increase their own emotional health by avoiding confrontational conversations such as this and also decrease emotional pain of the survivors.¹⁶⁶ Doing the legally and ethically right thing may not always be the easiest emotional route, but that does not excuse failure to do the right thing when a patient waiting for an organ will die without it.

The transplant community's three excuses result in the decisions of the two most important people in the organ gift process, the decedent donor and the potential organ transplant recipient, being accorded little respect.¹⁶⁷ Indeed, seeking unnecessary consent for a decedent's decision treats the decedent donor and the potential organ recipient poorly. There is a violation of the statutory legal right, in states that have enacted either the 1968 or 1987 UAGA, of the decedent to make a gift, and there is an unnecessary chance of death to a potential recipient.¹⁶⁸

V. THE COST TO SOCIETY OF AN OPO'S REFUSAL TO ACCEPT GIFTS

As of June 5, 2002, 52,772 patients were waiting on the kidney transplant list in the United States; however, only 14,152 renal transplants were performed in 2001.¹⁶⁹ This shortfall has resulted in a terrible economic cost

165. See Jardine, *supra* note 42, at 1666 (stating that there is a sincere concern by the medical community for the well-being of a decedent's next of kin).

166. Laura R. Sophie, *Intensive Care Nurses Perceptions of Cadaver Organ Procurement*, 12 *Heart & Lung* 261, 264-65 (1983); *cf.*, Thomas E. Starzl, *Implied Consent for Cadaveric Organ Donation*, 251 *JAMA* 1592, 1592 (1984) (suggesting that the failure to retrieve organs represents the prejudices of physicians rather than those of the public); *see also* Jardine, *supra* note 42, at 1666 (stating that the medical profession tries to give some form of solace to the next of kin by asking for consent to procure organs).

167. See Jardine, *supra* note 42, at 1668.

168. See UNIF. ANATOMICAL GIFT ACT (1987) § 2(h), 8A U.L.A. 34 (1993) (stating that an anatomical gift that has not been effectively revoked by a donor does not require consent of any person).

169. Federal OPTN data, *available at* http://www.unos.org/Newsroom/critdata_main.htm#npwl (last visited July 12, 2002).

to taxpayers and society.¹⁷⁰ Each kidney transplant eliminates about \$40,000—the cost for keeping one person on dialysis for a year—in costs to society per year.¹⁷¹ If this is multiplied by perhaps twenty years of life on dialysis and the tens of thousands of persons on dialysis, it produces a staggering number of possible taxpayer savings. A kidney from a decedent could save society more than \$500,000 over a twenty-year period.¹⁷² An increase of one thousand kidney transplants could save society well over \$500,000,000 over a twenty-year period.

One estimate is that if all OPOs took all organs donated by decedents, without asking for consent of next of kin, the number of organs recovered would be more than doubled.¹⁷³ What would two times as many transplants do for society? The answer is impressive. We would have a smaller transplant waiting list, Medicare would have a huge financial burden lifted from it, and more people would be able to work fully and lead better lives.

VI. THE LEGAL PRINCIPLES INVOLVED IN AN OPO'S REFUSAL OF A DECEDENT'S GIFT

As stated, an OPO has a superior right to the body of a decedent donor in all fifty states.¹⁷⁴ That is the undeniable basis for examination of the legal position of the OPO vis-à-vis a surviving family member who does not give consent to removal of organs. The OPO's rejection of a decedent's valid donation of an organ, on the basis that an OPO has received no consent from the next of kin, could result in the *death* of a person on the transplant list.¹⁷⁵ Would the OPO's rejection of valid gifts by decedents be grounds for a suit against the OPO?

170. See A REFERENCE GUIDE FOR CLERGY, *supra* note 3, at I-1 (stating that taxpayers could save millions of dollars by increasing the number of transplanted kidneys).

171. The payments by Medicare vary from state to state, but the average is about \$2,000 a month for dialysis maintenance alone. Maureen McKinley, *Reimbursement for Treatment of End-Stage Renal Disease*, available at <http://www.eparetn.com/healthcare/reimbursement.htm> (last visited June 13, 2002). Recent health insurance industry figures for the cost to an HMO for one kidney dialysis patient is in the range of \$60,000 to \$90,000, which includes average problems and needed medical care for a dialysis patient. Optimal Renal Care, *Facts on the ERSD Population and Medicare*, available at <http://www.optimalrenalcare.com> (last visited June 13, 2002). My use of \$40,000 is intended to be conservative.

172. \$40,000 per year times twenty years on dialysis that can be eliminated equals \$800,000.

173. LATOUR, *supra* note 104, at 5.

174. UNIF. ANATOMICAL GIFT ACT (1987) § 8, 8A U.L.A. 55 (1993). I use the words "decedent donor" in the legal sense of one who has made a donation before death. I am not using it in the sense the medical community uses "donor" to mean "source of organs," who may or may not have made what lawyers call a "donation."

175. Jardine, *supra* note 42, at 1667.

Lawyers can identify several grounds for suit against an OPO that *rejects* a donation because of lack of consent of the next of kin.¹⁷⁶ Likewise there may be grounds for suit against family members who interfere with an OPO's acceptance of anatomical gifts.¹⁷⁷ Indeed, *Liability Issues Arising Out of Hospitals' and Organ Procurement Organizations' Rejection of Valid Anatomical Gifts: The Truth and Consequences*¹⁷⁸ is a handbook of grounds for suit.¹⁷⁹ It was published with "the hope . . . that by empowering would-be transplant patients with legal muscle, the organ donation process will finally proceed as originally envisioned within the UAGA."¹⁸⁰ "A policy change [by OPOs would] be easily justified, as the medical profession [would] be doing only what it is legally bound to do."¹⁸¹

A. NEGLIGENCE

A jury could determine that an OPO owes a duty to perform its function for the benefit of potential organ recipients.¹⁸² A jury could also determine that rejection of a valid anatomical gift is negligence.¹⁸³ Furthermore, an effectively *prima facie* standard of care may have already been set by the UAGA's standard that donors' wishes are not to be vetoed by others.¹⁸⁴ Neither a judge nor a jury is likely to look kindly on an OPO that arbitrarily vetoed deceased donors' valid gifts of organs at the cost of the death of patients waiting for organs.

OPOs cannot escape negligence liability because "everybody does it."¹⁸⁵ As Dean William Prosser has stated: "Even an entire industry . . . cannot be permitted to set its own uncontrolled standard . . . where common knowledge and ordinary judgment will recognize unreasonable danger, what everyone does may be found to be negligent."¹⁸⁶ An individual patient on a transplant list might have a costly and difficult time finding the evidence of an OPO rejecting a valid gift, but a class of persons waiting on a transplant list would not likely find the task insurmountable. As the to-

176. *Id.*

177. *Id.*

178. 1990 WIS. L. REV. 1655 (1990).

179. *Id.* at 1667-94.

180. *Id.* at 1669.

181. *Id.* at 1693.

182. *Id.* at 1669.

183. *Id.*

184. See UNIF. ANATOMICAL GIFT ACT (1987) § 2(h), 8A U.L.A. 34 (1993).

185. Jardine, *supra* note 42, at 1669 (citing W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS § 33 (5th ed. 1984)).

186. *Id.* at 1669 n.107. (quoting Dean Prosser from W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS § 33 (5th ed. 1984)).

bacco, automobile, and insurance industries have discovered, a class of persons can find counsel equipped to spend the necessary time and money.

B. TORTIOUS INTERFERENCE WITH CONTRACT

A transplant patient has an implied contract with the transplant center and its OPO.¹⁸⁷ The implied contract is that the transplant center and its OPO will take any valid gift of an organ to be used in a transplant for another (or at least to use the organ for someone else and thus move others up the list for a future transplant).¹⁸⁸ It could be considered tortious interference by a family member when a contract is in existence, and the family member's objection to a decedent's contract of gift results in failure to render the contracted service to the decedent.¹⁸⁹ A court would likely find attractive the following quotation from a tortious interference with contract case, which held liable a third party that threatened a lawsuit, resulting in failure of the physician to perform medical services expected by the patient.¹⁹⁰

When an ailing person selects a physician to treat him, he does so with the full expectation that such physician will do his best to restore him to health, and the contract into which they enter is deserving of more attention from the law than a businessman's expectation of profit from a purely commercial transaction.¹⁹¹

Courts are not likely to favor a family member interfering with both the decedent's gift and also the implied contract between a transplant center or OPO and a dying patient on the waiting list.¹⁹² Why should anyone be favored who has deliberately frustrated the rational decision of a decedent and thereby caused the death of someone on the waiting list?

C. BREACH OF CONTRACT

Contract theory also could be the basis for a suit against an offending OPO.¹⁹³ There is an implied term of the dying patient's listing himself with a particular transplant institution for a transplant operation and paying for services to become listed, that the institution and its OPO will accept a valid

187. *Id.* at 1687.

188. *Id.*

189. *Id.*

190. *Id.* at 1688.

191. *Id.* (quoting *Hammonds v. Aetna Cas. & Sur. Co.*, 237 F. Supp. 96, 101 (N.D. Ohio 1965)).

192. *See id.* (discussing *Hammonds*, 237 F. Supp. at 101).

193. *Id.* at 1667 n.69.

organ donation for use in transplantation.¹⁹⁴ Would an OPO be breaching implied contracts with transplant list patients by rejecting a valid anatomical gift and then seeking consent from next of kin? Certainly a jury could so find.

D. VIOLATION OF CIVIL RIGHTS

Section 1983 of 42 U.S.C. imposes liability on any person who, under color of state law, deprives a citizen of any right secured by statute.¹⁹⁵ According to the court in *Doe v. Charleston Area Medical Center*,¹⁹⁶ a medical organization is deemed operating “under color of state law when it is regulated or funded by the government and enacts an internal regulation based on what it (mistakenly or not) believes is a state law requirement and enforces it to deprive a person of a right.”¹⁹⁷ A class may have a valid § 1983 claim against an OPO when (1) a class of transplant patients is deprived of some transplants (2) due to an OPO’s internal self imposed “consent” regulation (3) which actually is not required by state law, (4) but is self-enforced by the OPO as a purported requirement of state law.¹⁹⁸ This scenario fits into what the OPOs are doing when they make their decision to accept a decedent’s gift of an organ for transplantation dependent upon the veto power of a next of kin.

Violation of civil rights can result in damages proportionate to the damage inflicted.¹⁹⁹ The class’s counsel would argue the question of the monetary value of many lives. A class of persons could likely find counsel equipped to spend the necessary time and money to find the necessary evidence of the OPO’s rejection of some organs that would have gone to some members of the class. Indeed, the database of the Organ Procurement Transplant Network (OPTN) operated by the federal government probably is sufficient to find the specific recipient to whom a specific organ likely would have gone, had it been accepted by the OPO.²⁰⁰

194. *Id.*

195. *Id.*; 42 U.S.C. § 1983 (1994 & Supp. IV 1998).

196. 529 F.2d 638 (4th Cir. 1975).

197. Jardine, *supra* note 42, at 1667 n.69 (quoting *Charleston Area Med. Cent.*, 529 F.2d at 644). *Charleston Area Med. Center* was not a transplant case, but did involve principles that could apply to transplantation. The court hinted at the possibility of a class action suit. *Id.* (citing *Charleston Area Med. Cent.*, 529 F.2d at 645).

198. *Charleston Area Med. Cent.*, 529 F.2d at 645.

199. 42 U.S.C. § 1983.

200. Organ Procurement Transplant Network (OPTN) available at <http://www.optn.org> (last visited June 20, 2002).

E. PROTECTION OF IMMUNITY STATUTES

What should be of paramount importance to the medical profession is the effect that unnecessarily seeking consent could have on the immunity status of an OPO.²⁰¹ The important points are two and they are simple: (1) If the OPO acts *in accordance* with the UAGA, then it has liability protection,²⁰² and (2) if the OPO does not act *in accordance* with the UAGA, then it does not have liability protection.²⁰³

An OPO's rejection of organs donated by a decedent on the basis that there was no affirmative act of consent by next of kin conflicts with the UAGA.²⁰⁴ A procedure that rejects a donor's gift and then sets out to get a gift from the next of kin "cannot seriously be considered a [good faith act] in accordance with the . . . UAGA."²⁰⁵

In *Williams v. Hoffman*,²⁰⁶ the Wisconsin Supreme Court noted that immunity under the 1968 UAGA does not protect the medical community from suits by live transplant patients waiting on the list.²⁰⁷ An OPO should take note of its potential liability to suit by the living patients on the waiting list.

Jacobsen v. Marin General Hospital,²⁰⁸ should also be a wake-up call to OPOs regarding legally unnecessary searches for consent from next of kin.²⁰⁹ In *Jacobsen*, the California OPO requested a body from the coroner.²¹⁰ The OPO wisely did *not* search for next of kin, and simply accepted the gift of the body from the coroner.²¹¹ The deceased's parents sued, alleging that the Hospital and Network's "custodial relationship" with the body of their son Martin gave rise to a duty owed to the Jacobsens to search for Martin's next of kin and to protect their right to object to organ donation.²¹² The court dismissed the Jacobsens' three negligence claims.²¹³ The court said:

201. Jardine, *supra* note 42, at 1664.

202. UNIF. ANATOMICAL GIFT ACT (1987) § 11(c), 8A U.L.A. 59-60 (1993).

203. *Id.*

204. *Id.* § 2(h), 8A U.L.A. 34.

205. *Id.* §§ 2(h), 11(c), 8A U.L.A. 34, 59-60; Jardine, *supra* note 42, at 1664.

206. 223 N.W.2d 844 (Wis. 1974).

207. *Williams*, 223 N.W.2d at 846; *see also* *Ravenis v. Detroit Gen. Hosp.*, 234 N.W.2d 411, 414 (Mich. 1975) (holding hospital liable for negligence to patients waiting for corneas); Jardine, *supra* note 42, at 1664.

208. 192 F.3d 881 (9th Cir. 1999).

209. *Jacobsen*, 192 F.3d at 884.

210. *Id.*

211. *Id.* at 886. Apparently, California has an OPO that does not seek consent from next of kin if there is a valid gift. Under the UAGA, a coroner with possession of a body may make a valid anatomical gift. UNIF. ANATOMICAL GIFT ACT (1987) § 4(a), 8A U.L.A. 43 (1993).

212. *Jacobsen*, 192 F.3d at 885.

Although the Jacobsens contend that the Hospital and Network owed a duty to them arising from common law to search for Martin's next of kin, the Jacobsens cite to no authority for this proposition, nor do we find such a duty existed. As stated previously, *a duty may exist under common law if the Hospital and Network affirmatively undertook to search for Martin's next of kin. Here, however, the Jacobsens have not alleged facts to demonstrate that the Hospital and Network affirmatively undertook to search for Martin's next of kin. Nor do the facts alleged in the complaint demonstrate a preexisting or special relationship between the Jacobsens and the Hospital and Network giving rise to such a duty. Finally, the public policy rationale articulated in the Gift Act would not warrant imposing a duty to search for Martin's next of kin on the Hospital and Network.*²¹⁴

The legal lesson from *Jacobsen* is that OPOs should not search unnecessarily for next of kin.²¹⁵

VII. THE ETHICAL PRINCIPLES INVOLVED IN AN OPO'S REFUSAL OF DECEDENT'S GIFT

Ethical analysis is also a necessary component of the decision process by OPOs in deciding whether to accept an organ donation.²¹⁶ The ethical principles chosen may change the ethical decision. Ethical analysis may proceed satisfactorily only if the particular ethical principles to be applied are announced and accepted.²¹⁷

The three principles most directly applicable to organ and tissue transplantation are utility, justice, and autonomy.²¹⁸ In selecting these principles I agree with the position paper of the United Network for Organ Sharing's subcommittee on ethical distribution, which said:

The ideal allocation [of organs for transplantation] would be one that simultaneously maximized the aggregate amount of (medical) good, distributed the good equitably, respected the autonomous decisions of individuals, and was in accord with any other ethical principles that might come into play.

213. *Id.*

214. *Id.* at 886 (citation omitted) (emphasis added).

215. *Id.* at 844.

216. Wendler & Dickert, *supra* note 14, at 329-33.

217. United Network for Organ Sharing, 1991 Ethics Committee, *Principles of Organ and Tissue Allocation and Donation by Living Donors*, 24 TRANSPLANTATION PROC. 2226, 2227 (1992) [hereinafter UNOS].

218. *Id.*

....

[A] consensus has been reached for purposes of public policy relative to organ and tissue allocation: utility (taken as medical utility. . .) and justice (or fairness in distribution) should be given equal status.

....

A third basic principle plays a controversial and sometimes ambiguous role in deciding what is a morally appropriate allocation. In a free society, the autonomy of individuals is given great importance.²¹⁹

The Patient Affairs Committee of the United Network for Organ Sharing²²⁰ came to the conclusion that only the principles of utility and justice should be used in the analysis of what is a fair system of allocation.²²¹ But, it appears to me that the concept of autonomy of the individual is so ingrained in our culture that it must be included in an ethical analysis regarding organ donation.

Other authors, in analyzing problems similar to the one discussed here, have used the three principles of utility, justice, and autonomy. For example, *Ethical Analysis of Organ Recovery Denials by Medical Examiners, Coroner, and Justices of the Peace*,²²² used an ethical framework of non-maleficence, beneficence, justice, and autonomy derived from Beauchamp and Childress.²²³ I would argue that in the transplantation setting, the analysis choosing nonmaleficence, beneficence, justice, and autonomy is actually the same as using utility, justice, and autonomy as I do here.

A. UTILITY

Utility refers to the principle that the greatest good should be done for the greatest number of persons.²²⁴ It originated in the thoughts of Jeremy Bentham and John Stuart Mill as a method for determining social policy.²²⁵

219. *Id.* at 2229.

220. PATIENT AFFAIRS COMMITTEE, UNITED NETWORK FOR ORGAN DISTRIBUTION, *EQUITABLE DISTRIBUTION, A POSITION PAPER 2* (1991).

221. *Id.*

222. Shafer, et al, *supra* note 13.

223. *Id.* at 233, 235.

224. JEREMY BENTHAM, *A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 125 (Wilfrid Harrison ed., Basil Blackwell 1948) (1789).

225. *See id.*; *see also* JOHN S. MILL, *UTILITARIANISM AND OTHER WRITINGS* 189-212 (Meridian Publishing, 1961).

Utility is a theory of consequences.²²⁶ Utility is mathematics of pluses for good and minuses for bad.²²⁷ I agree that ethicists such as Beauchamp and Childress, certainly two of the most influential proponents of principlism, would prefer that the two principles of nonmaleficence and beneficence should be separately distinguished and used in the ethical analysis.²²⁸ However, utility in the context of organ transplantation is a category that, for all practical purposes, fully includes nonmaleficence (do no harm) and beneficence (actively help others).²²⁹ Further, utility already is a familiar concept to transplantation professionals.²³⁰

Organ transplantation is a public enterprise undertaken to benefit the public.²³¹ Indeed, the Task Force on Organ Transplantation took it as assumed that organs are “a national resource to be used for the public good.”²³² Therefore, utility is an appropriate norm to apply in an ethical analysis of actions by OPOs.

In measuring OPOs’ transplantation policies by the yardstick of ethical utility, I would apply two limitations. First, in applying the concept of utility to a public policy in the United States, the social status or social usefulness of individuals who are donating organs or receiving organ transplants should not be considered.²³³ Second, in applying the concept of utility to an ethical problem in transplantation, the benefits and harms considered should be limited to medical expenses and medical health.²³⁴

Utility seems easily satisfied by maximizing the number of organs available for transplant because the most people would benefit.²³⁵ Taking the decedent’s donation even if next of kin object is more likely to increase the supply of organs. The public good is increased by the increase in the number of years of quality life available to the population.²³⁶ In addition to years of quality life, consider cost. It costs less to have a healthy person than to maintain a sick person for years. Organ transplants result in a net decrease in society’s total medical costs.²³⁷ Kidney transplants versus di-

226. TOM L. BEAUSCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 47 (Oxford Univ. Press, 4th ed. 1994).

227. *Id.*

228. Shafer, et al., *supra* note 13, at 235-37.

229. UNOS, *supra* note 217, at 2227.

230. *Id.* at 2228.

231. *Id.* at 2227.

232. TASK FORCE ON ORGAN TRANSPLANTATION, U.S. DEPT. OF HEALTH & HUMAN SERVICES, *ORGAN TRANSPLANTATION: ISSUES & RECOMMENDATIONS* xxi (1986).

233. UNOS, *supra* note 217, at 2228.

234. *Id.*

235. *See supra* text accompanying note 224.

236. UNOS, *supra* note 217, at 2227.

237. *See, e.g.*, A REFERENCE GUIDE FOR CLERGY, *supra* note 3, at I-1.

alysis is the prime example of what more transplants can do for total medical costs to society.²³⁸

B. JUSTICE

The National Organ Transplant Act is the origin of the organization of OPOs.²³⁹ The Act mandated justice and equity in the organ procurement system.²⁴⁰ Therefore, not only for those of us who believe in justice as a criterion, but also for transplant system professionals, justice is an appropriate criterion to apply in an ethical analysis of OPO actions.²⁴¹

Justice is the proper relationship between persons in encounter, and for this there must be adequacy and there must be equality.²⁴² For some persons, justice is found in a divine or natural order.²⁴³ For others justice is redefined as fairness.²⁴⁴ Fairness in turn is defined as "right dealing between persons who are . . . competing with one another."²⁴⁵

United States society demands that utility and justice be considered jointly. In a democratic society, compromises between utility and justice are necessary in order to avoid the tyranny of the majority.²⁴⁶ Unlike utility, justice is not concerned exclusively with achieving the maximum good for the greatest number of people, but is concerned with security in society, conformity to rule, and distributive fairness according to performance, need, and choice.²⁴⁷ In my view, most persons would agree that justice in an organ recovery and distribution system should assure a distribution of adequacy and equality.

The OPO in providing justice should thus always accept a donation of a transplantable organ to assure adequacy for those on the list. Justice would also assure equality of supply for those on the transplant list at various times, in diverse parts of the country. Therefore, all OPOs should use a uni-

238. *Supra* Part V.

239. National Organ Transplant Act, Pub. L. No. 98-507, § 372(a), 98 Stat. 2344 (1984).

240. *Id.* § 101(b)(3)(E), 98 Stat. 2340.

241. *See id.*

242. HONORE, *supra* note 21, at 194-95.

243. *See* JOHN COGLEY ET AL., *NATURAL LAW AND MODERN SOCIETY*, 11-28 (World Publishing Co., 1962).

244. *E.g.*, John Rawls, *Justice and Fairness*, 54 *J. Phil.* 653, 657 (1957).

245. *Id.*

246. HONORE, *supra* note 21, at 237-38; ROBERT M. VEATCH, *A THEORY OF MEDICAL ETHICS* 302 (Basic Books 1981). I would agree with Veatch that in the simpler cases "[t]he duty of justice is a higher lexical priority than the duty to produce good." VEATCH, *supra* at 302. In the analysis here, there is no substantial difference between justice and utility in the actions they would direct for the OPO in regard to accepting an organ gift. Thus no need exists in this analysis to make a lexical priority.

247. VEATCH, *supra* note 246, at 197.

form policy of maximum acceptance of organ gifts, not a policy of organ gift acceptance dependent upon consent by next of kin.

Justice is a relationship of beings in encounter.²⁴⁸ It presupposes that beings will be able to encounter.²⁴⁹ It thus affirms that people have a right to participate in the events that effect their lives and desires.²⁵⁰ A transplant patient waiting on a list has no way to participate directly in the acceptance or rejection by an OPO of an organ gift. Justice thus requires that OPOs consider, and to that extent represent, the transplant patients in deciding whether to accept valid organ gifts. Representing the interests of transplant patients would be done by accepting the gift of a decedent donor. Representing the interests of transplant patients would not be done by rejecting an organ gift from a decedent or by the taking the chance that next of kin will donate the organ from the same source.

There is something to Lon Fuller's view that the legal order has an implicit or internal morality.²⁵¹ In a democracy, laws are enacted on society's ideas based on an implicit internal morality.²⁵² To phrase it differently: our laws on organ transplantation are based on the majority's idea of distributive justice.²⁵³ The UAGA has as its internal morality the goal of increasing organ transplantation.²⁵⁴ This goal is not a goal constructed in an ivory tower of academia, but is one actually set forth by a public morality in action. An OPO violates society's expression of how justice should be implemented in distribution of scarce goods when it violates the UAGA statutory scheme.

C. AUTONOMY

Autonomy, in the context of organ transplantation, refers to the principle of respecting the self-determination of autonomous individuals.²⁵⁵ Gauthier's description of autonomy is appropriate in the transplant setting.²⁵⁶ She stated:

We recognize that as a free and rational being, [a person] has the capacity to choose his or her own goals and projects on the basis

248. See Rawls *supra* note 244, at 657.

249. See *id.*

250. See *id.*

251. Lon L. Fuller, *Positivism and Fidelity to Law*, 71 HARV. L. REV. 630, 645 (1958).

252. COGLEY ET AL., *supra* note 243, at 59-62.

253. Shafer et al., *supra* note 13, at 242.

254. UNIF. ANATOMICAL GIFT ACT (1987) Prefatory Note, 8A U.L.A. 20-22 (1993).

255. UNOS, *supra* note 217, at 2229.

256. Candace C. Gauthier, *Philosophical Foundations of Respect for Autonomy*, 3 KENNEDY INST. OF ETHICS J. 21, 24 (1993).

of moral principles known by reason and, thus, to act on a personal conception of what is right. Only when we respect and do not interfere with others' goals, projects, and actions, chosen by their own conception of what is right, are we respecting their autonomy as rational agents.²⁵⁷

All modern philosophers since Kant have had to come to some terms with the notion of individual human freedom.²⁵⁸ The United States' culture, its religions, and its professional standards highly prize autonomy.²⁵⁹ It is so ingrained that autonomy must be addressed in any ethical analysis of actions in the United States.²⁶⁰ As David Thomasma correctly suggests: the principle of autonomy, which means so much to North Americans, may not be a universal norm appropriate to all countries.²⁶¹ But, in a free society we tend to think that a practice is right if it respects the choices one makes to live one's life.²⁶²

Autonomy in the context of accepting or rejecting an organ gift by a deceased donor would mandate accepting the donor's gift unless a competing equal or greater autonomy exists.²⁶³ A next of kin's demand that an OPO reject an organ gift is an attempt to block the autonomous choice of the decedent.²⁶⁴ The decision of the next of kin to block the donation is not ethically sufficient to overcome that of the deceased donor regarding his own body.²⁶⁵ In most medical situations, the medical community should feel comfortable giving priority to the preference of a decedent who made a rational decision and subsequently lost decision-making capacity over the preference of a family member to violate the decedent's decision.²⁶⁶ OPOs should feel ethically comfortable when they give priority to the decedent donor's decision. If a deceased person has donated his organs, and an OPO does *not* honor the directive, respect for autonomy is shattered.

257. *Id.*

258. VEATCH, *supra* note 246, at 193.

259. *Id.* at 194.

260. Shafer et al., *supra* note 13, at 239.

261. David C. Thomasma, *Bioethics and International Human Rights*, 25 J. OF LAW, MED. & ETHICS 295, 298 (1997).

262. Gauthier, *supra* note 256, at 24.

263. Shafer, et al., *supra* note 13, at 239.

264. Gauthier, *supra* note 256, at 22.

265. Shafer et al., *supra* note 13, at 238-39.

266. See BERNARD LO, RESOLVING ETHICAL DILEMMAS: A GUIDE FOR CLINICIANS 189-190, 344 (Williams & Wilkins 1995) (stating that retrieving organs from decedents who have signed donor cards "is reasonable and consistent with other policies").

VIII. CONCLUSION

If a decedent has made a valid anatomical gift, an OPO has the supreme right to take the organs.²⁶⁷ There is no legal reason to seek consent of the decedent's next of kin.²⁶⁸ Further, an OPO that requests consent of next of kin when there is a known donation by the decedent runs some risk of liability and may lose the protection of immunity statutes.²⁶⁹

There is a moral imperative to accept the valid organ gift by a decedent. An OPO should take a decedent donor's organ gift even if the next of kin objects. An OPO that seeks the consent of next of kin, when there is a known donation by the decedent, violates the ethical principles of justice, utility, and autonomy.²⁷⁰

267. UNIF. ANATOMICAL GIFT ACT (1987) § 8(a), 8A U.L.A. 55-56 (1993).

268. *See supra* Part III.

269. *See supra* Part VI.

270. *See supra* Part VII.