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# Property Interests in Cadaverous Organs: Changes to Ohio Anatomical Gift Law and the Erosion of Family Rights

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PROPERTY INTERESTS IN CADAVEROUS ORGANS:  
CHANGES TO OHIO ANATOMICAL GIFT LAW AND THE  
EROSION OF FAMILY RIGHTS

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I. INTRODUCTION

In Ohio, over 3000 patients are waiting to receive healthy organs for the purpose of organ transplantation.<sup>1</sup> However, only 574 patients actually received the needed organs and underwent transplant operations in 2001.<sup>2</sup> The national ratio of supply and demand for healthy organs mirrors the crisis situation in Ohio with over 80,000

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<sup>1</sup>Ted Wendling, *Donor’s Wishes binding in transplant decisions; Families can no longer overrule after death*. THE PLAIN DEALER, July 3, 2002 at A1.

<sup>2</sup>*Id.*

patients waiting for organs and only 12,580 transplants performed in 2001.<sup>3</sup> Of these transplanted organs, organs from living donors now exceed cadaverous organ donations by 418 transplants.<sup>4</sup> Because of this dramatic organ shortage, legislatures, Organ Procurement Organizations (OPO), hospital staff, and scholars have all sought to find ways to create and implement a more effective organ donor system in the United States. These efforts have focused on improving one or both of the two distinct areas in the transplantation process: procurement and distribution. Procurement is the process by which doctors and OPO representatives work to secure a healthy organ from either a brain-dead individual or a living donor for purposes of transplantation. All states currently implement procurement operations on an encouraged volunteerism basis meaning that a donor or donor's family must voluntarily consent to the donation of specified organs prior to their removal and transplantation.<sup>5</sup> The distribution scheme then determines how the limited available organs are equitably allocated among those in need considering such disparate factors as biological compatibility between donor and donee, age of donee, gravity of donee's medical condition, geographical location of donor and donee, and time donee has spent on a waiting list.<sup>6</sup> Although the debates surrounding the equitable distribution of organs are worthy of examination, this note focuses solely on the procurement side of the problem.<sup>7</sup> In particular, this note examines how Ohio anatomical gift laws have been interpreted to grant a property right to the next of kin in the decedent's cadaverous organs.

Ohio is one of three states<sup>8</sup> that recognizes the next of kin's right to make an organ donation as hinging on a property right. Commentators have vigorously debated whether granting property rights to either the donor/decedent or the next of kin hinders or facilitates the procurement process. These arguments often revolve

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<sup>3</sup>*Id.*

<sup>4</sup>*Id.* A cadaverous organ is one which is removed from a brain dead person whose body is kept alive by machines until the doctor has performed the organ extraction operation. This type of donation is also referred to as a "heart beating" donation. (Alexandra K. Glazier, "The Brain Dead Patient was Kept Alive" and Other Disturbing Misconceptions; A Call for Amendments to the Uniform Anatomical Gift Act, 9 SUM KAN. J.L. & PUB. POL'Y 640 (Summer 2000)). By contrast, an organ from a living donor is removed from a fully functioning and healthy donor who undergoes surgery to have the organ removed. This extraction does not typically affect the donor's post-recovery health.

<sup>5</sup>Presumed Consent Subcommittee United Network for Organ Sharing Ethics Committee, *An Evaluation of the Ethics of Presumed Consent and a Proposal Based on Required Response*, (last modified June 30, 1993) [www.unos.org/Resources/bioethics.asp?index=1](http://www.unos.org/Resources/bioethics.asp?index=1) (hereinafter *Ethics of Presumed Consent*).

<sup>6</sup>Roderick T. Chen, *Organ Allocation and the States: Can the States Restrict Broader Organ Sharing?* 49 DUKE L.J. 261, 266 (1999).

<sup>7</sup>For more on the distribution problem, see Chen, *supra* note 6; Gail L. Daubert, *Politics, Policies, and Problems with Organ Transplantation: Government Regulation Needed to Ration Organs Equitably*, 50 ADMIN. L. REV. 459 (1998); Laura E. McMullen, *Equitable Allocation of Human Organs: an Examination of the New Federal Regulation*, 20 JLEGMED 405 (1999).

<sup>8</sup>Ohio, Michigan, and California are the only three states who have recognized the next of kin's property right in the decedent's cadaverous organs. See *infra*.

around the moral, ethical, and practical consequences of granting a person property rights in cadaverous organs and the apprehension, in the case of some, or confidence, in the case of others, that an organ market would inevitably result.<sup>9</sup>

The issue of property rights in organs is especially topical in Ohio where Senate Bill 188<sup>10</sup> (SB 188) was passed into law on December 13, 2000<sup>11</sup> amending Ohio's anatomical gift laws. SB 188 made several statutory changes to Ohio law, but three are particularly noteworthy in the context of the property rights debate. First, SB 188 created a property right in the donee, or recipient of the donated organ, that did not heretofore exist.<sup>12</sup> Contrary to current case law, this portion of the new law suggests either that a donor has a property right to her organs prior to her demise transferable to the donee upon the execution of the statutorily approved instruments or upon death or that the newly created donee's property right to the donated organ springs out of nowhere. Second, SB 188 extinguished the next of kin's property rights in the decedent's organs as established in *Brotherton v. Cleveland*<sup>13</sup> where the donor/decedent had consented in writing to be an organ donor using one of the statutorily allowed forms. Third, SB 188 authorized the creation of a donor registration system through the Ohio Department of Motor Vehicles (DMV) effective July 2002, which now provides OPOs with an easily accessible way of tracking potential donors's wishes and enforcing their property rights in the donor's organs.

By recognizing the supremacy of a donor/testator's right to bequeath her organs and subsequently deterring family from contesting a decedent's designation, the new statute may alleviate, to a small degree, the overwhelming shortage of transplantable organs in Ohio. The new law, however, poses a serious threat to the public perception of organ donation since families who do not agree with the decedent's wishes will have no standing to contest the donation and can, under the new law, even be subject to a declaratory judgment filed by the donee to prevent family interference in the donation.<sup>14</sup> The negative impact of these changes on families could result in a public relations fiasco which would, in turn, dampen Ohioans willingness to register with the DMV organ donor registration system and make the organ donor designation under other statutorily accepted instruments. Hence, the possible gain in viable organs resulting from SB 188 could be offset by a corresponding decline in obliging donors.

Finally, although laudatory in purpose—to increase the number of viable cadaverous organs for transplantation—these changes pose considerable problems on the level of practical implementation. In particular, the medical community has

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<sup>9</sup>See Walter Block et al, *Human Organ Transplantation: Economic Legal Issues*, 3 QUINNIPIAC HEALTH L.J. 87, 98-108 (1999-2000) (examines arguments on both sides of debate and concludes a market system should be adopted.)

<sup>10</sup>OH S.B. 188, 123 Gen Assembly (1999-2000). This bill was enacted into law on December 13, 2000.

<sup>11</sup>Ted Wendling, *Organs May Now Be Taken Despite Kin*, THE PLAIN DEALER, Dec. 14, 2000, at 4B. [hereinafter *Organs May Now Be Taken*].

<sup>12</sup>S.B. 188, proposed § 2108.02(F).

<sup>13</sup>*Brotherton v. Cleveland*, 923 F.2d 477 9 (6th Cir. Ohio 1991) [hereinafter *Brotherton II*].

<sup>14</sup>S.B. 188, proposed § 2108.02(F), proposed § 2108.04(F) and § 2721.

traditionally deferred to the family's wishes when seeking an organ donation and has been reticent in facilitating a donation request in emotional situations.<sup>15</sup> When a family is obviously devastated or expresses aversion to donation, it is unlikely that the medical community will readily administer the new law which requires an expeditious request.<sup>16</sup> Under the new law, such a request is still dependant upon the hospital notifying the OPO representative or designated requester in a timely fashion.<sup>17</sup> Furthermore, even OPO representatives have expressed reservations about the usefulness of these changes in facilitating and improving the procurement process.

Part II of this note briefly examines the origins of anatomical gift law in the United States and in Ohio. Part III examines the codification of Ohio common law and the adoption of the 1969 Uniform Anatomical Gift Act as the foundation of Ohio's anatomical gift laws. Part IV analyzes post 1969 Ohio cases that directly or indirectly help interpret Ohio's anatomical gift laws, with a particular focus on the legal reasoning in *Brotherton II*. Part V delves into the new law's grant of property rights in cadaverous organs to the donee and criticizes the new law because of administrative and public relations problems such changes could create. Part VII proposes a legislative alternative recommending statutory recognition of the next of kin's property rights in cadaverous organs.

Overall, this note criticizes the changes to Ohio's anatomical gift law in so far as the new law grants property rights to the wrong party. In the face of *Brotherton II*, which held that the donor's family has property rights in the cadaverous organs, the new law appears to be a deliberate rejection of the family's property right. By gradually eliminating the family from the donor decision, the Ohio legislature may undermine the efficacy of a system which has long relied on families for cooperation and advocacy. Ohio and other states must recognize that there is no quick fix to the organ deficit problem short of replacing the voluntary donation system with a system based on a different paradigm.<sup>18</sup> Even a presumed consent system, the mildest of possible alternative donation models, does not bode well with a citizenry that values

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<sup>15</sup>Orly Hazony, *Increasing the Supply of Cadaver Organs for Transplantation: Recognizing that the Real Problem is Psychological not Legal*, 3 HEALTH MATRIX 219, 230-33 (1993). Hazony mentions several reasons why physicians choose not to cooperate with organ procurement laws. These include resentment of being told what to do by legislators, a fear of being sued by the family of the decedent who strongly opposes organ donation, and a concern for the emotional well-being of the decedent's family.

<sup>16</sup>See discussion *supra*.

<sup>17</sup>S.B. 188, § 2108.021.

<sup>18</sup>This note will not explore these alternative systems. Scholars have, however, identified and debated the merits of several paradigms in the area of organ procurement. These include non-compensatory systems such as the United States system of encouraged volunteerism. Presumed consent is another non-compensatory paradigm; it assumes consent is given unless the procurer is in good faith made aware of the donor or donor family's refusal. This paradigm has also been adopted in the United States, but for limited purposes. The other two non-compensatory paradigms include conscription and mandated choice. Various compensatory or market paradigms have also been suggested. These include: inter vivos sales, a futures market, and a death benefits system. See Shelby E. Robinson, *Organs for Sale? An Analysis of Proposed Systems for Compensating Organ Providers*, 70 U. COLO. L. REV. 1019, 1024-1039 (Summer 1999).

personal autonomy, freedoms, and the rights of family in decision making processes that involve the decedent's corpse.<sup>19</sup>

## II. THE ORIGINS OF ANATOMICAL GIFT LAW IN THE UNITED STATES AND IN OHIO

### *A. English Ecclesiastical and Common Law*

As applied to cadaveric body parts, two bodies of law generally inform anatomic gift law: laws governing the treatment of cadavers and laws governing testamentary bequests. These two strands of law, however, often intersect and overlap in ways which make it difficult for legal scholars to identify the two as separate points of origin.

Under early English ecclesiastical law, the Church controlled the disposition of dead bodies in accordance with the belief that the soul continued beyond death while the corporeal form would only be resurrected upon Christ's second coming.<sup>20</sup> According to Christian belief, then, the Church had a vested interest in the dead bodies of the faithful. While the English Burial Acts of 1850 removed legal control of cadavers from the church,<sup>21</sup> secular courts continued, perhaps under ecclesiastical influence, to hold that no one could claim property rights in a corpse.<sup>22</sup> In a prominent 1857 case, for example, a son was convicted for unlawfully opening his mother's grave despite his laudable intention of burying her in a consecrated graveyard.<sup>23</sup> At the time, even the son's religious scruples were not adequate to support a quasi-property right in his mother's body.

One exception to the general rule that no property rights existed in a corpse did, however, emerge in the English Anatomy Act of 1832 which was promulgated to provide medical schools with a steady supply of cadavers for educational purposes.<sup>24</sup> Under the 1832 Act, unclaimed corpses and paupers's corpses were donated to medical schools, thereby granting the schools a property interest in such cadavers. The Act served two main state purposes: (1) it relieved the state of the burden of determining the cadaver's religious preferences and of paying for a burial; and (2) it allowed the state to censure grave robbing by increasing the legal supply of corpses to the schools.<sup>25</sup> Only when no family appeared to claim the corpse and pay for its

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<sup>19</sup>*Ethics of Presumed Consent*, *supra* note 5, at 4. Although the subcommittee looked favorably upon a presumed consent system as an alternative to encouraged volunteerism, it decided not to pursue a presumed consent system at the present time because of its unpopularity in two surveys. *Ethics of Presumed Consent* at 5.

<sup>20</sup>Chad D. Naylor, *The Role of the Family in Cadaveric Organ Procurement*, 65 IND L.J. 167, 170 (1989).

<sup>21</sup>*Id.* at 171.

<sup>22</sup>B.C. Ricketts, Annotation, *Validity and Effect of Testamentary Direction as to Disposition of Testator's Body*, 7 ALR 3rd 747, 748-49 (1966).

<sup>23</sup>Brian G. Hannemann, *Body Parts and Property Rights: A New Commodity for the 1990s*, 22 SW. U. L. REV. 399, 404 (1993) citing *Regina v. Sharp*, 169 Eng. Rep. 959 (1857).

<sup>24</sup>Alexander Powhida, *Forced Organ Donation: The Presumed Consent to Organ Donation Laws of the Various States and The United States Constitution*, 9 ALB. L.J. SCI. & TECH. 349, 354-56 (1999).

<sup>25</sup>*Id.*

burial did the Act step in to create such an interest in the medical school.<sup>26</sup> As with abandoned property, the finder of the object— here the state as the medical school's agent—could then take legal possession of the unclaimed or pauper's corpse.<sup>27</sup>

### B. Early Ohio Common Law

In the United States, courts consulted, but felt no obligation to follow, the English ecclesiastical law and the English common law.<sup>28</sup> Property laws governing cadavers were, therefore, free to develop independently in each state. Although the United States Constitution prominently includes the word “property” several times, “property” is ultimately defined by state law and not by federal mandate.<sup>29</sup>

At the center of an analysis of both Ohio's common law and statutory understanding of corpses and cadaverous organs is the broad concept of property. The terms “property,” “property right,” “property interest”, and “quasi-property” are often used loosely in both the cases and scholarly commentary dealing with corpses and cadaverous organs. The term “property right” is rarely used, for example, as a means of designating a recognized estate interest such as an indefeasible fee simple. A basic understanding of the legal meaning of property is, therefore, necessary. A property interest has been broadly defined as consisting of a bundle of rights, an analogy the Supreme Court has employed a number of times.<sup>30</sup> This bundle consists of an undefined conglomeration of rights, powers, privileges, and immunities<sup>31</sup> some of which include:

ownership; the unrestricted and exclusive right to a thing; the right to dispose of a thing in every legal way, to possess it, to use it, and to exclude every one else from interfering with it. That dominion or indefinite right of use or disposition which one may lawfully exercise over particular things or subjects. The exclusive right of possessing, enjoying, and disposing of a thing. The highest right a man can have to anything.<sup>32</sup>

For a court to find an individual property interest, the party must have a sufficient number of the “twigs” in the property bundle, though not the complete bundle. There is, however, no bright line test for determining the threshold amount of “twigs” necessary to establish a property interest. Despite this vagueness, it is clear that “[a] property interest . . . has greater legal security, market value, and social

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<sup>26</sup>*Id.*

<sup>27</sup>“Property which is abandoned becomes subject to appropriation by the first taker or finder who reduces it to possession.” 1 AM. JUR. 2d *Abandoned Property* § 16 (1994).

<sup>28</sup>Naylor, *supra* note 20, at 171.

<sup>29</sup>Board of Regents v. Roth, 408 U.S. 564, 577 -78 (1972). The Supreme Court stated “[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from independent sources such as state law.”

<sup>30</sup>Kaiser Aetna v. U.S., 444 U.S. 164, 176 (1970).

<sup>31</sup>RESTATEMENT (THIRD) OF PROP.: SERVITUDES, forward (Tentative Draft No. 3, 1993).

<sup>32</sup>BLACK'S LAW DICTIONARY 1217 (6th ed. 1990).

meaning<sup>33</sup> than does an interest generated, for example, by a tort claim. As this note demonstrates, this greater legal security has prompted individuals, courts, scholars, legislatures, and advocates of a more productive organ donation system to condone property rights in cadaverous organs.<sup>34</sup>

In Ohio, courts began recognizing quasi-property rights to a corpse in two different areas: (1) the testator's rights to provide for the disposition of his body after death; and (2) the next of kin's rights to dictate the method of corporeal disposition. It is at this juncture where concepts from both the laws governing cadavers and the laws governing testamentary disposition of property emerge as distinct and conflicting influences in state jurisprudence.

Under Ohio common law, the courts limit an individual's right to control the disposition of his own corpse.<sup>35</sup> A testator's wishes as to his burial site expressed in a codicil to his will are not legally binding, nor will they weigh more heavily with the court than other equitable considerations.<sup>36</sup> Although willing to consider the decedent's written wishes, the *Herold* court found the testator's will codicil invalid since its sole provision was to grant the testator's father the right of disposition and control over his dead body.<sup>37</sup> Such a grant was not tantamount to a disposition of property and, therefore, could not be probated by the court as a legitimate will.<sup>38</sup>

In *Herold*, then, the obstacles to the testator's wishes were twofold. First, the fact that the testator's daughter lived in Cleveland, Ohio while the testator wished to be interred in Hamilton, Ohio weighed heavily as an equitable factor against the testator and his consanguine relatives. The court's sympathies were ultimately with the infant daughter who would be better able to visit her father's grave were he buried in Cleveland.<sup>39</sup> Second, as mentioned, the alleged testamentary document did not dispose of property and thus, was not a valid will. The court does leave open the possibility, however, that if the will codicil had also included a legitimate disposition of property, the writing may have been admitted to probate thereby giving more weight to the testator's wishes regarding his burial.

Ohio common law has also recognized the right of the next of kin to control the decedent's remains. We have already seen an example of this in *Herold* where the daughter's equitable interest in visiting her father's grave prevailed over her father's wishes to be buried elsewhere.<sup>40</sup> This common law right is based in a concern for the family since "it is only the living who can give the protection . . . from which the right springs [and] [i]t is only the living whose feelings can be outraged by an

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<sup>33</sup>RESTATEMENT (THIRD) OF PROP.: SERVITUDES, forward (Tentative Draft No. 3, 1993).

<sup>34</sup>See discussion *infra*.

<sup>35</sup>*Herold v. Herold*, 1905 WL 857 \*4 (Ohio Ct. Com. Pl. 1905).

<sup>36</sup>*Id.* at \*5.

<sup>37</sup>*Id.*

<sup>38</sup>*Id.* at \*3. The court refers to *Hadsell v. Hadsell* to support the proposition that a corpse is not property. 3 Circ. Dec. 725 (7 R. 196). See also *Hayhurst v. Hayhurst*, 1926 WL 2487 (Ohio Ct. Com. Pl. 1926).

<sup>39</sup>*Herold*, 1905 WL 857 at \*5.

<sup>40</sup>*Id.* at \*3.



unlawful disturbance of the dead.”<sup>41</sup> When the surviving relatives disagree<sup>42</sup> as to where to bury the decedent’s remains, however, the court will step in to decide the final burial place by exercising its best judgment given the various equitable interests at stake.<sup>43</sup> A child’s interest in being close to her father’s grave for purposes of visitation may, as in *Herold*, prevail over a father’s, sister’s, and even the decedent’s own expressed wishes to have his body buried in his family’s hometown.<sup>44</sup>

Although willing to recognize a right to the cadaver in the next of kin, the *Smiley* court stresses, through analogy, that this right is not absolute: like the custody right a guardian has over a child, the next of kin’s right is subject to the finality of a court judgment when disagreement exists among the surviving relatives.<sup>45</sup> The court further circumscribes this right by emphasizing that the person vested with the right to the corpse is not the owner of the corpse, but “holds it only as a sacred trust for the benefit of all who may from family or friendship have an interest in it.”<sup>46</sup> While this analogy would seem to reject any property rights in the corpse, the next of kin who has “the right to the control, custody, and burial of the body”<sup>47</sup> acts as both trustee and as a beneficiary because the custodial next of kin holds the corpse for the benefit of all interested family and friends, clearly including the custodial next of kin. Hence, under the trust analogy, the next of kin does not have outright ownership or title in the corpse, but has certain common law rights that can be exercised with respect to its possession and control until interment, including the manner of its disposition. Under the trust analogy, the custodial next of kin therefore holds legal title and a portion of the equitable title.<sup>48</sup>

The *Smiley* court seems to recognize the imperfect analogy between the next of kin’s rights to the decedent’s corpse and the trustee’s interest in trust property by concluding the analysis with yet another property law analogy. The court compares the next of kin’s right to the corpse to an easement in real property as opposed to outright ownership of a freehold by title.<sup>49</sup> The court struggles with both the trust analogy and the easement analogy in that the underlying subject being acted upon in

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<sup>41</sup>*Smiley v. Bartlett*, 1892 WL 964, \*3 (Ohio Cir. Ct. 1892).

<sup>42</sup>Such disagreements are typically what initiate court proceedings. In *Herold*, for example, the widow disagreed with the decedent’s father and sisters as to the location of the interment. (*Herold*, 1905 WL 857 at \*1).

<sup>43</sup>*Smiley*, 1892 WL 964 at \*2. A widow or widower’s rights, however, usually supercede all other next of kin. *Evans v. Evans*, 1912 WL \*893 (Ohio Com. Pl. 1912).

<sup>44</sup>*Herold*, 1905 WL 857 at \*1, \*4-5.

<sup>45</sup>*Smiley*, 1892 WL 964 at \*2, \*4.

<sup>46</sup>*Id.* at \*4. But see *Pettigrew v. Pettigrew*, 56 A. 878 (Pa. 1904.) (arguing the trust analogy is fitting, but adding that corpse is in fact property held in trust).

<sup>47</sup>*Smiley*, 1892 WL 964 at \*2.

<sup>48</sup>Notably, the next of kin does not have sole equitable title so that the interests do not merge to create full ownership rights. That does not mean, however, that the next of kin’s rights in the corpse cannot be understood in property law terminology. Although not fully recognized as a property interest, the next of kin does hold several of the sticks in the property rights bundle. See discussion *supra*.

<sup>49</sup>*Smiley*, 1892 WL 964 at \*4.

both a trust and an easement is actual property. In other words, although the legal vehicle of a trust or an easement limits a trustee's or an easement holder's rights to mere custody, control, disposition, and/or use of the property as opposed to outright ownership of full title, these limitations do not diminish the fact that a recognized form of property lies at the center of both legal arrangements.<sup>50</sup>

The issue of whether one's body, once a cadaver, becomes personal property is hotly debated in the area of organ donation laws primarily because of the underlying conflict between laws pertaining to cadavers and testamentary laws of property disposition. In Ohio, a testator can devise and bequeath by will only such real and personal property as she has or may acquire.<sup>51</sup> Furthermore, because of the fundamental nature of the estate, a mere life interest in the income from the principal in trust can neither be bequeathed by will nor disposed of by power of appointment.<sup>52</sup> To extend the trust model analogy, one could argue that an individual only has a life estate in his body with the body's daily functions akin to the income from a trust. Under this analogy, once the functions of the decedent's body cease, the decedent would thus have no claim to the remaining principal which is the body. As already suggested, the trust analogy is not without problems. Indeed, the trust analogy poses the additional quandary of determining the grantor's identity. In *Smiley*, the court leaves unanswered the question of who "owned" the property outright prior to the creation of the "trust," although we suspect that the grantor is God because of the court's emphasis that the trust is "sacred,"<sup>53</sup> again a remnant of English ecclesiastical law. The other possible interpretation is that the decedent is the grantor and thus has the ability to dispose of his corpse at his discretion. This possibility seems less likely, however, given that Ohio courts do not necessarily respect the decedent's last wishes as to the disposal of his corpse, but instead weigh the equitable interests of the living in making a determination where the surviving relatives disagree. Finally, Ohio further limits a testator's rights to bequeath property in that the legislature may "prescribe to whom property may be given by will and what species of interest will be wholly exempt from testamentary disposition"<sup>54</sup> provided, of course, that no individual's constitutional rights are violated.

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<sup>50</sup>Other Ohio courts have also struggled to define the legal relationship the next of kin has to the decedent's corpse. One court recognizes that the next of kin has "some ownership" in the corpse, but that it is an ownership right which consists merely of a "duty to perform" the disposition of the corpse. (Evans, 1912 WL 893 at \*4).

<sup>51</sup>*Aubry v. Aubry*, 45 N.E.2d 892 (1941).

<sup>52</sup>*Central National Bank v. McMunn*, 12 Ohio Misc. 1, 228 N.E.2d 349, 359 (1967).

<sup>53</sup>*Smiley*, 1892 WL 964 at \*4. Commentators today continue to rely on the notion that the body is sacred as a bedrock argument against granting property rights in both living and cadaverous organs: "Proper respect for the body is irremovably a part of respect for the sanctity of the life of all flesh." PAUL RAMSEY, *THE PATIENT AS PERSON* 207-08 (1970).

<sup>54</sup>*Bielat v. Bielat*, 721 N.E.2d 28, 35 (2000) (citing *Ostrander v. Preece*, 196 N.E. 670, 673 (1935)).

## III. STATUTORY CODIFICATION OF OHIO COMMON LAW

A. *The Uniform Anatomical Gift Act*

Although Ohio common law dealing with the surviving spouse, next of kin, and testator's rights to the corpse was well established by the early twentieth century, it was not until the 1950's and 1960's that Ohio and other states implemented legislation addressing cadaverous organ donation. The need for such legislation was prompted largely by the development of medical technology that allowed for human organ transplantation. The first successful kidney transplant from a living family member took place in the early 1950's, while the first successful kidney transplant using a cadaverous kidney occurred in 1962.<sup>55</sup> In 1973, Congress acknowledged kidney transplantation as an effective treatment for end-stage renal disease by allowing Medicare to pay for such transplants; this legislative acknowledgment was a clear sign of the medical community's acceptance of organ transplantation.<sup>56</sup> Another medical advancement which enabled a dramatic rise in successful transplants was the advent of cyclosporine, an immuno-suppressive drug which fights off potential organ rejection by the recipient's body. This drug, discovered in 1972 and approved by the Food and Drug Administration in 1983, dramatically increased the number of recipients who were now eligible as candidates for organ transplantation.<sup>57</sup>

In the midst of these developments, the National Conference of Commissioners on Uniform State Laws met and approved the Uniform Anatomical Gift Act (hereinafter UAGA) in August 1968 in response to the "confusion, diversity, and inadequacy" of common law and state statutes in the area of organ donation.<sup>58</sup> In the preface to the 1968 UAGA, the authors identified five competing interests considered in drafting the model laws, none of which were to be given priority over the others. These interests included:

- (1) the wishes of the deceased during his lifetime concerning the disposition of his body;
- (2) the desires of the surviving spouse or 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 upon such cause; and
- (5) the need of society for bodies, tissues and organs for medical education, research, therapy and transplantation.<sup>59</sup>

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<sup>55</sup>Sheldon F. Kurtz and Michael J. Saks, *The Transplant Paradox: Overwhelming Public Support for Organ Donation vs. Under-supply of Organs: The Iowa Organ Procurement Study*, 21 J. CORP. L. 767, 771 (1996).

<sup>56</sup>*Id.*

<sup>57</sup>RENÉE C. FOX AND JUDITH P. SWAZEY, *SPARE PARTS: ORGAN REPLACEMENT IN AMERICAN SOCIETY* 3-4 (Oxford Univ. Press 1992).

<sup>58</sup>UNIF. ANATOMICAL GIFT ACT, preface (amended 1987), 8A U.L.A. 64 (1993). (Hereinafter 1968 U.A.G.A.).

<sup>59</sup>*Id.*

The 1968 UAGA was eventually adopted in some form by all fifty states and by the District of Columbia.<sup>60</sup> Ohio was the twenty-second state to adopt the 1968 UAGA on November 11, 1969.<sup>61</sup>

Although the 1968 UAGA set out to provide a standard approach to facilitate organ donation for medical, research, and educational purposes, a 1985 Hastings Center assessment of the 1968 UAGA claimed that the public policies promulgated therein were inadequate in the face of the current and projected demand for healthy transplantable organs.<sup>62</sup> The Hastings Center<sup>63</sup> assessment, along with other influential factors, brought about a revision of the UAGA in 1987 which reflects more effective and more aggressive procurement strategies. Some of the other influential factors in shaping this reform included: ongoing improvements in medical technology;<sup>64</sup> the 1980 Uniform Determination of Death Act which redefined the moment of death according to brain death criteria;<sup>65</sup> the passing of the 1984 National Organ Transplant Act (NOTA) which prohibited the sale of human organs, established federal grants to OPOs, created a national organ-sharing system and a Task Force to study the many legal, ethical, economic, social and medical issues surrounding transplantation;<sup>66</sup> the passing of the Omnibus Budget Reconciliation Act of 1986 which withheld medicaid and medicare payments from hospitals unless they followed the new protocols for organ procurement;<sup>67</sup> and a 1985 Gallup Poll which

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<sup>60</sup>*Id.* at 20.

<sup>61</sup>21 OHIO REV CODE ANN., §§ 2108.01-2108.99 (West 1999) [hereinafter O.R.C.].

<sup>62</sup>1968 U.A.G.A., preface, 8A U.L.A. 20 (1993). The Hastings Center study felt that the encourage volunteerism system posed various inadequacies, with key problems hindering increased organ donation including “1) Failure of persons to sign written directives; 2) Failure of police and emergency personnel to locate written directives at accident sites; 3) Uncertainty on the part of the public about circumstances and timing of organ recovery; 4) Failure on the part of the medical personnel to recover organs on the basis of written directives; 5) Failure to systematically approach family members concerning donation; 6) Inefficiency on the part of some procurement agencies in obtaining referrals of donors; 7) High wastage rate of some organ procurement agencies in failing to place donated organs; 8) Failure to communicate the pronouncement of death to next of kin; and 9) Failure to obtain adequate informed consent from family members.” THE HASTINGS CENTER, ETHICAL, LEGAL AND POLITICAL ISSUES PERTAINING TO SOLID ORGAN PROCUREMENT (October, 1985) (cited in 1968 U.A.G.A. at 20-21).

<sup>63</sup>The Hastings Center, also known as the Institute of Society, Ethics and the Life Sciences, is a pioneering bio-ethics organization which researches and evaluates new developments and ethical debates in current and future areas of bio-medical science. The Center presents its findings in periodic reports.

<sup>64</sup>Because of the introduction of cyclosporine, surgical procedures and organ procurement techniques evolved as well. Cyclosporine create a boom in the number and kind of organs transplanted which, in turn, gave doctors greater opportunities to finesse transplantation operations. See Fox and Swazey, *supra* note 57, at 1-30.

<sup>65</sup>Kurtz and Saks, *supra* note 55, at 771-73.

<sup>66</sup>PHILLIP G. WILLIAMS, LIFE FROM DEATH: THE ORGAN AND TISSUE DONATION AND TRANSPLANTATION SOURCE BOOK WITH FORMS 17 (The P. Gaines Co. 1989).

<sup>67</sup>1986 U.A.G.A., at 21.

indicated that while 75 percent of Americans approved of organ donation, only 27 percent would be willing to donate their organs, with only 17% actually having signed a donor card.<sup>68</sup> While federal laws clearly played an important role in shaping the broader discourse in the area of organ donation, each state's anatomical gift laws dictate the nature of the procurement transaction, the nature of donor, donee, and next of kin's interests in the donated organs and tissues, the rights of the deceased donor, and the rights of the next of kin in the cadaverous organs and tissues.

Ohio did not adopt the 1987 UAGA, but instead amended its anatomical gift law eleven times over the past thirty-one years to reflect some if not all of the changes in the 1987 UAGA.<sup>69</sup> The Ohio Anatomical Gift Act, entitled "Human Bodies or Parts Thereof"<sup>70</sup> (the Code), does not cover the testator's and next of kin's rights to the corpse for purposes of burial; that is still the province of Ohio common law. Although organ transplants are governed by the Code, the burial rights cases continue to be used as interpretive tools in understanding Ohio anatomical gift law.

Three overarching questions will direct our analysis of Ohio's current anatomical gift law: (1) What are the donor/testator's rights in his cadaverous organs and do these rights amount to a property interest? (2) What are the next of kin's rights in his relative's cadaverous organs and do these rights amount to a property interest? (3) How does the Code language, separate from that addressing the donor and next of kin's rights, treat body parts and tissues: as property or as something else? As discussed earlier, the preface to the 1969 UAGA identifies the testator/donor and the next of kin as two of five conflicting interests that anatomical gift law must seek to address and resolve. Before delving into the case law that has emerged interpreting Ohio anatomical gift laws, a capitulation of the relevant portions of the statutes is helpful.

#### *B. The Donor's Rights prior to the Adoption of SBI88 into law*

An individual who is eighteen years of age or older and of sound mind is granted the right to make an anatomical gift to take effect upon his death.<sup>71</sup> Such anatomical gift can only be made for limited purposes: "[for] transplantation, therapy, medical or dental education, research, or advancement of medical or dental science."<sup>72</sup> The Code defines an "anatomical gift" as "a donation of all or part of a human body to

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<sup>68</sup>The Gallup Organization, Inc. 1985 GALLUP POLL cited in the preface to the 1986 U.A.G.A., at 20. For the most recent Gallup Poll on attitudes towards organ donations see The Gallup Organization, Inc., *The American Public's Attitudes Toward Organ Donation and Transplantation* (last modified 1993) at [http://www.med.umich.edu/trans/develop/testing/reference/articles/gallup\\_survey](http://www.med.umich.edu/trans/develop/testing/reference/articles/gallup_survey). A total of 85 percent of those surveyed supported organ donation and 37% were "very likely" to donate their own organs, with an additional 32 percent "somewhat likely" to donate their own organs.

<sup>69</sup>O.R.C. § 2108 et seq. The various amendments can be gleaned from the historical notes following each subsection.

<sup>70</sup>O.R.C. § 2108.01 et seq.

<sup>71</sup>O.R.C. § 2108.02, amended by OH S.B. 188, § 2108.02 (2000). Minors may also make anatomical gifts provided they have parental consent. O.R.C. § 2108.02(A)(2).

<sup>72</sup>O.R.C. § 2108.03(A).

take effect upon or after death.”<sup>73</sup> Although the terms “gift” and “anatomical gift” are employed throughout the statute, the Code does not assume in the statutory definition that the subject of the gift is property. However, by granting an individual donor the right to gift his organs prior to death,<sup>74</sup> the Code gives the donor the right to exclude or include another party from receiving or not receiving his cadaverous organs. The right to exclude or include others has traditionally figured as one of the “twigs” in the property rights bundle.<sup>75</sup> In fact, the Supreme Court has called the “right to exclude others . . . one of the most essential sticks in the bundle of rights that are commonly characterized as property.”<sup>76</sup> In counterbalance, however, the Code does not grant the donor, “the right to dispose of a thing in every legal way”<sup>77</sup> since permissible donees are limited to those who will use the organs for the statutorily approved purposes. Moreover, the decedent cannot exclude the coroner from conducting an autopsy when the circumstances so warrant under the Code.<sup>78</sup> Still, the decedent can exclude or prevent the coroner from extracting his organs.<sup>79</sup> So although a coroner can examine a decedent’s organs during an autopsy, the decedent’s wishes not to become a donor will prevail even in the face of Ohio’s presumed consent laws.<sup>80</sup>

Under the Code, the donor is authorized to make an anatomical gift by way of several written instruments. One such instrument is the donor/testator’s will.<sup>81</sup> This provision may suggest that the will was chosen as an appropriate instrument for the inclusion of an anatomical gift because of the sheer convenience provided by already having a document with the appropriate formalities in place. By designating the will as a vehicle for a legitimate anatomical gift, however, the Code, in essence, allows a testator to make bequests of personalty, devises of realty, and gifts of organs all

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<sup>73</sup>O.R.C. § 2108.01(A).

<sup>74</sup>O.R.C. § 2108.02, *amended by* OH S.B. 188, § 2108.02 (2000).

<sup>75</sup>*See supra*.

<sup>76</sup>*Kaiser Aetna*, 444 U.S. at 176.

<sup>77</sup>BLACK’S LAW DICTIONARY 1217, *supra* note 32.

<sup>78</sup>O.R.C. § 2108.02(E), *amended by* OH S.B. 188, § 2108.02(E)(2000) and O.R.C. § 313.13.

<sup>79</sup>O.R.C. § 2108.02(A), *amended by* OH S.B. 188, § 2108.02(A) (2000) and O.R.C. § 2108.02(C), *amended by* OH S.B. 188, § 2108.02(C) (2000).

<sup>80</sup>The Code contains special presumed consent statutes for the removal of pituitary glands and corneas. (O.R.C. § 2108.53 and § 2108.60 respectively.) A presumed consent law means that a donor or donor family’s consent is presumed and a legally valid donation may ensue without obtaining this consent. Ohio’s presumed consent laws, however, are of the milder variety. One commentator has called them “shifting presumption laws” since the presumption of consent can be overcome either by the donor’s express wishes made before death or by the next of kin’s express wishes when approached regarding the possibility of an anatomical gift. See Powhida, *supra* note 24, at 356. Eighteen additional states have passed similar shifting presumption statutes for pituitaries and corneas. Mehlman, *Brotherton v. Cleveland: Transplant Organs, Property Rights, and the Constitution*, 2 HEALTH L.J. OF OHIO 6, 141 (1991).

<sup>81</sup>O.R.C. § 2108.04(A).

within the same document. The inclusion of anatomical gifts within a document that is traditionally used to dispose of property after death<sup>82</sup> suggests that anatomical gifts—body parts and tissues—may consist of property as well.

This interpretation may be questioned, however, by Ohio's different treatment of an anatomical gift from its treatment of other property bequests when a will that contains both types of bequests is declared invalid. The Ohio anatomical gift statute stipulates that even if "the will is not probated or is declared invalid for testamentary purposes, the anatomical gift, to the extent it has been acted on in good faith, is nevertheless valid and effective."<sup>83</sup> By contrast, the traditional disposition of personal property in an invalid will does not survive a will's invalidity; instead the testator's property is dividend according to the state's intestacy laws and not according to the testator's wishes.<sup>84</sup> This difference, however, does not eliminate the possibility that organs are property that can be bequeathed by will. It merely indicates that the formalities of execution required to validate a will are secondary to the testator's intent in making the gift because the gift survives an invalid will if acted upon in good faith. I would argue that the survival of the gift in the face of an invalid will makes the disposition of organs more likely to be a disposition of property because the bequest is elevated to status higher than other personal property bequeathed by will.

The Code also allows the donor to make a gift of his body parts through a second instrument: the donor card which "shall be signed by the donor in the presence of two witnesses who shall sign the document in his presence."<sup>85</sup> Here the Code treats a donor card not like a contract which, barring the Statute of Frauds, requires only the elements of offer, acceptance and consideration, but like a testamentary disposition.<sup>86</sup> Hence, for the donor card to carry legal weight, it must follow the basic elements of a typical Statute of Wills: testamentary capacity, a writing, signed by the testator, and by competent witnesses.<sup>87</sup> In other words, whereas an anatomical gift can survive an invalid will thereby dispensing with the testamentary formalities, a donor card adheres to a stricter standard by requiring that the formalities be properly executed for the card to be valid. While the 1987 UAGA eliminates the donor card witness signature requirement "to simplify the making of anatomical gifts,"<sup>88</sup> Ohio has not adopted this amendment and still requires the traditional formalities.

The third instrument by which a donor can make an anatomical gift in Ohio is by making an organ donor designation on his driver's license.<sup>89</sup> Again for the gift to be

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<sup>82</sup>"The object of the law concerning wills is to enable the owners of property to reasonably control its disposition after death." Also, "[a] will has been defined as an instrument executed by a competent person, in the manner proscribed by statute, whereby he makes a disposition of his property to take effect after his death." 79 AM. JUR 2d § 1 (1975).

<sup>83</sup>O.R.C. § 2108.04(A).

<sup>84</sup>O.R.C. § 2105.06.

<sup>85</sup>O.R.C. § 2108.04(B)(1), amended by OH S.B. 188, § 2108.04(B)(1) (2000).

<sup>86</sup>O.R.C. § 2107.03 & n.4.

<sup>87</sup>O.R.C. § 2107.03.

<sup>88</sup>UNIF. ANATOMICAL GIFT ACT preface, 8A ULA 35.

<sup>89</sup>O.R.C. § 2108.04(C), amended by OH S.B. 188, § 2108.04(C) (2000).

legitimate, two witnesses must also sign the written statement allowing an organ donor designation to be placed on the driver's license. This requirement indicates that donated organs are being treated similarly to the disposition of personal property by will.

Unlike the common law which requires capacity, intent, delivery, and acceptance for a gift to be valid,<sup>90</sup> the instrument conveying the anatomical gift need not be delivered during the donor's lifetime to validate the anatomical gift.<sup>91</sup> The donor need only have executed the instrument to ensure its validity. Thus, the donee who is aware that such an instrument has been executed through the newly created BMV Donor Registration database, does not have to produce the donation instrument to validate the gift. Of the three available instruments for making an anatomical gift, the driver's license combined with the BMV Donor Registration database is clearly the method of choice from the OPO's perspective for purposes of facilitating the donation.

The provisions examined so far focus mostly on the mechanics of who can make an anatomical gift and how this gift can be made. With regards to the donor's rights, the Code provides that an individual has the right to make an anatomical gift so long as statutory requirements are met and has a corresponding right to revoke the gift before death.<sup>92</sup> Second, the donor also has the right to specify the surgeon or physician he wishes to perform the operation.<sup>93</sup> Third, the donor can choose which parts he wishes to donate and which parts he does not wish to donate<sup>94</sup> and if the designation of the anatomical gift is "ambiguous as to whether a general or specific anatomical gift is intended . . . the statement shall be construed as evidencing the specific gift only."<sup>95</sup> Although no Code section is specifically devoted to the individual who has strong feelings against becoming an organ donor, the rights of such an individual are also included in the Code language. If a decedent is adverse to making an anatomical gift and his wishes surface in the aftermath of his death, the Code provides that an anatomical gift may not be effectuated by the next of kin, a hospital or the coroner since such a gift would be contrary to the decedent's wishes.<sup>96</sup>

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<sup>90</sup>BLACK'S LAW DICTIONARY 688 (6th ed. 1990).

<sup>91</sup>The Code emphasizes several times that delivery of the gifting instrument is not required to validate the gift. O.R.C. § 2108.04(B)(1), *amended by* OH S.B., § 2108.04(B)(1) (2000), O.R.C. § 2108.04(C), *amended by* OH S.B. 188, § 2108.04(C) & O.R.C. § 2108.05.

<sup>92</sup>O.R.C. § 2108.06 provides for the "[p]rocedure of amendment or revocation."

<sup>93</sup>O.R.C. § 2108.06(D).

<sup>94</sup>O.R.C. § 2108.10.

<sup>95</sup>O.R.C. § 2108.04(C), *amended by* OH S.B. 188, § 2108.04(C) (2000).

<sup>96</sup>An anatomical gift can only be made by the decedent's next of kin "in the absence of actual notice of contrary indications by the decedent" O.R.C. § 2108.02(B), *amended by* OH S.B. 188, § 2108.02(B) (2000). A donee may not accept a gift if "he has actual notice of contrary indications by the decedent." O.R.C. § 2108.02(C), *amended by* OH S.B. 188, § 2108.02(C) (2000). Even corneas, which can be harvested from cadavers under Ohio's presumed consent laws for these particular organs, are subject to the decedent not objecting to their removal. To remove a cadaver's corneas, the coroner must have "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." O.R.C. § 2108.60(B)(4)(a).



As the above analysis illustrates, although the Code does not stipulate outright that such a property right exists, persuasive arguments can be made based on statutory language and construction which bolster a property rights interpretation.

*C. The Next of Kin's Rights prior to the Adoption of SB188 into Law*

Under Ohio law, the next of kin had a sometimes conflicting set of rights regarding anatomical gifts. When the decedent has made no indication in writing as to his wishes with regards to anatomical gifts of his cadaverous organs, the Code enumerates a straightforward hierarchy of relatives who have the right to make the anatomical gift decision on behalf of the decedent.<sup>97</sup> The next of kin also have a custody right to the cadaver after the removal of the anatomical gift at which time "the custody of the remainder of the body vests" in the next of kin.<sup>98</sup> Presumably, if the next of kin do not chose to make an anatomical gift, the custody right in the entire body vests with the next of kin upon the decedent's death.

Although, as discussed, an individual has a right to make an anatomical gift, prior to December 13, 2000 the Code included somewhat confusing provisions as to whether a donor's express written conveyance of an anatomical gift, under the prescribed instruments, prevailed over the wishes of other interested parties. This confusion could be a remnant of the Ohio common law consideration of equitable interests in determining whether the decedent's wishes should be followed as to the disposition of his corpse.<sup>99</sup> On the one hand, the next of kin cannot make an anatomical gift in Ohio where the next of kin has "actual notice of contrary intentions by the decedent."<sup>100</sup> On the other hand, the next of kin had the power to deny an anatomical gift even in the face of the decedent's express written wishes to be an organ donor. This later power did not result from a clear statutory grant. Section 2108.02(B) states that "in the absence of actual notice of contrary indications by the decedent . . . [the next of kin] may make an anatomical gift of all or any part of the body of a decedent."<sup>101</sup> This grant gives the next of kin the power to "make" a donation, which in practical terms, was translated as the ability to make or not to make a donation. Furthermore, the requirement of "actual notice" combined with the requester's protocol guidelines to practice "discretion and sensitivity with respect to

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<sup>97</sup>"Any of the following persons, in the order of priority stated . . . may make an anatomical gift of all or any part of the body of a decedent for any purpose specified in section 2108.03 of the Revised Code:

- (1) The spouse;
- (2) An adult son or daughter;
- (3) Either parent;
- (4) An adult brother or sister;
- (5) A grandparent;
- (6) A guardian of the person of the decedent at the time of death;
- (7) Any other person authorized or under obligation to dispose of the body."

O.R.C.2108.02(B)(1)-(7), *amended by* S.B. OH S.B. 188, § 2108.(b)(1)-(7) (2000).

<sup>98</sup>O.R.C. § 2108.07(A).

<sup>99</sup>*Herold*, 1905 WL 857 at \*5.

<sup>100</sup>O.R.C. § 2108.02(B), *amended by* OH S.B. 188, § 2108.02(B) (2000).

<sup>101</sup>O.R.C. § 2108.02(B), *amended by* OH S.B. 188, § 2108.02(B) (2000).

the circumstances, opinions, and beliefs of the family of each potential donor” also gave the next of kin the upper hand in making the donation decision.<sup>102</sup>

Another reason the next of kin had the upper hand was because, as mentioned, Ohio had no delivery requirement with regards to the instrument gifting the cadaverous organs. Without delivery, the donee hospital or OPO representative had no practical way of learning about the decedent’s gift and of then marshaling its resources to ensure the effectuation of that gift.<sup>103</sup>

Prior to September 9, 1999, the next of kin’s ability to override the decedent’s donative intent was further ensured by the fact that doctors faced with the question of whether a suitable candidate for organ donation had desired to be an organ donor were required, by statute, to first approach the family. The pre-1999 Code procurement protocol “require[d] that families of potential donors be informed of the option to make an anatomical gift.”<sup>104</sup> This “requirement” was softened, however, by the provision stipulating that doctors aware of either the decedent’s or the next of kin’s contrary feelings regarding anatomical gifts were directed by statute not to approach the families to discuss the gift option at all.<sup>105</sup> Hence, if a member of the decedent’s family articulated feelings against anatomical donation, despite the decedent’s express written wishes to be a donor, the treating physician or OPO representative would never even broach the subject with the family.

In September 1999, the legislature repealed the 1991 version of section 2108.021 and replaced it in its entirety. Following the model set forth in the 1987 UAGA,<sup>106</sup> the new provision adopts a more aggressive, pure required request approach. More pro-active than traditional encouraged volunteerism, routine request laws are designed to force a personal choice upon the candidate’s family.<sup>107</sup> Although the donation is still based in volunteerism, the 1999 amendment placed greater emphasis on the “encouragement” of such volunteerism. Oftentimes, as a result of the required request, a candidate’s family will inquire into their relative’s wishes regarding organ donation, a step they probably would not have otherwise taken.<sup>108</sup>

The post-1999 section 2108.021 required hospitals to provide timely notice of a potential donor to a qualified OPO and in collaboration with the OPO, the hospital must “ensure [that] the family of each potential donor is notified of the option to donate . . . or to decline to donate.”<sup>109</sup> Although the post-1999 provision “encourage[s] discretion and sensitivity with respect to the circumstances, opinions,

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<sup>102</sup>O.R.C. § 2108.021(A)(3), *amended by* OH S.B. 188, § 2108.021 (2000).

<sup>103</sup>Although the 1987 OAGA includes a search provision where a law enforcement officer, fireman, paramedic, emergency rescuer, or hospital staff person can search the potential donor’s clothes for a driver’s license to check for the organ donor designation, Ohio never adopted this provision (1987 U.A.G.A. § 5(c), at 47).

<sup>104</sup>O.R.C. § 2108.021(A), *amended by* OH S.B. 188, § 2108.021(A) (2000).

<sup>105</sup>O.R.C. § 2108.021(A), *amended by* OH S.B., § 2108.021(A) (2000).

<sup>106</sup>U.A.G.A., § 5, 8A U.L.A. 47 (1987).

<sup>107</sup>Powhida, *supra* note 24, at 359-360.

<sup>108</sup>*Id.*

<sup>109</sup>O.R.C. § 2108.021(A)(2), *amended by* OH S.B. 188, § 2108.021(A) (2000).

and beliefs of the family of each potential donor,"<sup>110</sup> the doctor or OPO representative is no longer prevented from making the request in the face of the decedent's or the family's contrary feelings regarding anatomical gifts. In other words, the requester was required to ask all potential donors to consider donation, a provision which seemed to limit the treating physician's discretion as to when not to ask. Still, even with the 1999 reform, the next of kin's wishes not to donate prevailed over the decedent's wishes to be a donor. This deferral to the next of kin could therefore render moot the provisions enumerating the individual's rights to make and revoke a donation as well as the various legal instruments available to the donor.

Even with the more stringent required request protocol, the post-1999 statutes allowed the next of kin to have ultimate say over organ donation. Because the Code language ranked the family's rights to the cadaverous organs above all interests with the exception of the coroner's interest in performing an autopsy,<sup>111</sup> the next of kin were more likely to have some kind of "property right"<sup>112</sup> to the decedent's cadaveric organs than would the donor while alive. The next of kin had similar but not identical rights to those of the donor: the right to exclude or include by choosing or not choosing to make an anatomical gift, the right to dispose of the organs for certain circumscribed purposes, and the right or ability to revoke the donor's gift.

#### *D. Ohio Code Provisions relating to Property Rights*

The single most important provision curtailing the possibility that donors and/or next of kin may have property rights in cadaverous body parts is the statutory prohibition on the sale of human body parts.<sup>113</sup> This provision was passed into law on March 27, 1991 as one of Ohio's amendments in conformity with the 1987 UAGA. The provision stipulates that "[n]o person, for valuable consideration, shall knowingly acquire, receive, or otherwise transfer a human organ, tissue, or eye for transplantation."<sup>114</sup> Along similar lines, the Code provides that "the procuring, furnishing, donating, processing, distributing, or using . . . organs . . . for the purpose of transplanting . . . the body part in another human body, is considered for all purposes as the rendition of a service by every person participating in the act and not a sale of any such . . . body part."<sup>115</sup> Together, these two provisions emphasize the concept that organ donation for purposes of transplantation is to be understood legally as a service freely given, not as a bargained-for transaction of property.

As suggested, the 1987 UAGA adopted this provision spurred on by NOTA's criminalization of the sale or purchase of body parts in 1984. NOTA's legislative history explained the reasoning behind this provision: "[i]ndividuals . . . should not profit by the sale of human organs for transplantation,"<sup>116</sup> because "human body parts

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<sup>110</sup>O.R.C. § 2108.21(A)(3), amended by OH S.B. 188, § 2108.021(A) (2000).

<sup>111</sup>O.R.C. § 2108.02(E), amended by OH S.B. 188, § 2108.02(E)-(F) and O.R.C. § 313.13.

<sup>112</sup>See discussion *supra*, for how the term "property right" is being used in this note.

<sup>113</sup>O.R.C. § 2108.12.

<sup>114</sup>O.R.C. § 2108.12(A).

<sup>115</sup>O.R.C. § 2108.11. This provision also became effective as of March 27, 1991.

<sup>116</sup>S. Rep. No. 382, 98th Cong., 2d Sess. 2 (1984), reprinted in U.S.C.C.A.N. 3975, 3982.

should not be viewed as commodities.”<sup>117</sup> One commentator has remarked on the paradoxical nature of NOTA’s commercial prohibition when read independent of its corresponding legislative history: “the very existence of a law forbidding commercial alienation of organs paradoxically portrays the human body as an ‘article of commerce’ that lies within the purview of congressional power and would otherwise be subject to sale on the market.”<sup>118</sup> Again, we return to the problem faced earlier by the *Smiley* court of how to discuss rights pertaining to anatomical gifts without adopting terminology which defines or analogizes the transaction in terms of property law.

Along similar lines, NOTA’s legislative history does not directly state that organs cannot or should not be viewed as property, merely that organs should not be viewed as commodities. In fact, the legislature’s concern with gain from the sale of human organs seems to be based not in a fear of property rights *per se*, but in a fear of the development of criminal enterprises which, in the worst case scenario, sell illegally-obtained human organs to the highest bidder. In short, the distinction between “property” and “commodity” should not be overlooked as the two concepts are not synonymous.<sup>119</sup>

The aforementioned Code provisions are not watertight as divestitures of property rights in cadaveric organs for another reason as well. The Code only strictly defines organ donation as “the rendition of services” for the purposes of transplantation. The other permissible purposes listed in section 2108.03—“therapy, medical or dental education, or advancement of medical or dental science”<sup>120</sup>—are treated differently. The Code neither prohibits selling and purchasing organs for these purposes, nor defines the transfer of organs for these purposes as “the rendition of services.” This loophole suggests that cadaverous organs may be treated as property, for example, when the transaction of cadaverous organs takes place between a person and an educational institution for the purposes of medical or dental research.

### III. CASES INTERPRETING OHIO’S ANATOMICAL GIFT LAWS

#### A. *Brotherton v. Cleveland*

Despite the various anomalies and ambiguities in the Code, Ohio’s anatomical gift laws have instigated minimal litigation.<sup>121</sup> In fact, only one Ohio case,

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<sup>117</sup>*Id.* at 17, reprinted in 1984 U.S.C.C.A.N. at 39982.

<sup>118</sup>Radhika Rao, *Property, Privacy, and The Human Body*, 80 B.U.L. REV.359, 374 (2000).

<sup>119</sup>See discussion *supra* p. 27-28.

<sup>120</sup>O.R.C. § 2108.03.

<sup>121</sup>This dearth of litigation can be explained in a couple of ways. First, the absence of significant litigation could reflect that current laws are, by and large, well drafted and well administered from the perspective of the donor and next of kin. Second, when a decedent expresses a wish to be a donor but his family overrides that designation either due to ignorance or disapproval, the donee hospital or donee OPO currently has no legal remedy by which to pursue the gift and it is unlikely that the decedent’s executor, often a family member, will pursue legal action to enforce the gift.

*Brotherton v. Cleveland*, delves into questions of statutory interpretation pertaining to Ohio's Anatomical Gift Act and directly challenges the constitutionality of one of its statutes.<sup>122</sup> *Brotherton* is a complex case that has spanned thirteen years in the courts.<sup>123</sup> Most pertinent to our analysis of the case, the Sixth Circuit Court of Appeals held that the next of kin have a constitutionally protected property right in the organs of the deceased.<sup>124</sup> The Sixth Circuit was the first in the nation to recognize such a right<sup>125</sup> and is, today, one of only two circuits to recognize a property right.<sup>126</sup>

The case arose from the removal by the county coroner of the decedent's corneas despite the widow's refusal to consent to removal because of her husband's aversion to making an anatomical gift.<sup>127</sup> As the next of kin and the decedent's widow, Deborah Brotherton was approached in the hospital regarding an anatomical gift.<sup>128</sup> Her decision to object to a gift pursuant to her husband's wishes was subsequently recorded in the hospital's "Report of Death."<sup>129</sup> Because of the circumstances surrounding Mr. Brotherton's death, an autopsy was conducted as standard procedure.<sup>130</sup> Upon later reading the coroner's autopsy report, Deborah Brotherton discovered that her deceased husband's corneas had been removed against her and her husband's express wishes.<sup>131</sup> Although title 21, section 2108.60 of the Code allows the county coroner to remove the corneas of autopsy subjects without first obtaining consent,<sup>132</sup> the coroner may only do so provided that he has, in good faith, no knowledge of the next of kin's contrary wishes.<sup>133</sup> Fully aware of this provision, the coroner's custom was to deliberately avoid discussing consent with the next of kin and deliberately refrain from inspecting the medical records or hospital documents of the decedent prior to removing the corneas.<sup>134</sup> Deborah Brotherton

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<sup>122</sup>*Brotherton II*, 923 F.2d at 477 *et seq.*

<sup>123</sup>The initial district court decision was issued on August 11, 1989. The decision on the most recent appeal was issued in 2001. *Brotherton v. Cleveland*, 141 F. Supp 2d 907 (S.D. Ohio 2001).

<sup>124</sup>*Id.* at 481.

<sup>125</sup>Mehlman, *supra* note 80, at 141. But see *Florida v. Powell*, 497 So.2d 1188,1191 (Fla. 1986) (holding that a Florida presumed consent statute for the removal of corneas was not a taking of next of kin's property because the next of kin had no property in the decedent's body.)

<sup>126</sup>The Ninth Circuit has also recently recognized such a right. *Newman et al v. Sathyavaglswaran*, 287 F.3d 786 (9th Cir. Cal. 2002).

<sup>127</sup>*Brotherton II*, 923 F.2d at 478.

<sup>128</sup>*Id.*

<sup>129</sup>*Id.*

<sup>130</sup>*Id.* at 478.

<sup>131</sup>*Id.* at 478.

<sup>132</sup>See *supra* note 80 for more on Ohio's presumed consent laws.

<sup>133</sup>*Brotherton II*, 923 F.2d at 478.

<sup>134</sup>*Id.*

promptly filed suit alleging, among other claims, a violation of 42 U.S.C. §1983 in that her husband's corneas were removed without due process of law.<sup>135</sup>

The District Court reluctantly dismissed the section 1983 due process claim despite its sympathies with the widow because plaintiff was unable to meet her burden of proving the first of two required elements: (1) that plaintiff was deprived of a Constitutional right; and (2) that the deprivation occurred under color of state law.<sup>136</sup> The District Court reasoned that plaintiff failed to prove she was deprived of a constitutional right, here a property interest under the Fourteenth Amendment, since "nothing in Ohio's statutory scheme warrants a finding that the relative's rights in a corpse are more extensive than mere possession or consent."<sup>137</sup> In short, Brotherton's due process claim did not "rise to the level of a legitimate claim of entitlement."<sup>138</sup> The District Court looked to two Ohio cases in support of its legal reasoning: *Carney v. Knollwood Cemetary Assn.*<sup>139</sup> and *Everman v. Davis.*<sup>140</sup> It is important to note from the outset that neither case is directly on point since *Brotherton* is the first Ohio case to deal directly with the anatomical gift statutes.

In *Carney*, the family of the decedent had a legitimate claim for the mishandling of a dead body as an instance of intentional infliction of emotional distress and when, unbeknownst to the family, the deceased's corpse and casket were unearthed and dumped elsewhere to make way for another family member's corpse.<sup>141</sup> Of particular interest, the court acknowledged that although the basis for recovery in a suit for the mishandling of a corpse was the next of kin's quasi-property right in the corpse, such a right was a "mere peg upon which to hang damages for the mental distress inflicted upon the survivor."<sup>142</sup> The court, therefore, reasoned that a cause of action for the mishandling of the corpse was not a separate claim, but merely a subspecies of negligent or intentional infliction of emotional distress.<sup>143</sup> The next of kin's right to a relative's corpse was found to be a personal right of the family to bury the body and not a property right in the dead body.<sup>144</sup>

In *Everman*, the widower of the deceased alleged the county coroner violated the Fourth Amendment's "unreasonable search and seizure" provision when the coroner conducted an autopsy on the widower's dead wife despite his express instruction not to perform an autopsy.<sup>145</sup> Mr. Everman claimed that Code section 313.12, which

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<sup>135</sup>*Id.* at 478, 479.

<sup>136</sup>*Brotherton v. Cleveland*, 733 F. Supp. 56, 57-58 (1989) [hereinafter *Brotherton I*] citing *Parratt v. Taylor*, 451 U.S. 527, 535 (1981).

<sup>137</sup>*Brotherton I*, 733 F. Supp. at 59.

<sup>138</sup>*Id.* at 58 citing *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978).

<sup>139</sup>514 N.E.2d 430 (Ohio Ct. App. 1986).

<sup>140</sup>561 N.E.2d 547 (Ohio Ct. App. 1989).

<sup>141</sup>*Carney*, 514 N.E.2d at 431.

<sup>142</sup>*Id.* at 435.

<sup>143</sup>*Id.*

<sup>144</sup>*Id.*

<sup>145</sup>561 N.E.2d at 550.

allows the coroner to conduct the autopsy absent consent from the next of kin given certain circumstances was, therefore, unconstitutional.<sup>146</sup> The Ohio Court of Appeals, however, refused to acknowledge the next of kin's possessory right to the decedent's body as constituting "an effect" under the language of the Fourth Amendment.<sup>147</sup> The Court found that any argument proposing the body is an "effect" strains both the imagination and the constitutional language given that the right of immediate possession of a dead body does not constitute real or personal property.<sup>148</sup>

The plaintiff's arguments, as presented in the District Court's opinion, are worth examining since the Sixth Circuit Court of Appeals reversed the lower court's position on this issue. The plaintiff attempted to counter *Carney* and *Everman* by pointing to the statutory language of section 2108.12(B) which allows the next of kin to make an anatomical gift in the absence of the decedent's express wishes to the contrary. To give an item away, the plaintiff argued, one must first possess a property right in the item.<sup>149</sup> The District Court responded with two rebuttals.

First, the court cites *Restatement (Second) of Torts* §868 *Comment a*, which states that the right of control to a dead body is not akin to a property interest because "the body ordinarily cannot be sold or transferred, has no utility and can be used only for the one purpose of interment or cremation."<sup>150</sup> The difficulty with this argument lies in the fact that dead bodies do have a usefulness beyond cremation and interment as is attested by the very existence of anatomical gift laws. Today, indeed even in 1979 when the *Restatement* was published, organ transplantation was an established and viable medical procedure. Also, as discussed earlier, the Ohio anatomical gift statutes only prohibit the transfer or sale of organs for purposes of transplantation, but not for the other designated purposes.

Second, the District Court equates the plaintiff's possessory right to the corpse to the right created by medical consent laws where the next of kin can consent to medical treatment for minors. Although this analogy is not without merit, as we have seen before with the trust and easement analogies, such analogies tend to offer an imperfect fit. Administering a medical remedy is hardly the same as permanently removing an organ from a cadaver. Consent to a medical remedy does not constitute a gift by the patient or the patient's agent as nothing is taken or removed from the living body in administering a medical remedy. Administration of a medical remedy makes the body whole, whereas organ donation divides and separates the body into usable parts which are removed and used to make the donee "whole." In essence, then, the analogy fails because it collapses the difference between addition to subtraction.

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<sup>146</sup>*Id.*

<sup>147</sup>*Id.* The Fourth Amendment provides "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

<sup>148</sup>*Id.*

<sup>149</sup>*Brotherton I*, 733 F. Supp. at 59.

<sup>150</sup>*Id.* The Court borrows this argument from *Carney*, 514 N.E. at 435.

In reversing the lower court, the Sixth Circuit relied on the broader bundle of rights approach to property to hold that Deborah Brotherton's protected property interest in her husband's corneas created a legitimate §1983 claim.<sup>151</sup> On appeal, the court focused on the requirement that the due process clause only protects a "legitimate claim of entitlement"<sup>152</sup> which it defined as "any significant property interest."<sup>153</sup> The court saw *Carney* and *Everman* as each recognizing one twig in the bundle. *Carney* acknowledged the next of kin's right to pursue a tort claim for outrageous disturbance of the decedent's remains, while *Everman* recognized the next of kin's right of possession for purposes of preparing the corpse for burial.<sup>154</sup> In agreement with plaintiff, the Sixth Circuit also looks to the statutory language of section 2108.02(B) as the third twig comprising a bundle sufficient to form a "legitimate claim of entitlement."<sup>155</sup> Although the court pretends to skirt the nature underlying this interest—whether it is a property, quasi-property, or non-property interest—the opinion claims thereafter that the coroner's failure to provide the necessary pre-deprivation process prior to removing Brotherton's corneas was in violation of the Supreme Court's constitutional position that a property interest may not be destroyed without a hearing.<sup>156</sup> Moreover, following the *Brotherton II* opinion, other courts and commentators have recognized *Brotherton II's* holding to be that the next of kin had a constitutionally protected property interest in the decedent's corpse.<sup>157</sup> The *Brotherton II* court's willingness to recognize a property interest in the corpse was strongly influenced by ongoing scientific advancements which have created a market benefitting scientists, physicians, and others.<sup>158</sup>

The Sixth Circuit seems to recognize that anatomical gift law presents separate and distinct issues from other Ohio cases that confront the sensitive issue of what rights the next of kin have in a corpse when it states "[t]he human body is a valuable resource. As biotechnology continues to develop, so will the capacity to cultivate the resources in a dead body."<sup>159</sup> This observation is in direct contradistinction to the District Court's view that a corpse "has no utility and can be used only for the one purpose of interment or cremation."<sup>160</sup> The court's citation to *Moore v. Regents of the University of California*<sup>161</sup> (hereinafter *Moore*) in support of viewing the dead

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<sup>151</sup>*Brotherton II*, 923 F.2d at 477.

<sup>152</sup>*Id.* at 480 (citing *Moore*, 408 U.S. at 577).

<sup>153</sup>*Id.* (citing *Boddie v. Connecticut*, 410 U.S. 371, 379 (1971)).

<sup>154</sup>*Id.* at 480.

<sup>155</sup>*Id.* at 481.

<sup>156</sup>*Brotherton II*, 923 F.2d at 482.

<sup>157</sup>See *Whaley v. County of Tuscola*, 58 F.3d 1111, 1114 (6th Cir. Mich. 1995). See also *Mansaw v. Midwest Organ Bank*, No. 9700271 CV-W-6, 1998 U.S. Dist. LEXIS 10307 (W.D. Mo. July 8, 1998) and *Newman v. Sathyavaglswaran*, 287 F.3d 786 (9th Cir. 2002).

<sup>158</sup>*Brotherton II*, 923 F.2d at 481.

<sup>159</sup>*Brotherton II*, 923 F.2d at 481 (citing *Moore v. Regents of the University of California*, 793 P.2d 479).

<sup>160</sup>*Brotherton I*, 733 F. Supp. at 59.

<sup>161</sup>*Moore v. Regents of the University of California*, 793 P.2d 479 (1990).



body as a resource presents an interesting backdrop for further investigation of property rights in bodies and bodily parts.

The *Moore* court held that a physician's failure to disclose research or economic interests in a patient's discarded cells prior to the removal of such cells constitutes a breach of informed consent, but that a patient does not have a property interest in his discarded cells and does not, therefore, have a tort claim for conversion when the physician appropriates the discarded cells for research.<sup>162</sup> The *Moore* court refused to recognize the patient's right to his cells as a property right for two reasons. First, it reasoned that Moore's claims could be remedied by recognizing the physician's breach of informed consent.<sup>163</sup> Second, it reasoned that granting the patient a property right in his excised cells would hinder the public policy of promoting the advancement of scientific research which benefits society as a whole.<sup>164</sup> One of the primary differences between *Brotherton II* and *Moore* is that *Moore* deals with a living person's right to his biological materials whereas *Brotherton II* examines the next of kin's rights to the biological materials of a deceased relative. Although this difference is significant, the *Moore* court's majority and dissenting opinions are relevant in their general treatment of property rights.

In the context of the *Moore* court's reasoning vis-a-vis anatomical gift law, the Broussard dissent is particularly informative. The majority opinion argues that the tort and property concepts embodied in the law of conversion are not the appropriate framework within which to understand and analyze the *Moore* facts.<sup>165</sup> Instead, the court argues that the laws which treat "human biological materials as objects sui generis [and] regulat[e] their disposition to achieve policy goals," such as California's version of the UAGA, should provide guidance.<sup>166</sup> The majority opinion, however, fails to then examine how the various statutes it cites, including the UAGA, actually treat biological materials and a patient's or donor's rights to these materials, a point the Broussard dissent emphasizes.<sup>167</sup> According to the Broussard dissent, the donor or patient has the right to designate the purpose of the discarded or donated material thereby endorsing a principal or "donor control" which is violated under the law of conversion when another party exercises "unauthorized use of [the donor's] property or improper interference with this right to control [the donor's] property."<sup>168</sup> In short, the Broussard dissent argues that were the majority opinion to follow through on its own proposal to consult statutes such as the

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<sup>162</sup>*Id.* at 482, 493. Plaintiff John Moore, a hairy-cell leukemia patient, underwent treatment for the disease which involved the removal of his spleen and other bodily products. Without first obtaining his consent by informing Moore of the potential scientific and economic benefits his discarded cells could produce, his physician used these discarded cells to create a lucrative cell line in conjunction with several other biotechnology partners. Upon discovery of this research, Moore sued the physician and his partners.

<sup>163</sup>*Id.* at 493-94.

<sup>164</sup>*Id.* at 496-97.

<sup>165</sup>*Id.* at 489.

<sup>166</sup>*Moore*, 793 P.2d 479 at 489.

<sup>167</sup>*Id.* at 501.

<sup>168</sup>*Id.* at 502.

California UAGA for guidelines, it would be forced to recognize a property right in the living donor/patient to his own biological materials.

One broad question looming in the background of both *Moore* and *Brotherton II* is whether property rights or privacy rights should govern biological materials. From a Constitutional standpoint, one of the principal differences between property and privacy rights lies in the fact that a property right, once established under state law, can be transferred by the property right holder to another upon his death whereas a privacy right is based in a person's personal autonomy and bodily integrity while living<sup>169</sup> and does not continue beyond her death.<sup>170</sup> In *Tillman v. Detroit Receiving Hospital*, a Sixth Circuit case with similar facts to *Brotherton I* and *II*, the court held that a mother's right to privacy was not invaded when her dead daughter's corneas were harvested without the mother's consent.<sup>171</sup> The problem, however, with understanding a living person's right to her organs as consisting solely of a privacy interest is that the testator cannot convey her privacy interest in the organ to another since a privacy interest does not survive death.<sup>172</sup> Characterizing a donor's right to her organs as a privacy interest, therefore, directly conflicts the UAGA and with Ohio's statute which grants the donor the right to make an anatomical gift which survives death. This conflict suggests that the donor and donor family must have some kind of property interest in the gifted organ.

#### *B. Criticism of Brotherton v. Cleveland*

One commentator critical of *Brotherton II* claims that the Sixth Circuit's legal reasoning is flawed because any property rights created in the decedent's organs would have to be of recent vintage since the technology of transplantation is only thirty years old.<sup>173</sup> In creating a *new is bad and old is good* dichotomy, the commentator points up his own faulty reasoning. The mere fact that a legal issue is new and that courts find new, creative ways to resolve those novel issues does not, in and of itself, invalidate a court's legal reasoning. Along similar lines, commentators have argued that *stare decisis* is the single most important reason why property rights should not be recognized in a cadaverous organs used for purposes of anatomical gifts.<sup>174</sup> What these commentators fail to appreciate is that the voluntary or involuntary donation of an organ from a corpse is not the same post mortem

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<sup>169</sup>See generally *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding that a woman has a fundamental liberty interest in her personal autonomy.)

<sup>170</sup>The Supreme Court has never decided whether an individual's privacy right extends beyond death. Powhida argues that such recognition would be a stretch for the court: "It is possible the court would never reach the liberty question, finding simply that a decedent is not a 'person' for purposes of the Fourteenth Amendment." Powhida, *supra* note 24, at 368 and *supra* note 98. See also Rao, *supra* note 118, at 400. Rao adds that "family members possess privacy interests only in their ongoing relationships with the living."

<sup>171</sup>360 N.W.2d 275 (Mich. Ct. App 1984).

<sup>172</sup>Rao, *supra* note 118, at 359.

<sup>173</sup>Mehlman, *supra* note 80 at 143.

<sup>174</sup>See Mehlman, *supra* note 80 at 142 and Michael H. Scarmon, *Brotherton v. Cleveland: Property Rights in the Human Body—Are the Goods Oft Interred with their Bones?*, 37 S.D.L. REV. 429, 446 (1992).

transaction as the disturbance of a corpse from its resting place (*Carney*) or the performance of an autopsy on a corpse that is bound for final burial or cremation (*Everman*). These precedents are distinguishable. This is not to say that the next of kin in such varied situations do not experience similar emotional distress, anxiety, and grief thus giving rise to potential tort claims.<sup>175</sup> Still, merely because a case confronts the issue of the next of kin's rights in a cadaverous organs which are part of the corpse does not mean the court's reasoning should be identical given an entirely different body of law—anatomical gift law—and different set of facts—the gifting of a decedent's organs.

While the old Ohio common law is representative of an era when, indeed, the corpse had no utility beyond burial and cremation, in cases of more recent vintage that examine parties's rights in the organs of the deceased, the corpse does have utility and should therefore be understood as a resource and not as a sentimental shell or valueless mass of flesh. Along these lines, the rebuttal argument that the value to the next of kin of a cadaverous body from which donated organs have been taken is no different than the value of a cadaverous body from which no organs have been taken<sup>176</sup> does not take into account the value of the donated organs to those receiving them. The moment the gift is made, the cadaverous organ is endowed with tremendous value. Certainly, organ recipients would not argue that the gift of a healthy organ is without value. By contrast, from the donee's perspective, the value attached to a donated organ is immeasurable since it may represent the gift of life itself.<sup>177</sup> In more practical terms, the value of the limited supply of available organs is in fact augmented by the ever growing demand. Moreover, hospitals, OPOs, and companies can and do make a profit on a donor's organs. For example, CryoLife, a for profit Georgia company that receives tissues and organs collected by Ohio's four OPOs and not immediately used in transplant, pays these OPOs a recovery fee of \$500 to \$1,200 per heart.<sup>178</sup> From these hearts, CryoLife is typically able to recover 1.4 valves which it then sells for \$7000 per valve.<sup>179</sup> Company spokesman Roy Vogeltanz claims that "[i]t's not an issue that we're profiting on it [since] we're helping families that have had a loved one die help someone else with that gift."<sup>180</sup> Companies like CryoLife do save lives and probably could not do so without a steady stream of profits to pay their employees and improve their "product," but their operations ultimately rely on donations which are not valueless. It is therefore disingenuous and self-serving for OPOs and companies like CryoLife to argue that a

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<sup>175</sup>For more on tort liability, see Thomas R. Trenkner, Annotation, *Tort Liability of Physician or Hospital in Connection with Organ or Tissue Transplant Procedures*, 76 A.L.R.3d 890 (1977).

<sup>176</sup>Mehlman, *supra* note 80, at 143.

<sup>177</sup>Mark F. Anderson, *The Future of Organ Transplantation: From Where Will New Donors Come, to Whom Will their Organs Go?* 5 HEALTH MATRIX 249, 299 (arguing that the immeasurable value of an organ donation is cheapened by the prospect of making organs a saleable commodity).

<sup>178</sup>Joe Milicia, *Organ Bill Leaves Decision to Donor, Not Family*, DAYTON DAILY NEWS, Nov. 13, 2000, at 4B.

<sup>179</sup>*Id.*

<sup>180</sup>*Id.*

donated organ is valueless and cannot be understood as property merely because they are the only entities who can legally ascribe a value to the organ and reap the benefits from transactions which treat organs like property. The Broussard dissent in *Moore* makes a similar point: “[f]ar from elevating these biological materials above the marketplace, the majority’s holding simply bars plaintiff, the source of the cells, from obtaining the benefit of the cells’ value.”<sup>181</sup>

Another argument raised in opposition to recognizing the next of kin’s property rights to the decedent’s organs is that acknowledging such a right would only “add confusion to the allocation and supply of organs for transplant.”<sup>182</sup> This argument is a thinly veiled way of saying that the fewer rights the next of kin have to put a halt to undesired organ donation, the more efficient the system will be. We have already seen the Ohio legislature move tentatively in this direction with the 1999 revision of section 2108.021 where a family’s expressed aversion to donation no longer prevented the required request.<sup>183</sup> As we shall see, Ohio legislators have not only eliminated the next of kin’s property right to the decedent’s corpse and cadaverous organs, but have erased almost all family participation in the gifting process.

Finally, criticism of the Sixth Circuit’s decision has also been based on public policy considerations which reflect an ethical and moral position that ultimately favors the rights of OPOs and donees over the rights of donors and next of kin. In essence, the fewer rights the donor and next of kin have in organs, the greater the ability those harvesting organs have in recovering the organs without legal wrangling. These ethical and moral arguments, admittedly, deserve serious consideration. Proponents of these arguments are horrified at the prospect of designating organs as property because of the morass of problems that accompany marketplace transactions in property: coercion, fraud, misrepresentation, and undue advantage as well as the problem of the inequitable distribution of property in a capitalist society.<sup>184</sup> As to the later, commentators have expressed particular concern about the poor, fearing, on the one hand, that financial need will induce the poor to hastily consent as living donors and, on the other, that the poor in need of transplants will not be able to afford them, with the available organs going to the wealthy.<sup>185</sup> Still others fear that the poor and homeless will be viewed as a disposable source of healthy organs by the wealthy.<sup>186</sup>

Such concerns, legitimate though they may be, are based on the notion that granting property rights in cadaverous organs necessarily entails organs becoming marketable commodities with a fluctuating, but generally high market price. This slippery slope argument assumes that the recognition of property rights in either the donor or the next of kin will invariably strip the body of its sanctity and transform it

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<sup>181</sup>*Moore*, 793 P.2d 479 at 506.

<sup>182</sup>Scarmon, *supra* note 174, at 447.

<sup>183</sup>*See supra*.

<sup>184</sup>Scarmon, *supra* note 174, at 444.

<sup>185</sup>UNOS Ethics Committee Payment Subcommittee, *Financial Incentives for Organ Donation: A Report of the UNOS Ethics Committee Payment Subcommittee* [http://www.unos.org/frame\\_Default.asp?Category=Resources](http://www.unos.org/frame_Default.asp?Category=Resources) (last modified June 30, 1993).

<sup>186</sup>Robinson, *supra* note 18, at 1043.

into a commodity.<sup>187</sup> This assumption, however, can be dispelled. One scholar has argued that the property interests in organs should be recognized as a natural extension of the rights inherent to human autonomy, but that these property interests should be “market inalienable” to prevent commodification of the individual.<sup>188</sup> As the bundle of rights theory of property suggests, labeling something property does not automatically grant the person holding the property interest any specific twig in the bundle.<sup>189</sup> Thus, the conflation of property rights with market alienability and commodification is an assumption that can be overcome simply by denying market alienability as a twig in the organ bundle of property rights.<sup>190</sup>

Another approach to property rights in organs which steers clear of market alienability as the defining twig in the property bundle is not to view property “as absolute power over things to the total exclusion of anyone else, [but] as a mechanism for defining relationships.”<sup>191</sup> Granting the next of kin property rights to the corpse can be an effective way of enabling survivors to work through grief and confront their own mortality.<sup>192</sup> The benefits of gifting a decedent’s organs can offer “a profound source of consolation to the families of patients suffering unexpected and premature death.”<sup>193</sup> As a source of consolation, some donor families even feel that part of the decedent lives on in the organ recipient.<sup>194</sup> This phenomenon can be traced to what sociologist Marcel Mauss has identified as a gift’s emotional, symbolic as well as material value and meaning.<sup>195</sup> Because the spirit of the thing given pertains to the person, a bond is also created between the donor family and recipient<sup>196</sup> thereby forming a relationship that helps the donor family work through its grief. Today, the donor/recipient bond is no longer openly acknowledged or encouraged because of the medical community’s discomfort with donor family’s tendency to personify organs.<sup>197</sup> The anonymity of the donor/recipient relationship, however, does not prevent the donor family from feeling they have a special connection to an anonymous recipient. To truly respect and encourage the family’s

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<sup>187</sup>Scarmon, *supra* note 174, at 446.

<sup>188</sup>Michelle B. Bray, *Personalizing Property: Toward a Property Right in Human Bodies*, 69 TEX. L. REV. 209, 234-44 (1990).

<sup>189</sup>Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 294 (1998).

<sup>190</sup>For more on the view that organs should be market alienable see Brian G. Hannemann, *Body Parts and Property Rights: A New Commodity for the 1990s*, 22 SW. U.L. REV. 399 (1993) and David E. Jefferies, *The Body as Commodity: The Use of Markets to Cure the Organ Deficit*, 5 IND. J. GLOBAL LEGAL STUD. 621 (1998).

<sup>191</sup>Tanya K. Hernandez, *The Property of Death*, 60 U. PITT. L. REV. 971, 1024 (1999).

<sup>192</sup>Hernandez, *supra* note 191, at 1023.

<sup>193</sup>OFFICE OF ORGAN PROCUREMENT, U.S. DEPT. OF HEALTH & HUMAN SERVICES, REPORT OF THE TASK FORCE ON ORGAN TRANSPLANTATION: ISSUES AND RECOMMENDATIONS 27 (1986).

<sup>194</sup>Anderson, *supra* note 177, 266-67.

<sup>195</sup>FOX & SWAZEY, *supra* note 57, at 32. Fox and Swazey provide an excellent analysis of how Mauss’s paradigm applies to organ donation. MARCEL MAUSS, *THE GIFT* (1954).

<sup>196</sup>*Id.*

<sup>197</sup>*Id.* at 37.

involvement in the donation, the law must also recognize that donor families take an intense interest in the organs they are donating and that families invest these organs with tremendous value.

#### V. OHIO SENATE BILL 188: OHIO'S NEW ANATOMICAL GIFT LAW

##### A. *A New Property Right is Created*

Before scrutinizing the language in SB 188, a brief chronicle of the origins and progress of this legislation is useful. Senator Grace Drake originally introduced SB 188 to the Senate on September 30, 1999.<sup>198</sup> Drake's original bill focused on amending Ohio's Second Chance Trust Fund Board, which spearheaded efforts to educate Ohioans and encourage them to participate in the organ donation system. SB 188 was eventually combined with House Bill 683, introduced to the House by Representative William Schuck on May 2, 2000<sup>199</sup> and House Bill 658, proposed by Representative Greg Jolivet and introduced to the House on April 12, 2000.<sup>200</sup> Jolivet's bill introduced the DMV Registration System. Both Schuck and Jolivet's bills proposed the idea that a donor's anatomical gift designation would take precedence over the contrary wishes of the donor's family thereby limiting the role of family consent.<sup>201</sup> In the Senate, the Committee of Health, Human Services and Aging oversaw the progress of SB 188 from September 9, 1999 to October 20, 2000 when SB 188, in its revised form, went to the House Committee on Health, Retirement and Aging for approval.<sup>202</sup> The bill was abruptly tabled on September 20, 2000 after warring organ, eye, and tissue banks disagreed as to the number of representatives each would have on a new Second Chance Trust Fund Advisory Board that would replace the Second Chance Trust Fund Board.<sup>203</sup> However, the legislature reconvened after the 2000 election and passed SB 188 on November 8, 2000.<sup>204</sup> SB 188 was then signed into law by Governor Bill Taft on December 13, 2000.<sup>205</sup>

Broadly speaking, the bill makes four important changes, two of which are largely administrative in nature, and two of which change the underlying policy of Ohio anatomical gift law. The administrative changes are as follows: (1) the replacement of the ineffective Second Chance Trust Fund Board with the Second Chance Trust Fund Advisory Committee, a change made to improve spending on educational efforts geared towards increasing organ, tissue, and eye donations in

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<sup>198</sup>S.B. 188 (2000).

<sup>199</sup>H.B. 683, 123rd Gen. Assembly, (2000).

<sup>200</sup>H.B. 658, 123rd Gen. Assembly, (2000).

<sup>201</sup>HOUSE ORGAN PROCUREMENT AND TRANSPLANTATION SUBCOMMITTEE, COMMITTEE REPORT, 123rd Gen. Assembly (August 30, 2000).

<sup>202</sup>S.B. 188, Ohio Bill Tracking, Westlaw.

<sup>203</sup>Julie Carr Smith, *Turf Fight Stalls Organ Donor Bill; Senate Delays; Organ, Eye, Tissue Banks Disagree*, THE PLAIN DEALER, September 21, 2000, at 2B.

<sup>204</sup>Milicia, *supra* note 178, at 4B and Anonymous, Ohio: Bill Changes Organ Donation Policy, AMERICAN HEALTH LINE, Nov. 14, 2000.

<sup>205</sup>Wendling, *Organs May Now Be Taken*, *supra* note 11, at 4B.

Ohio<sup>206</sup> and (2) the replacement of hospital protocol for procuring anatomical gifts in conjunction with OPOs with the federal procurement protocol found in 42 C.F.R. section 482.45<sup>207</sup> (despite the fact that this Code section was completely overhauled as recently as 1999.)<sup>208</sup>

The principle difference between the 1999 Code section 2108.021 and the new 2108.021, which defers to federal law, lies in the designation of who can request the organ donation. Under federal law, only an OPO representative or a designated requester can make the required request. The treating physician and other hospital staff, who have not completed a course offered or approved by the OPO, are almost completely removed from the actual procurement transaction.<sup>209</sup> The hospital staff, however, still initiates procurement protocol by notifying the OPO or trained requester of suitable candidates in a timely manner.<sup>210</sup>

The policy changes that concern us most begin in the new language of section 2108.01 which adds a definition for the word “donee”:

“Donee” means the specified person or entity; otherwise “donee” means, in the case of organs, an Organ Procurement Organization that serves the region of the state where the body of the donor is located or, in the case of tissue or eyes, an organization entitled by law to recover the tissue or eyes from the donor’s body.<sup>211</sup>

Previously undefined although used throughout the Code, the term “donee” takes on greater importance in light of the other changes. Section 2108.02(F) states:

The Donee has a property right in an anatomical gift donated pursuant to sections 2108.02 and 2108.04 of the Revised Code and may enforce this right in an action for a declaratory judgment under Chapter 2721 of the Revised Code in the Common Pleas Court of the county where the donor last resided or died or the county where the donee resides. The court shall give such an action precedence over other pending actions.<sup>212</sup>

Furthermore, section 2108.04(F) underscores the preeminence of both the individual’s express wishes to make an anatomical gift and the donee’s property right to the gifted organs: “[a] valid declaration of an anatomical gift made under division (A), (B), or (C) of this section prevails over any contrary desires of the

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<sup>206</sup>OH S.B. 188, § § 2108.18-20, 3301.07(E), 4501.024. For more on the creation and repeal of the Second Chance Trust Fund Board, see Ted Wendling, *Trust Fund for Organ Donations Unspent; Panel only Gives out Fraction of \$2.1 Million Collected*, THE PLAIN DEALER, Sept. 10, 2000, at 1A. and see Second Chance Trust Fund, *Home Page* <http://www.2ndchancetrust.org>. (last modified Feb 10, 2000).

<sup>207</sup>S.B. 188 § 2108.021.

<sup>208</sup>See discussion *supra*.

<sup>209</sup>42 C.F.R. § 482.45(3).

<sup>210</sup>42 C.F.R. § 482.45(1).

<sup>211</sup>OH S.B. 188, § 2108.01(C).

<sup>212</sup>OH S.B. 188, § 2108.02(F).

donor's family regarding the donor's corpse."<sup>213</sup> Sections 2108.01 et seq. have real bite with the DMV Donor Registry now in operation as hospitals and OPOs have at their fingertips a registry of valid organ declarations accessible on a twenty-four hour, seven day a week basis. Finally, section 2108.04(C) stipulates that the driver's license designation to become an organ donor will continue to be valid even in the face of license expiration.<sup>214</sup> Although this added stipulation conflicts with old language retained and found in the same portion of the Code which requires that "[t]he anatomical gift must be renewed upon renewal of each license, endorsement, or identification card,"<sup>215</sup> it is likely that the DMV registry will prevail despite license expiration.

Recognizing the creation of property rights to the gifted organs in the donee is a radical departure from the old statutory paradigm as well as from the 1987 UAGA. The 1987 UAGA does, however, recognize that a family's consent is not needed when a donor has made a valid gift of her organs.<sup>216</sup> Ohio, however, had not adopted this UAGA provision prior to December 2000. When Representative Jolivet first introduced his bill to the House Committee on Health, Retirement & Aging on May 10, 2000, he noted that under the current anatomical gift law, "five Cincinnati-area families recently refused to honor their deceased love [sic] ones' wishes even after they had signified on their driver's licenses that they wanted to donate their organs."<sup>217</sup> Linda Jones, a representative from Lifeline, a qualified Ohio OPO, testified that honoring the decedent's wishes to be a donor was a commendable change since "her experience is that families struggle to make a decision for someone who can't decide themselves about organ donation" and the current bill "giv[es] and opportunity for the wishes of the deceased to be honored."<sup>218</sup> The only opposition to the then proposed changes in the area of recognizing the donor's wishes over those of the donor's next of kin was from funeral directors, who were now apparently swayed by the new bill's provision to increase educational efforts directed towards donor families.<sup>219</sup>

Although the House Committee Reports do not mention *Brotherton II* as a motivating factor in drafting the SB 188,<sup>220</sup> the House invited two OPO representatives to speak at the May 10th meeting: David Lewis of Life Center and Linda Jones of Lifeline. As a greatly publicized case and as the only Ohio case to specifically attack the constitutionality of anatomical gift laws, these OPO representatives were surely aware of *Brotherton II's* controversial grant of property

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<sup>213</sup>OH S.B. 188 § 2108.04(F).

<sup>214</sup>OH S.B. 188 § 2108.04(C).

<sup>215</sup>*Id.*

<sup>216</sup>Section 2(h) of the 1987 UAGA stipulates "[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."

<sup>217</sup>Staff of House Committee on Health, Retirement & Aging, 123rd Gen. Assembly, *Committee Report*, <http://www.han2.hannah.com> (last modified May 10, 2000).

<sup>218</sup>*Id.*

<sup>219</sup>*Id.*

<sup>220</sup>It should be noted that the Ohio Senate does not publish its committee reports.



rights to the next of kin. Before examining the current law's effect on the next of kin's property right, it will be useful to understand how SB 188 and *Brotherton II* potentially clash in the area of donor rights.

Although *Brotherton II* deals principally with the question of the next of kin's rights in the cadaverous organs thereby reversing the lower court's decision on this matter, it does not reverse the lower court's dicta that the decedent does not have a property interest in his organs since a "decedent's fundamental rights [are] terminated at his death."<sup>221</sup> Under *Brotherton I* and *Brotherton II*, the new Ohio statute would appear to endorse the view that a donor's rights to his organs constitute a fundamental privacy right that he has only while alive. In other words, a living donor has no property or privacy right to his own organs once his living body is diagnosed as brain dead. While this view is in contradistinction to the implied reasoning behind Ohio's anatomical gift statute even prior to the passage of SB 188 into law,<sup>222</sup> the new law does not attempt to correct or clarify the *Brotherton II* dicta on this matter.

What is perplexing about this assertion is that although a living donor has no express property interest in his organs in that, under new law, a donor can now not only gift his organs—an act which in and of itself suggests some kind of property right—but such a bequest creates a property interest in the donee so long as the gift is executed according to statutorily approved instruments. The question raised by this conundrum is fairly straightforward: how can a property right be created in the donee when no property interest existed in the donor? Or to rephrase the issue, from what point of origin does the donee's property right emerge?

Certainly, the creation of the donee property right seems, on its face, to grant the testator/donor more interest in her organs than did the law prior to December 13, 2000 since a valid declaration of an anatomical gift would now prevail over the contrary wishes of the donor's family. In fact, proponents of the new law have said the provision is merely a way of honoring the decedent's wishes.<sup>223</sup> This premise, however, is not made manifest in the statute's new language. If the legislature had wanted to honor the decedent's wish, they could have created a donor property interest in her own organs. Interestingly, aside from the rare case where a donor names a "specified person or entity,"<sup>224</sup> the donee will be the OPO by default. Hence, the OPO donee is given two new rights: a property right in the donated organ and a right to seek a remedy in court for the potential obstruction of this right, while the donor, by contrast, is merely "honored" with rights she already had under the language of Ohio's pre-December 2000 law: the ability to gift her organs.

Unfortunately, the real loser in this new legislation is the donor's family who is deprived of a right formerly granted in the Code and fleshed out in the long court battle of *Brotherton II*. Admittedly, the family will still have the ultimate say in

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<sup>221</sup>*Brotherton I*, 733 F. Supp at 59.

<sup>222</sup>See discussion *supra*.

<sup>223</sup>Ted Wendling, *Bill Puts Punch in Donor's Pledge to Give Organs*, THE PLAIN DEALER, Sept. 20, 2000, at 24A and Unsigned Editorial, *Transplants - a State Directory; Honor Donor's Wish*, THE CINCINNATI ENQUIRER, August 30, 2000, at A14. See also Linda Jones testimony before the Ohio House, *supra* pp. 38-39.

<sup>224</sup>OH S.B. 188, § 2108.01(C).

making the donation decision when the decedent has not expressed his wishes as to organ donation and will presumably still have a property right to the decedent's organs in such a situation. Hence, *Brotherton II* has not been completely overturned. In the case where the decedent has validly declared a wish to be a donor, however, the family's rights are now inferior to the donee or OPO's rights.

Given that the only available statistic as to the number of times a family has in fact overridden the decedent/donor's wishes is small—with a mere five instances in 1999 as reported by LifeCenter, the OPO for greater Cincinnati—the new bill seems designed to help OPOs meet their transplant goals at the expense of the donor's family. Although, “honoring donor's wishes” is the claimed motivation for this portion of the new law, there is no evidence that this motivation is based on statistically sound evidence of family refusal. Donor families, who should be embraced in the procurement process, are being pushed out.

*B. Public Relations and Administrative Problems with the Proposed Changes*

If newspaper coverage is any indication of public sentiment, the public reception of this controversial aspect of SB 188 was mixed. The news items which supported SB 188's creation of a property right provided several reasons for backing this portion of the bill. In keeping with House testimony, several news pieces focused on the new property right as merely honoring the donor's intent. In support of this positive spin, Marilyn Pongonis of Lifeline comments “The public really believes that if they have ‘organ donor’ on their license that their organs will be recovered. When I talk to people, they say, ‘Isn't that what's done now?’”<sup>225</sup> What the news coverage fails to report is that the donor's intent will be enforced not by any newly granted right to the donor, but by a new property interest created in the donee OPO.

Another reason cited for backing this portion of the bill is that the new legislation will “save lives.”<sup>226</sup> This argument has some merit in that, as mentioned, five willing donors wishes were overruled by their families.<sup>227</sup> Although the math varies, had an OPO been able to harvest organs and tissues from these five donors, anywhere from fifteen to twenty-one lives could have been improved or saved.<sup>228</sup>

This emphasis on “saving lives” highlights one of the underlying complexities with organ transplantation rhetoric: the donor's and donor family's interests are diametrically opposed to those of individuals in desperate need of organ transplants. This is not to say that all families of potential organ donors are against making a donation when faced with such a decision. Instead, this statement merely acknowledges that prior to even considering the donation decision, a family member's death is required to save another person's life and the deaths which lead to

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<sup>225</sup>Wendling, *supra* note 223, at 24A.

<sup>226</sup>Editorial, *Transplants — A state directory; Honor donor's wishes*, THE CINCINNATI ENQUIRER, Aug. 30, 2000, at A14; Editorial, *Lifesaving Measure Lawmakers Should Approve Organ-Donor Bill*, THE COLUMBUS DISPATCH, Sept. 14, 2000, at 14A.

<sup>227</sup>*Id.* See also Anonymous, TRANSPLANT NEWS, July 27, 2002, at 2: “In the first five months of 2002, five Ohio families refused to follow donation wishes of family members.”

<sup>228</sup>*Id.* First, it is rare that all of a donor's transplantable organs or tissues will be suitable for donation. Second, a cadaver can provide up to three transplantable organs and four transplantable tissues. Third, transplantable tissues improve lives more often than saving lives.

organ donation are often devastating to the family—viable donors often die in extremely unpredictable and brutal ways such as by automobile accidents or gun violence.<sup>229</sup> One commentator has aptly called this phenomenon of requiring death to save lives as the “tragedy of reliance on cadaveric organs.”<sup>230</sup> In the face of this tragedy, society must weigh the interests of the decedent and his family against the interests of the person in need of an organ transplant and her family, recalling the balancing act called for by the 1968 UAGA, which laid out five different interests it sought to consider and weigh equally.<sup>231</sup> Ohio’s new law deserves criticism because it clearly tips the scale more heavily toward the interests of those in need of organ transplants and toward the OPOs than it weighs the emotional needs of the donor families and their rights to the cadaverous organs.

Several news items have observed, in keeping with the position of this note, that a public relations fiasco could occur in light of the newly created property right that would decrease the long term effectiveness such legislation would have. A *Cleveland Plain Dealer* editorial recognizes that underlying the gift of life made possible by organ donation is “an unprepared family . . . waking up to the reality of losing a loved one.”<sup>232</sup> The editorial argues that although

the intent of the proposal is benign, . . . the effect could be quite different if this bill becomes law and organ banks [OPOs] use it aggressively. The last thing organ banks should want is to be seen as grim and grasping reapers of spare parts. Some things simply ought not to be done by force—not even the force of law.<sup>233</sup>

Monica Heath of LifeBanc, a Cleveland OPO, expressed similar views on the harshness of the new language when she commented: “‘We certainly wouldn’t be opposed to anything that would increase donation’ but . . . LifeBanc would prefer softening the bill’s language about taking legal action against families who stand in the way.”<sup>234</sup> In a similar vein, Maurice Van Zant, director of the Lions Eye Bank of West Central Ohio in Dayton said “[r]egardless of what is passed, our eye bank will not take any cornea or eye tissue without the consent of the next of kin and that will never change.”<sup>235</sup> These spokespeople correctly recognize the crucial role the family plays in the donation process and, as a result, they are unwilling to reduce family participation despite the contours of the new law. Although it is conceivable that OPOs will not pursue their legal property right in the organ and that the new law will therefore have little to no impact in the property rights debate, that possibility does

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<sup>229</sup>Anderson, *supra* note 177, at 278-79.

<sup>230</sup>*Id.* at 276.

<sup>231</sup>*See* discussion *supra*.

<sup>232</sup>Unsigned Editorial, *Death, Life and the Law*, THE PLAIN DEALER, Sept. 29, 2000, at B10.

<sup>233</sup>*Id.*

<sup>234</sup>Milicia, *supra* note 178, at 4B.

<sup>235</sup>Wendling, *Organs May Now be Taken*, *supra* note 11, at 4B.

not eliminate the inequity of the new law which chips away at family involvement in the procurement process.<sup>236</sup>

Criticism has also justly been aimed at the cursory procedural mechanisms currently in place at the DMV for subscribing donors and at the dearth of information the DMV provides donors as to how the donation process works and that their organs may in fact be given to a for-profit company if a suitable local recipient is not found.<sup>237</sup> This criticism mirrors a procedural due process argument in *Moore* as to the requirement of informed consent when one's cells may be used for research purposes that lead to economic gain.<sup>238</sup> Potential organ donors and donor families should be afforded complete disclosure of the donated organ's potential uses before making their decision. Potential organ donors should also be informed that the Donor Registry will override family wishes.

Eye bank officials in Columbus and Dayton have also criticized the format of the Donor Registry as being hypocritical in that it will only include information on people who have volunteered to be donors, but will not include the wishes of those who have specified that they do not wish to be donors.<sup>239</sup> Such a system, they justly argue, invalidates the position of those who supported SB 188 that the underlying impetus for the legislation was one of honoring donor's rights.<sup>240</sup>

Administratively, the new law does little to encourage hospital staff, in particular the decedent's treating physician, to follow through on informing the OPO representative or designated requester of the potential donor. Doctors are now even further removed for the procurement process. Although the treating doctor no longer makes the actual request, organ procurement is awkward in an atmosphere where medical professionals are accustomed to saving the lives of their patients and not giving up until every remnant of hope has been exhausted. Indeed, the organ procurement process usually results only when an intensive care unit has failed to save the patient's life.<sup>241</sup> When the decedent's family is first dealing with the death of a loved one, physicians are generally more concerned with the decedent's family than with an unknown patient waiting for a healthy organ.<sup>242</sup>

Under the pre-1999 version of Code section 2108.021 where the treating physician was still a point person for initiating the request, the physician was placed in the uncomfortable and difficult position of having to ask the family for a donation after failing to save their loved one.<sup>243</sup> A 1989 survey of neurosurgeons confirmed this difficulty with sixty-seven and a half percent of surveyed neurosurgeons

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<sup>236</sup>More recent news coverage has suggested that Ohio's OPOs may have adopted a more uniform approach. "All four agencies have agreed to abide by the donor's wishes." Ted Wendling, *Donor's Wishes Binding*, THE PLAIN DEALER, July 3, 2002, 1 at A1.

<sup>237</sup>*Id.* at 4B; Unsigned, *Ohio: Bill Changes Organ Donation Policy*, AMERICAN HEALTH LINE, Nov. 14, 2000.

<sup>238</sup>*Moore*, 793 P.2d at 482-85.

<sup>239</sup>Wendling, *Organs May Now be Taken*, *supra* note 11, at 4B.

<sup>240</sup>*Id.*

<sup>241</sup>Hazon, *supra* note 15, at 235-36.

<sup>242</sup>*Id.* at 236.

<sup>243</sup>*Id.* at 238.

perceiving their colleagues as reluctant to approach such a family regarding donation.<sup>244</sup> Recall that in the post-1999 version of 2108.021, the treating physician or other hospital staff member was required to notify an OPO and in conjunction with the OPO make the required request of suitable organ donor's families. The new law goes one step further in limiting the treating physician's or hospital staff's role in the donation request by relegating the hospital to a mere conduit of timely information. Despite the treating physicians's and hospitals's reduced roles in the procurement request, however, they still control the most important step in assuring successful procurement: the timeliness with which they choose to inform the OPO of the potential organ donor. If physicians perceive the new law to be inequitable in its treatment of potential donor families, they may choose not to inform the OPOs in a timely manner of the patient's suitability. In this way, physicians could bypass the new law and, in essence, endow the donor family with rights to the cadaverous organs that differ from their statutory rights.<sup>245</sup>

Several commentators have identified physicians, particularly neurosurgeons and intensive care unit nurses, as the primary obstacle in effectuating the current procurement process and have recommended that legislators, OPOs, and organ donation advocates focus their energies on educating medical staff in the area of organ procurement.<sup>246</sup> If sufficient resources were channeled into educating hospital staff, it is possible that donations of cadaverous organs could increase significantly. Given that several estimates indicate that cadavers alone could supply the escalating need for donations<sup>247</sup> and that Americans generally approve of organ donation,<sup>248</sup> educating hospital staff seems like a much better solution than diminishing the roles families and hospital staff play in the procurement process. But educating the medical community alone is not enough because it is a one-sided solution which views the medical community as a passive receptacle of state-sponsored education.

Instead, the Ohio legislature must recognize that doctors and nurses can be resources and not roadblocks in promoting and facilitating organ donation. As such, doctors and intensive care nurses should be invited to educate the legislature as to their role in and views of the procurement process prior to drafting new legislation, instead of merely being viewed as parties to be educated after legislation has passed.<sup>249</sup>

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<sup>244</sup>Jeffrey M. Prottas & Helen Levine Batten, *Neurosurgeons and the Supply of Organs*, HEALTH AFF., Spring 1989, at 119, 125.

<sup>245</sup>Naylor, *supra* note 20, at 181.

<sup>246</sup>Naylor, *supra* note 20, at 185; Hazony, *supra* note 15, at 244-250. Caplan, *Professional Arrogance and Misunderstanding*, 18 HASTINGS CENTER REP., April-May 1988, at 34-35.

<sup>247</sup>Jefferies, *supra* note 190, at 624.

<sup>248</sup>See *supra* p. 14; *supra* note 68.

<sup>249</sup>This mutual education proposal could overcome physician noncompliance with anatomical gift laws which result from physician's "underlying resentment of being told what they must do by non-physicians, particularly by legislators and bureaucrats." Hazony, *supra* note 15, at 233.

## VI. AN EQUITABLE SOLUTION

*A. Acknowledging Next of Kin's Property Right*

The pressure on the legislature to “solve” the organ shortage problem is tremendous. “As transplantation therapy becomes more refined and successful, reformers and legislators may be tempted to reduce the role of the family.”<sup>250</sup> An equitable solution, however, must continue to balance the five 1968 UAGA interests and not allow “the desires of the surviving spouse or next of kin” to be diminished by “the need of society for bodies, tissues and organs for medical education, research, therapy and transplantation.”<sup>251</sup> If Ohio were to protect the family’s rights by amending the Code to reflect the *Brotherton II* holding, legislators would dispel fears donor families continue to have regarding overreaching and infringement of the donor’s autonomy by OPOs and designated requesters justifiably eager to increase the number of harvested organs.<sup>252</sup>

A significant problem with the new law is that it tackles the problem of family contravention only after it has arisen. Pursuing legal action in a court of law to enforce a “donee’s property right” will be more time consuming and will be more likely to delay a successful transplant than would a simple preventative measure aimed at educating families and encouraging their early involvement in the donation process. Similarly, if the OPOs and legislature are truly worried about families overriding a donor’s expressed wishes, they should amend the approved methods for making a valid organ donation in a way that empowers donors and donor families instead of adopting a provision which literally puts families on the defensive as parties in a declaratory action. Such an amendment would include a section that requires the donor to secure signatures of the donor’s next of kin to confirm their approval of the donation in addition to the required signatures of two disinterested witnesses. Certainly, this solution would allow the family greater involvement in and understanding of the organ donation and procurement process. For donors who feel strongly about having their designation as an organ donor honored, this additional formality would also ensure the effectuation of the bequest.

If the next of kin, as identified in hierarchical order by section 2108.02(B),<sup>253</sup> is strongly opposed to the donation and refused to provide her consent even when approached by the living donor, problems could arise. To alleviate this potential conflict, Ohio could amend the donation document so that it mirrors Ohio’s Durable Power of Attorney, which allows the grantor to designate the individuals who are to be consulted in making crucial life-sustaining medical decisions.<sup>254</sup> Such a form would allow the donor to designate family members who are amenable to carrying out the donor/decedent’s wishes as to organ donation, instead of relying, by default,

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<sup>250</sup>Naylor, *supra* note 20, at 189.

<sup>251</sup>U.A.G.A., 8A U.L.A. 64 (1993), preface (amended 1987).

<sup>252</sup>Naylor, *supra* note 20, at 186.

<sup>253</sup>*See supra* note 97.

<sup>254</sup>OHIO REV. CODE ANN. § 1337.12. “Except as otherwise provided in this division, a durable power of attorney for health care may designate any competent adult as the attorney in fact.” OHIO REV. CODE ANN. § 1337.12(A)(2).

on the next of kin as defined by statute. This would accomplish two goals: it would recognize a donor/decedent's right to determine what happens to his cadaverous organs after death and it would continue to involve amenable family members in the donation decision.

In keeping with the 1987 UAGA's choice to eliminate the witness signature requirement on donor cards,<sup>255</sup> opponents may argue that adding an additional formality to the organ donor designation process would result in another tedious obstacle to subscribing donors. A better way of looking at an additional requirement, however, is to see it as a beneficial step in the process of educating and involving the public as to the positive impact organ has in our society.

Finally, the Ohio legislature should amend its anatomical gift law to reflect the *Brotherton II* holding. This revision would include language in 2108.02(B) that recognizes the donor family's property right in the decedent's organs where the decedent had left no indication as to his position on organ donation. This property right would then transfer to the donee once the donor family chose to make an anatomical gift. By including the family in the procurement process, these proposed amendments would empower the family to support a donor's decision and would ensure that the donor's wishes were carried out. No legal intervention by the donee would be necessary in such situations.

## VII. CONCLUSION

The procurement strategies Ohio has adopted have not yet been able to meet the high demands for transplantable organs. Because of this perceived failure,<sup>256</sup> Ohio has sought to reform its anatomical gift law many times since it adopted the 1968 UAGA, most recently by enacting SB 188. While some of the changes to the law fine tune systems already in place, such as the newly created Second Chance Trust Fund Advisory Committee, others present radical departures from both the 1986 UAGA and from Ohio case law. The SB 188 creation of a new property right to the donor's cadaverous organs in the donee is precisely such a change. This change, trumpeted as a way to honor the deceased donor's intent, does not grant the donor any rights he did not previously have under the Code prior to the adoption of SB 188. Furthermore, this change puts the donor's family on the defensive after the donor has passed away. Finally, this change may face resistance from the medical community and even from some OPOs who have traditionally looked to the donor's family for guidance on the donor decision.

Ohio should also seriously consider recognizing the *Brotherton II* property right grant to cadaverous organs in the next of kin by amending statutory language. Such recognition would assure Ohio families that their wishes will be respected in the procurement process and that the family's feelings and their deceased relative's corpse will be treated with dignity and sensitivity and not merely as a market alienable commodity from which choice parts are harvested without family consent or involvement. Again, by bolstering family rights and involvement, Ohio would

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<sup>255</sup>1968 UAGA at 64.

<sup>256</sup>It is certainly possible that the Ohio legislature, and other state legislatures, have simply set their procurement goals too high, too soon or, in the alternative, have amended the procurement protocols in place before sufficient time passed to determine their effectiveness

ultimately encourage families to view the organ donation system favorably and subsequently act as advocates of organ donation.

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<sup>257</sup>I would like to thank Heidi Gorovitz Robertson for her editorial guidance in writing this piece.