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## To Donate or Not to Donate Your Organs: Texas Can Decide For You When You Cannot Decide For Yourself

Jennifer Rutherford-McClure

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**TO DONATE OR NOT TO DONATE YOUR  
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WHEN YOU CANNOT DECIDE  
FOR YOURSELF**

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INTRODUCTION

Ten forty-five at night on a busy Fort Worth street, a drunk driver critically injured nineteen-year old college student Sam Jones.<sup>1</sup> The police and paramedics were dispatched, but by the time they reached Sam, he was near death due to massive head injuries. The paramedics took Sam to the hospital where he was placed on life support. Through hospital tests, doctors determined that Sam was “brain-dead”<sup>2</sup> and nothing more could be done for him.

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1. Fictional name and portrayal.  
 2. Brain-death occurs when the brain no longer responds to stimuli, controls reflexes, or causes respirations. See TABER’S CYCLOPEDIA MEDICAL DICTIONARY 259 (Clayton L. Thomas ed., 18th ed. 1997).

Since Sam's body was otherwise uninjured and his organs were suitable for transplantation, the hospital contacted an organ procurement agency per state and federal law. Nowhere in Sam's belongings did the agency find a donor card, or anything else that would indicate that Sam wanted his organs donated. For four hours, the agency and police searched to no avail for Sam's next of kin in order to gain consent for organ donation. Little did they know that Sam's parents were out-of-town. Upon request by the agency, the county medical examiner permitted the removal of Sam's organs for transplantation in another individual.

The above example illustrates what could occur under current Texas law when a person does not carry a card of some sort indicating that he or she does not want to donate organs in the event of death. There is not a problem with this scenario if Sam wanted his organs donated upon his death. However, if Sam or his parents were opposed to donating his organs, they would have no remedy under current Texas law.

Section 521.405 of the Texas Transportation Code allows a medical examiner to permit the removal of a decedent's "heart, lung, kidney, liver, or other organ or tissue that requires a patient support system" if the decedent's next of kin cannot be contacted within four hours after death is pronounced.<sup>3</sup> Put simply, if a person dies and does not want their organs donated due to personal reasons, and their next of kin or personal representative cannot be located within four hours, their organs can be harvested.

Texas is the one state that allows only four hours to find the next of kin or a personal representative. The other states that allow a medical examiner to harvest organs or other tissue without consent from the next of kin or a personal representative are less restrictive and require that a reasonable search for those individuals be conducted first (except for California which has a twelve hour time period to search after death is pronounced).<sup>4</sup> The Texas statute (1) interferes with a quasi-

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3. TEX. TRANSP. CODE ANN. § 521.405(b) (Vernon 1999).

4. See ARIZ. REV. STAT. ANN. § 36-844 (West Supp. 1999); ARK. CODE ANN. § 20-17-604 (Michie 2000); CAL. HEALTH & SAFETY CODE § 7151.5 (West Supp.1999); HAW. REV. STAT. ANN. § 327-4 (Michie 1996); IDAHO CODE § 39-3405 (1993); IND. CODE ANN. § 29-2-16-4.5 (West Supp. 1999); IOWA CODE ANN. § 142C.4A (West 1997); MD. CODE ANN., EST. & TRUSTS § 4-509 (Supp. 1999); MINN. STAT. ANN. § 525.9213 (West Supp. 1999); MISS. CODE ANN. § 41-61-71 (1999); MONT. CODE ANN. § 72-17-215 (1999); N.H. REV. STAT. ANN. § 291-A:5 (1999); N.M. STAT. ANN. § 24-6A-4 (Michie 1997); N.D. CENT. CODE § 23-06.2-04 (1991); OR. REV. STAT. § 97.956 (1999); R.I. GEN. LAWS § 23-18.6-4 (1996); UTAH CODE ANN. § 26-28-5 (Supp. 1997); WIS. STAT. ANN. § 157.06(4) (West Supp. 1999). Some state statutes provide for only corneal removal. See COLO. REV. STAT. § 30-10-620 (1998) (allowing the removal of corneas for transplantation and pituitary glands for "research, education, or therapy"); 755 ILL. COMP. STAT. ANN. 55/1 (West 1992); MASS. GEN. LAWS ANN. ch. 113, § 14 (West 1996); 20 PA. CONS. STAT. ANN. § 8641 (West Supp. 1999); TENN. CODE ANN. § 68-30-204 (1996).

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property right and thus is a violation of a person's substantive due process rights; (2) violates American notions of free-will; (3) conflicts with the Uniform Anatomical Gift Act; and (4) is basically unreasonable in its application.

Part I of this comment illustrates the historical background of the organ shortage. Part II discusses the response of the federal government, other states, and other countries to the organ shortage. Part III discusses Texas's response to the organ shortage and Texas's version of the Uniform Anatomical Gift Act. It also discusses why Texas should repeal section 521.405 of the Texas Transportation Code and provides alternative methods of procuring organs for transplantation other than the aforementioned statute.

This comment is not meant to sway anyone from organ donation—quite the contrary.<sup>5</sup> The purpose of this note is to illustrate the importance of having a choice about what we want to happen to our bodies after we die. Nothing is quite so personal to us as our body, for it is the vessel that carries our soul. For that very reason, it should be us—not the state—that determines its destiny.

## I. HISTORICAL BACKGROUND: THE ORGAN SHORTAGE

Over the last 30 years, survival rates of transplant recipients have drastically increased since the improvement of surgical techniques, organ preservation techniques, and the development of new anti-rejection drugs.<sup>6</sup> While technology has made successful transplants possible, the lack of one essential element, the organs themselves, presents a special problem.

On average, three thousand people will die each year while waiting for an organ transplant.<sup>7</sup> Currently, there are over fifty-eight thousand people waiting for transplants, but in 1997, only fifty-five hundred organs were donated.<sup>8</sup> While most Americans—eighty-five percent—support organ donation, only about twenty-eight percent actually take steps to donate their organs.<sup>9</sup>

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5. For general organ donation information, a list of organ procurement agencies, and an on-line organ donor card form, see *The Living Bank: The Only National Organ & Tissue Donor Registry* (visited September 3, 2000) <<http://www.livingbank.org>>.

6. See Monique C. Gorsline & Rachelle L.K. Johnson, *The United States System of Organ Donation, The International Solution, and the Cadaveric Organ Donor Act: "And the Winner is . . ."*, 20 J. CORP. L. 5, 6 (1994).

7. See Stephanie Stapleton, *Students Spread Word about Organ Donation*, AM. MED. NEWS, Dec. 21, 1998, at 19.

8. See *id.*

9. See Edward J. Saub et al., *Do Patients want to Talk to Their Physicians about Organ Donation? Attitudes and Knowledge about Organ Donation: A Study of Orange County, California Residents*, 23 J. COMMUNITY HEALTH, Dec. 1, 1998 at 407, 408.

Several factors contribute to the organ shortage. First, individuals, in general, are reluctant to donate.<sup>10</sup> The reasons for not donating include: “denial of mortality; fear that the medical community will not use every effort to save the donor patient’s life in order to harvest the patient’s organs; opposition to organ donation stemming from a religious belief or the belief that the surviving family should decide the question; and disgust at the idea of having an organ removed.”<sup>11</sup> Another factor is that some physicians are reluctant to approach family members about donating their deceased loved one’s organs.<sup>12</sup> Physicians may feel that approaching a grieving family member about organ donation is inappropriate at an already difficult time.<sup>13</sup>

Additionally, families of persons who die with or without a donor card may not authorize the donation of the decedent’s organs for various reasons.<sup>14</sup> For instance, a family member may be too traumatized by a loved one’s sudden death to consent to donation.<sup>15</sup> In other situations, the family member may not fully understand that their loved one is brain-dead despite a beating heart.<sup>16</sup> Still others believe that by consenting to donation, they are giving up on any hope of their loved one recovering.<sup>17</sup>

Public skepticism about the fairness of the organ distribution system also leads to the scarcity of organs.<sup>18</sup> In recent years, the media questioned whether celebrities such as Mickey Mantle, Larry Hagman, Evel Knievel, or David Crosby received their new organs because they were next on the transplant list or because of their celebrity sta-

10. See David E. Jefferies, Note, *The Body as Commodity: The Use of Markets to Cure the Organ Deficit*, 5 IND. J. GLOBAL LEGAL STUD. 621, 628-29 (1998).

11. *Id.* Most major religions accept organ donation despite the belief otherwise. See Michelle Kaufman, *Organ Donation Can Be the Gift of Life*, INTELLIGENCER JOURNAL, Apr. 3, 1999, at A5; *Organ Transplants: A Web of Information*, 29 NURSING, Oct. 1, 1999, at 14; Beatrice Robin, *Louisiana Steps Up Push for Organ Donation*, THE NEW ORLEANS TIMES-PICAYUNE, Jan. 6, 2000, at 1F3; see also London Health Centre, *Religious and Cultural Attitudes About Donation* (last modified Dec. 1, 1996) <<http://www.lhsc.on.ca/transplant/religatt.htm>>. Many religious leaders go beyond just accepting organ donation and actively promote the practice to their congregations. See Geraldine A. Collier, *Hadassah Begins National Drive to Encourage Organ Donations*, TELEGRAM & GAZETTE, Nov. 8, 1999, at C1; *Religious Leaders to Ask Faithful to Consider Organ Donation*, FLA. TODAY, Nov. 14, 1998, at 5A.

12. See Jefferies, *supra* note 10, at 629-30.

13. See *id.* at 630.

14. See *id.* at 629 (citing Melissa N. Kurnit, *Organ Donation in the United States: Can We Learn from Success Abroad?*, 17 B.C. INT’L & COMP. L. REV. 405, 427 (1994)); Teri Randall, *Too Few Human Organs for Transplantation, Too Many in Need . . . and the Gap Widens*, 265 JAMA 1223, 1223 (1991).

15. See Jefferies, *supra* note 10, at 629.

16. See *id.*

17. See *id.* (citing Kurnit, *supra* note 14, at 429).

18. See William DeJong et al., *Options for Increasing Organ Donation: The Potential Role of Financial Incentives, Standardized Hospital Procedures, and Public Education to Promote Family Discussion*, 73 MILBANK QUARTERLY 463, 463 (1995).

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tus.<sup>19</sup> Some people have the opinion that celebrities will receive organs in preference to the average Joe, so they choose not to take part in the process.<sup>20</sup>

In addition to the above factors, there is another factor that prevents individuals from receiving transplants—money. Over sixty-seven million people lack insurance to cover the costs of heart, lung, liver, or kidney transplants.<sup>21</sup> Estimates are that between twenty-nine and seventy-five percent of the uninsured are less likely to be treated aggressively and receive a high-cost inpatient procedure.<sup>22</sup> One author states that “the rich can purchase health services at the expense of the poor, since the poor can donate organs but will most likely not be able to afford organ transplants.”<sup>23</sup> Moreover, unless a

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19. See, e.g., Kathy A. Edgar, *Celebrity Illnesses Bring Attention to Organ Donation*, DALLAS MORNING NEWS, Feb. 7, 1999, at 1B; Kevin Lamb, *Organ Replacement; Football Great Adding His Name to Transplant List*, DAYTON DAILY NEWS, Feb. 9, 1999, at 1C; Jay Mariotti, *Payton's Dignity Shines Through Life's Dim Reality*, CHI. SUN-TIMES, Feb. 4, 1999, at 114; Mary Otto, *Overhaul Urged in System Allocating Transplant Organs Critics Say the Current Procedures Sometimes Fail to Serve Those with the Greatest Need*, FORT WORTH STAR-TELEGRAM, July 21, 1999, at 3A; Clarence Page, Editorial, *Payton Shined Light on Organ Shortage*, GRAND RAPIDS PRESS, Nov. 8, 1999, at A10; Jackie Rothenberg, *Some Fan Favorites Saved by the System*, N.Y. POST, Jan. 23, 1999, at 6; Sharon Schmickle, *Wait Time for Organ Donations: Is it Fair? Walter Payton's Need For a Liver Transplant Has Put a Spotlight on a Controversy in the Allocation System*, STAR-TRIB. NEWSPAPER OF THE TWIN CITIES, Feb. 4, 1999, at A1; Mike Stobbe, *Evel Knievel Given Liver Transplant*, TAMPA TRIB., Jan. 28, 1999, at 1; Herb Whitney, *Losing the Waiting Game: Youth Battles Insurer for Lung, Liver Transplants*, ARIZ. REPUBLIC, Mar. 4, 1999, at B1.

Although Mickey Mantle's transplant was met with some skepticism, in the end, the publicity associated with the transplant had positive ramifications. Forney High School student Clay Jones, influenced in part by Mantle's organ transplant, decided to donate his organs upon death and indicated that intent on his driver's license. He told his mother that he could not “understand why anyone would not want to be an organ donor.” Just weeks after expressing his wish to donate, during a high school football practice, Clay was struck by lightning and died five days later at Baylor University Medical Center in Dallas. Clay's generosity and selflessness helped save a man's life when he received one of Clay's kidneys. See Linda Jones, *One Easy Decision* (visited Nov. 14, 1999) <<http://web2.airmail.net/autiger/Clay.htm>> (originally printed in “Baylor University Medical Center Proceedings.”).

Mantle's family continues to promote organ donation with The Mickey Mantle Foundation. “Our initial mission is the complete elimination of the loss of life or the loss of quality of life due to the lack of organs and tissue available for transplantation.” *The Mickey Mantle Foundation* (visited Nov. 14, 1999) <<http://www.transweb.org/mantle.html>>.

20. See Jennifer Flasher, *Transplants: Who Should Get Them First; How to Raise Donation Rates—Public Has Many Misconceptions About Donations*, WIS. ST. J., June 18, 1998, at 13A, available at WL 5874723.

21. See Diane M. Dewar, *Allocating Organ Transplant Services: What Can be Learned from the United States Experience?*, 56 REV. OF SOC. ECON. 157, 163 (1998); cf. Randall, *supra* note 14, at 1223 (“Many people who could benefit from a transplant are never added to the list because they could not afford the transplant and the subsequent expensive immunosuppressive therapy. . .”).

22. See Dewar, *supra* note 21, at 158.

23. *Id.* at 163.

person can prove the ability to pay for a transplant, many transplantation centers will not place them on an organ waiting list.<sup>24</sup>

Certain criteria have to be met before an organ can be transplanted, which further hinders the donation process. Optimally, the donor should be under fifty-five years of age, brain-dead, but still have a beating heart.<sup>25</sup> Not every organ is suitable for transplantation. Certain diseases, age, and physical damage to organs caused by blunt trauma or oxygen insufficiency may make organs unsuitable for transplantation.<sup>26</sup>

Texas has made organ donation even more difficult by discontinuing the practice of allowing individuals to indicate on their driver's license whether or not they want to donate.<sup>27</sup> A person must now jump through additional hoops in order to become a registered organ donor. Organ procurement agencies now provide donor cards to the Texas Department of Public Safety (DPS) who distribute the cards to "interested individuals" when those individuals obtain a license or renewal.<sup>28</sup> The individual must fill out the card and send it to the organ bank. Making it harder for an individual to donate organs decreases the chance that they will donate. There is no single reason for the organ shortage. Likewise, there is no single answer.

## II. RESPONSE TO THE ORGAN SHORTAGE

### A. *The Uniform Anatomical Gift Act*

In response to the organ shortage, the National Conference of Commissioners on Uniform State Laws drafted and approved in 1968, the Uniform Anatomical Gift Act (UAGA). The UAGA's purpose was to increase the supply of organs by allowing mentally competent people eighteen years of age or older the right to choose whether they wanted to donate their organs.<sup>29</sup> The UAGA was also enacted to protect those who procured organs and tissues from cadavers in good faith from criminal or civil liability.<sup>30</sup> This protection was meant to encourage the medical profession to participate in the organ procurement process, thus increasing the organ supply.<sup>31</sup>

Although physicians under this system did not have to obtain the consent of the next of kin to have the deceased relative's organs

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24. *See id.* at 163.

25. *See* Jefferies, *supra* note 10, at 626.

26. *See id.*

27. *See* TEX. TRANSP. CODE ANN. § 521.401 (Vernon 1999).

28. *See id.*

29. *See* UNIF. ANATOMICAL GIFT ACT § 2 (amended 1987), 8A U.L.A. 99-100 (1993) (listing categories of persons allowed to donate the decedent's body); *see also* Jefferies, *supra* note 10, at 627-28.

30. *See* Gorsline & Johnson, *supra* note 6, at 15.

31. *See id.* (citing Daniel G. Jardine, Comment, *Liability Issues Arising out of Hospitals' and Organ Procurement Organizations' Rejection of Valid Anatomical Gifts: The Truth and Consequences*, 1990 WIS. L. REV. 1655, 1656).

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donated, the physicians usually acquiesced to the family's wishes.<sup>32</sup> "However, family members may not donate the decedent's body [or organs] if they have actual notice that the decedent did not want the body [or organs] donated."<sup>33</sup> While the UAGA was praised for allowing individuals to choose to have their organs donated, it still did not significantly increase organ donation.<sup>34</sup>

In 1987, the National Conference of Commissioners on Uniform State Laws amended the UAGA to remedy the problems of the previous UAGA. There were two main changes. The first revision was that organs could not be sold for transplantation purposes.<sup>35</sup> Second, doctors were now required to notify the hospital of potential organ donors.<sup>36</sup> Another change was that it eliminated the requirement that two witnesses sign the organ donation card.<sup>37</sup> Additionally, the amendment provided that the desire of the donor is given priority over the desires of the family.<sup>38</sup> Like the 1968 UAGA, the 1987 UAGA allows certain persons to donate the organs of the deceased when the deceased did not express whether or not they wanted to donate.<sup>39</sup> If the decedent's family cannot be located, the 1987 UAGA states that the coroner may permit the removal of a part from a body under certain conditions.<sup>40</sup> The UAGA requires that a reasonable

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32. See Jefferies, *supra* note 10, at 628.

33. Gorsline & Johnson, *supra* note 6, at 14.

34. See Jefferies, *supra* note 10, at 628.

35. See UNIF. ANATOMICAL GIFT ACT § 10 (amended 1987), 8A U.L.A. 58 (1987). Section 10 states: "A person may not knowingly, for valuable consideration, purchase or sell a part for transplantation or therapy, if removal of the part is intended to occur after the death of the decedent." *Id.*

36. See *id.* § 5(a) (discussing routine inquiry and required request under the 1987 UAGA).

37. See Gorsline & Johnson, *supra* note 6, at 16-17.

38. See UNIF. ANATOMICAL GIFT ACT § 2(h) (amended 1987), 8 U.L.A. 34 (1993) (stating that "(a)n anatomical gift that is not revoked by the donor before death is irrevocable and does not require the consent or concurrence of any person after the donor's death").

39. See *id.* § 3.

40. See *id.* § 4 (1987). Section 4(a) provides:

The [coroner] [medical examiner] may release and permit the removal of a part from a body within that official's custody, for transplantation or therapy, if:

- (1) the official has received a request for the part from a hospital, physician, surgeon, or procurement organization;
- (2) the official has made a *reasonable effort*, taking into account the *useful life* of the part, to locate and examine the decedent's medical records and inform persons listed in Section 3(a) of their option to make, or object to making, an anatomical gift;
- (3) the official does not know of a refusal or contrary indication by the decedent or objection by a person having priority to act as listed in Section 3(a);
- (4) the removal will be by a physician, surgeon, or technician; but in the case of the eyes, removal may be by an enucleator;
- (5) the removal will not interfere with any autopsy or investigation; and
- (6) the removal will be in accordance with accepted medical standards; and
- (7) cosmetic restoration will be done, if appropriate.



search be conducted for the next of kin.<sup>41</sup> Moreover, the Act indicates that the medical examiner must take into account the useful life of the organ and locate the decedent's medical records before removing body parts.<sup>42</sup>

The 1987 UAGA requires that hospitals ask each patient if they are an organ donor.<sup>43</sup> If a patient is an organ donor, a copy of the donation document is placed in the patient's medical records.<sup>44</sup> If, however, the patient is not a donor and the attending physician consents, the hospital staff must discuss with the patient the options of organ donation.<sup>45</sup> The hospital staff is required to discuss these options with the patient's family members if the patient's chart does not indicate whether the patient wants to donate organs and the patient is near death.<sup>46</sup>

A Hastings Center report cited several problems with the current system of organ procurement.<sup>47</sup> These problems include the following: (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 the circumstances and timing of organ recovery; (4) failure on the part of 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 organ procurement agencies in obtaining referrals of donors; (7) high wastage rates on the part 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.<sup>48</sup> Like the 1968 UAGA, the 1987 version failed to remedy the organ shortage. Perhaps the failure of the 1987 UAGA is due in part to the states' ambivalence to adopt the amended statute. The consent provisions and the routine inquiry requirement are troublesome to some states.<sup>49</sup> Since hospitals in the states that have not adopted the 1987 version of the UAGA are not required to inquire as to patients' wishes, many people who would have donated (in their own or representative capacity) do not get the opportunity to do so.

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*Id.* (emphasis added).

41. *See id.* §§ 3(a), 4(a)(2).

42. *See id.* § 4(a)(2).

43. *See id.* § 5(a).

44. *See id.*

45. *See id.*

46. *See id.* §§ 3(a), 5(b).

47. *See* UNIFORM ANATOMICAL GIFT ACT (amended 1987), 8A U.L.A. 20-21 prefatory note (1993) (quoting Gorsline & Johnson, *supra* note 6, at 31-32).

48. *See id.*

49. *See* Gorsline & Johnson, *supra* note 6, at 18.

### B. *The National Organ Transplant Act*

Congress enacted the National Organ Transplant Act (NOTA) in 1984 to develop a national organ-sharing and procurement system through the National Organ Procurement and Transplantation Network (OPTN).<sup>50</sup> The NOTA established federal grants for organ procurement agencies, prohibited the sale of organs, created a Task Force on Organ Transplantation and developed a national scientific registry of transplant recipients.<sup>51</sup> As with the UAGA, the NOTA failed to alleviate the organ shortage problem.<sup>52</sup>

### C. *Other States*

All states have adopted the 1968 UAGA in some form.<sup>53</sup> At least 21 states have adopted the 1987 version of the UAGA.<sup>54</sup> In all states, the medical examiner has jurisdiction of bodies under certain circumstances such as homicides.<sup>55</sup> About half the states allow the removal of a part from a body without consent under additional circumstances.<sup>56</sup> The wording of these state statutes is similar to, if not verbatim of, the 1987 UAGA. The medical examiner must receive a request for the body part from a hospital, physician, surgeon, or organ procurement agency, and there must have been a *reasonable*<sup>57</sup> effort to contact the next of kin before removing the body part. Moreover, the medical examiner must take into account the useful life of the part and make a reasonable effort to locate the decedent's medical records to determine whether the decedent has executed a document of an anatomical gift.<sup>58</sup> Additional requirements are that the removal of tissues or organs must be done by a physician, the removal will not interfere with any autopsy or investigation, and cosmetic restoration will

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50. See National Organ Transplant Act, Pub. L. No. 98-507, 98 Stat. 2339 (1994), amended by 42 U.S.C. §§ 273-274e (1988); see also Gorsline & Johnson, *supra* note 6, at 31-32.

51. See National Organ Transplant Act § 101.

52. See *id.*

53. See Michelle Bourianoff Bray, Comment, *Personalizing Personalty: Toward a Property Right in Human Bodies*, 69 TEX. L. REV. 209, 222 (1990).

54. See UNIF. ANATOMICAL GIFT ACT § 2 (amended 1987) Table of Jurisdictions Wherein Act Has Been Adopted (Supp. 1999). The following states have adopted the 1987 UAGA: Arizona, Arkansas, California, Connecticut, Hawaii, Idaho, Indiana, Iowa, Minnesota, Montana, Nevada, New Hampshire, New Mexico, North Dakota, Oregon, Rhode Island, Utah, Vermont, Virginia, Washington, and Wisconsin. See *id.*

55. See Richard C. Froede & Roy G. Spece, Jr., *Forensic and Medicolegal Aspects of Transplantation*, in ANESTHESIA AND TRANSPLANTATION SURGERY 1, 17 (Burnell R. Brown, Jr. ed., 1987).

56. The other states that allow a medical examiner to remove organs suitable for transplantation, with the exception of California which requires a 12 hour search, do not require a particular time limit to find the next of kin. See *supra* note 4 and accompanying text.

57. See *id.*

58. See *id.*

be done, if appropriate.<sup>59</sup> Some states allow for the removal of only corneas if the medical examiner makes a reasonable effort to obtain the next of kin's or personal representative permission before doing so.<sup>60</sup>

#### D. *Other Countries and Presumed Consent*

The "presumed consent" system is used in many European countries to procure organs. Under this system, the decedent's consent to organ procurement is presumed unless otherwise indicated.<sup>61</sup> In the absence of a wish expressed by the donor during life, organs may be removed in the following circumstances: (1) only with the consent of the person lawfully in possession of the body and subject to express objection of the deceased or objection of the relatives, if available (UK); (2) after the relatives have been informed of the intention to remove organs, but irrespective of their consent (except for that of the nearest relative, Norway); (3) once it has been ascertained that the relatives do not object (Italy); (4) where the dead person has not expressed an objection, this is confirmed by the relatives and consent is then presumed (Belgium); and (5) irrespective of the relatives' view (Austria).<sup>62</sup>

Countries such as Austria, Poland, and Switzerland have the strongest presumed consent laws.<sup>63</sup> In Austria, for example, the doctor does not have to inform family members that organs will be taken.<sup>64</sup> The deceased can avoid having their organs harvested if a written objec-

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59. See ARIZ. REV. STAT. ANN. § 36-844 (West Supp. 1999); ARK. CODE ANN. § 20-17-617 (Michie 2000); CAL. HEALTH & SAFETY CODE § 7151.5 (West Supp. 1999); HAW. REV. STAT. ANN. § 327-4 (Michie 1996); IDAHO CODE § 39-3405 (1993); IND. CODE ANN. § 29-2-16-4.5 (West Supp. 1999); IOWA CODE ANN. § 142C.4A (West 1997); MD. CODE ANN., EST. & TRUSTS § 4-509 (Supp. 1999); MINN. STAT. ANN. § 525.9213 (West Supp. 1999); MISS. CODE ANN. § 41-61-71 (1999); MONT. CODE ANN. § 72-17-215 (1991); N.H. REV. STAT. ANN. § 291-A:5 (1999); N.M. STAT. ANN. § 24-6A-4 (Michie 1997); N.D. CENT. CODE § 23-06.2-04 (1991); OR. REV. STAT. § 97.956 (1999); R.I. GEN. LAWS § 23-18.6-4 (1996); UTAH CODE ANN. § 26-4-23 (1995); WIS. STAT. ANN. § 157.06(4) (West Supp. 1999).

60. COLO. REV. STAT. § 30-10-620 (1998); 755 ILL. COMP. STAT. ANN. 55/1, /2 (West 1992); LA. REV. STAT. ANN. § 33:1565 (West 1988 & Supp. 2000) (requiring only that the removal not interfere with an autopsy or subsequent investigation); MASS. GEN. LAWS ANN. ch. 113, § 14 (West 1996); 20 PA. CONS. STAT. ANN. §§ 8641, 8641 (West Supp. 1999); TENN. CODE ANN. § 68-30-204 (1998).

61. See Jefferies, *supra* note 10, at 634-35.

62. See I. Kennedy et al., *The Case for "Presumed Consent" in Organ Donation*, 351 THE LANCET 1650, 1650 (1998). France has established a computerized register that lists those citizens who do not want their organs donated. Those citizens who are not on the register are presumed to have consented to organ donation. Through the registry, hospitals can immediately determine whether a deceased individual consents to donation. See Alexander Dorozynski, *France Creates Opt Out Register for Organ Donation*, 317 BRITISH MED. J., 234, 234 (1998).

63. See Gorsline & Johnson, *supra* note 6, at 21.

64. See *id.* at 22.

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tion accompanies the body.<sup>65</sup> Family members may also rebut the presumption of consent by informing the physician that the deceased unmistakably did not want to donate; however, “the physician may ignore such statements.”<sup>66</sup>

Other countries such as Finland, Greece, Italy, Norway, Spain, and Sweden have adopted weak presumed consent laws.<sup>67</sup> In these countries, the family members can object to organ donation in place of the decedent.<sup>68</sup> The advantage of this system is that it increases the availability of organs and eliminates the need for organ donation cards.<sup>69</sup> Also eliminated is the infliction of grief upon family members by asking for consent to donate.<sup>70</sup> Countries such as Austria, Belgium, and France all have higher organ procurement rates than the United States.<sup>71</sup>

Disadvantages of this system include the following: the limitation of individual autonomy and freedom; the heavy impact on those who are unaware of their rights because they are uneducated or poor; and, the procurement of organs from individuals who chose not to have their organs donated because the doctor did not make a reasonable search for the donor’s registered objection.<sup>72</sup> The biggest drawback of presumed consent laws is that even when the deceased have clearly indicated opposition to donation, consent is still presumed.<sup>73</sup> Critics take exception to the presumed consent laws because the concept of “silence equals consent” is a hard one to accept.<sup>74</sup> Recognizing the shortcomings of the presumed consent principle, many European countries are turning away from presumed consent.<sup>75</sup>

### III. THE TEXAS RESPONSE

#### A. *Texas Anatomical Gift Act and Texas Transportation Code § 521.405*

Texas adopted the Uniform Anatomical Gift Act (TAGA) in 1969.<sup>76</sup> This act closely follows the language of the UAGA, which sets forth the manner in which an individual can donate his body.<sup>77</sup> An

65. *See id.*

66. *Id.* at 22.

67. *See id.* at 22.

68. *See id.* at 21-22.

69. *See* Jefferies, *supra* note 10, at 640.

70. *See id.*

71. *See id.* at 639-40.

72. *See id.* at 640-42.

73. *See* Gorsline & Johnson, *supra* note 6, at 22.

74. *Id.*

75. *See id.* at 35.

76. *See* Eric C. Sutton, *Giving the Gift of Life: A Survey of Texas Law Facilitating Organ Donation*, 22 ST. MARY’S L.J. 959, 969 (1991) (providing an overall discussion of the Texas Anatomical Gift Act, codified as TEX. HEALTH & SAFETY CODE ANN. § 692.001-.016 (Vernon 1992)).

77. *See* TEX. HEALTH & SAFETY CODE ANN. § 692.003 (Vernon 1992).

individual may do so by will or by another document.<sup>78</sup> The statute also delineates who may execute a gift in place of the decedent if there is no actual notice that the decedent had contrary intentions.<sup>79</sup>

Perhaps the most important aspect of the TAGA are the hospital protocols the act sets forth in the 1987 addition.<sup>80</sup> Hospitals are now required to “develop a protocol for identifying potential organ and tissue donors from among those who die in the hospital.”<sup>81</sup> At or near the time of death, a hospital representative must inquire whether the patient is an organ donor.<sup>82</sup> If the patient is not a donor, the hospital representative must advise the patient’s representative about the options of organ donation.<sup>83</sup> In these discussions, communication with a patient’s family requires sensitivity to their beliefs and circumstances.<sup>84</sup> However, hospital personnel are required to make a notation in the decedent’s medical records that the inquiry was made.<sup>85</sup>

The TAGA also places a limitation on civil and criminal liability for persons (medical examiners and hospital personnel) who act in good faith in accordance with their duties.<sup>86</sup> Good faith is not clearly defined in the statute, but it is described as “making a reasonable effort to locate and contact the member or members of the highest priority class [referring to the next of kin or personal representative] who are available at or near the time of death.”<sup>87</sup>

In 1995, the Texas Legislature enacted Section 521.405(b) of the Transportation Code, which states:

If a person listed in Section 692.004, Health and Safety Code, is not contacted within four hours after death is pronounced, the medical examiner may permit the removal of the heart, lung, kidney, liver, or other organ or tissue that requires a patient support system to maintain the viability of the organ or tissue.<sup>88</sup>

The following, in order of priority, must be notified within four hours according to Section 692.004 of the Texas Anatomical Gift Act: decedent’s spouse, adult child, either parent, adult brother or sister, decedent’s guardian or any other person authorized to dispose of the body.<sup>89</sup> The situation in which this particular statute would take effect

78. *See id.* § 692.003(b).

79. *See id.* § 692.004. Individuals in the following order may donate “all or any part of the decedent’s body”: the spouse of the decedent; an adult child of the decedent; a parent of the decedent; a brother or sister of the decedent; the decedent’s guardian; or a person authorized to dispose of the body. *Id.*

80. *See Sutton, supra* note 76, at 973-74.

81. TEX. HEALTH & SAFETY CODE ANN. § 692.013(a) (Vernon 1992).

82. *See id.* § 692.014(a).

83. *See id.* § 692.014(d).

84. *See id.* § 692.013(b)(2).

85. *See id.* § 692.013(b)(4).

86. *See Sutton, supra* note 76, at 973-74.

87. *Id.* at 976-77.

88. TEX. TRANSP. CODE ANN. § 521.405(b) (Vernon 1999).

89. TEX. HEALTH & SAFETY CODE ANN. § 692.004 (Vernon 1992).

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is one where the decedent is brain-dead, but the body is maintained by mechanical means (patient support system). Section 521.405(b) does not come into play until “brain death” or “cardiac death” occurs as required by section 521.404.<sup>90</sup>

This is a troublesome statute. The thought of the state taking a person’s organs without consent is an uneasy one. It is counterintuitive. If a person desires to donate their organs, they sign a card indicating that desire. If a person does not want to donate, what is their recourse? They run the risk of having their organs harvested anyway. Yet the state is willing to deprive a person of their decision without setting up a system that allows those who do not wish to donate to so indicate.

Even assuming the public interest in procuring organs for transplantation is paramount, the statute is poorly written and needs modification. The statute allows medical examiners to arbitrarily decide whether a person’s organs will be donated without setting any guidelines. Some medical examiners may decide that a four hour search after the time of death is enough to satisfy the statute, others may not. Is the medical examiner required to take into account the useful life of the organ or tissue? Hopefully, the medical examiner is prudent and would do so, but he is not required to do so by the statute.

#### B. *Statute Violates a Quasi-Property Interest*

In early English common law cases, the decedent could not dispose of his body by will because there was no property right in a dead body.<sup>91</sup> However, in 750 A.D., the Church determined that it had jurisdiction over the dead.<sup>92</sup> In 1857, the court for Crown Cases convicted a son for removing his mother’s corpse from her grave.<sup>93</sup> The court for Crown Cases rationalized their judgment by holding that there were no property rights to a corpse.<sup>94</sup> However, early American courts granted the next of kin a quasi-property interest in the remains.<sup>95</sup> Most of these cases found a quasi-property right in a corpse in determining who would take possession until burial.<sup>96</sup>

Presently, from a legal standpoint, the issue of whether there is a property interest in dead bodies is unsettled.<sup>97</sup> American courts have

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90. *Id.* § 521.404 (“If the person meets the medical criteria for organ or tissue donation, the receiving hospital or facility shall immediately notify a qualified organ or tissue procurement organization as soon as brain death or cardiac death occurs.”).

91. *See* Brotherton v. Cleveland, 923 F.2d 477, 481 (6th Cir. 1991) (citing Williams v. Williams, 20 Ch.D. 659, 665 (1882)).

92. *See* Gorsline & Johnson, *supra* note 6, at 9.

93. *See* Regina v. Sharpe, 169 Eng. Rep. 959, 960 (1857).

94. *See id.*

95. *See* Gorsline & Johnson, *supra* note 6, at 10.

96. *See id.*

97. *See* Bray, *supra* note 53, at 220.

not recognized absolute property rights in corpses.<sup>98</sup> According to several courts, the state must assert a compelling interest before it can take organs, recognizing that the next of kin's right to dispose of the body is substantial.<sup>99</sup>

Quasi-property interests regarding human bodies can be analyzed under the Constitution.<sup>100</sup> The United States Supreme Court has held that although property interests are not defined by the Constitution, "they are created and their dimensions are defined by the existing rules or understandings that stem from an independent source such as state law rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."<sup>101</sup> Moreover, the Fourteenth Amendment to the United States Constitution does not allow states to deprive a person of life, liberty, or property without due process of law.<sup>102</sup> Plaintiffs, in order to assert a valid due process claim, must prove that under color of state law, they were deprived of a property interest.<sup>103</sup> Furthermore, it must be shown that the conduct was caused by "established state procedure rather than random and unauthorized action."<sup>104</sup> Property has been described as "the totality of interests through which a person has a relationship to some tangible or intangible object."<sup>105</sup> Moreover, it is said that property is not a static concept but one that evolves.<sup>106</sup> For instance, property rights once included people as slaves and wives as chattels.<sup>107</sup>

The Sixth Circuit Court of Appeals, in *Brotherton v. Cleveland*,<sup>108</sup> found that surviving relatives have an interest that rises to a "legitimate claim of entitlement" in a corpse under the due process clause.<sup>109</sup> In *Brotherton*, a widow claimed that her deceased husband's corneas were wrongfully removed.<sup>110</sup> Steven Brotherton was killed in an automobile accident.<sup>111</sup> The hospital where he was taken

98. See Gorsline & Johnson, *supra* note 6, at 10.

99. See *State v. Powell*, 497 So. 2d 1188, 1191 (Fla. 1986) (explaining that corneal tissue can be removed from a corpse without notice to the next of kin because the state's interest in providing sight to the blind is great); cf. *People v. Roehler*, 213 Cal. Rptr. 353, 381 (Cal. Ct. App. 1985) (explaining that in order to intrude on a family's expectation of privacy in their next of kin regarding the performance of an autopsy, there must be a compelling state interest).

100. See 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, 436 (1992).

101. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

102. U.S. CONST. amend. XIV, § 1.

103. See *Parratt v. Taylor*, 451 U.S. 527, 536-37 (1981), *overruled on other grounds*, *Daniels v. Williams*, 474 U.S. 327 (1986).

104. *Hudson v. Palmer*, 468 U.S. 517, 532 (1984).

105. Scarmon, *supra* note 100, at 436.

106. See *id.* (citing RESTATEMENT OF PROPERTY § 5 cmt. e (1936)).

107. See *id.* at 436-37.

108. 923 F.2d 477 (6th Cir. 1991).

109. *Id.* at 481-82.

110. See *id.* at 478-79.

111. See *id.* at 478.

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asked his widow if she would consider making an anatomical gift.<sup>112</sup> Because of her husband's aversion to making an anatomical gift, she refused.<sup>113</sup> The hospital documented her refusal in her husband's medical records.<sup>114</sup> Brotherton's body was taken to the coroner's office because his death was considered a possible suicide.<sup>115</sup> After the autopsy, the coroner permitted an eye bank to remove Brotherton's corneas without inquiring whether there was an objection to the removal of the eyes.<sup>116</sup> The widow filed a claim under 42 U.S.C. § 1983 "alleging that her husband's corneas were removed without due process of law and in violation of the equal protection clause."<sup>117</sup> The court agreed with the widow and held that the harvesting of Brotherton's corneas constituted a deprivation of an entitlement, or property right, which required due process protection.<sup>118</sup>

To analyze whether there is a constitutional basis for property rights in bodies, Texas must recognize that right. Currently, there are no Texas cases on point concerning due process claims in which a medical examiner has procured a body or an organ. Texas also has not affirmatively stated whether it recognizes a quasi-property interest in a corpse.<sup>119</sup>

Although not affirmatively recognizing a quasi-property interest, Texas case law implies such a right by protecting the next of kin's right to preserve the body in the same condition "in which death leaves

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112. *See id.*

113. *See id.*

114. *See id.*

115. *See id.* at 478.

116. *See id.*

117. *Id.* at 478-79. Several states have recognized a constitutionally protected property interest in dead bodies. *See Whaley v. County of Tuscolosa*, 58 F.3d 1111, 1117 (6th Cir. 1995) (asserting that Michigan recognizes the right of the survivors to possess the body of the deceased for burial and that it qualifies as a due process claim); *Arnaud v. Odom*, 870 F.2d 304, 309 (5th Cir. 1989) (recognizing a due process property interest in dead bodies); *Fuller v. Marx*, 724 F.2d 717, 719 (8th Cir. 1984) (holding that the next of kin's quasi-property right in a dead body, recognized by Arkansas, qualifies as a due process property right); *Mansaw v. Midwest Organ Bank*, No. 97-0271-CV-W-6, 1998 WL 386327, at \*4 (W.D. Mo. July 8, 1998) (adopting the *Brotherton* court's analysis and holding that Missouri recognizes a constitutionally protected, quasi-property right in controlling the disposal of dead bodies by next of kin); *Wells v. Nuwayhid*, No. 96-C-4456, 1996 WL 674149, at \*3 (N.D. Ill. Nov. 19, 1996) (holding that parents of a stillborn baby had the right of possession to their baby's remains). *But see Florida v. Powell*, 497 So. 2d 1188, 1193 (Fla. 1986) (noting that survivors have "no protectable or liberty property interest in the remains of their decedents. . . ."); *Georgia Lions Eye Bank, Inc. v. Lavant*, 335 S.E.2d 127, 128 (Ga. 1985) (noting that the rights to a decedant's body are not constitutionally protected); *Crocker v. Pleasant*, 727 So. 2d 1087, 1089 (Fla. Dist. Ct. App. 1999) (applying *Powell* but certifying a question to the Florida Supreme Court to clarify if *Powell* precluded all section 1983 claims based on interference with a dead body).

118. *See Brotherton*, 923 F.2d at 482.

119. Texas does have an older case, *Foster v. Foster*, 220 S.W. 215 (Tex. Civ. App.—Texarkana 1920, no writ), which held that a widow does not have an *absolute* property right in the body of her deceased husband. *See id.* at 218.



it.”<sup>120</sup> The court in *Terrill v. Harbin* held that “[a]ny interference with such a right of possession of the body of a deceased by mutilation or otherwise disturbing the body without the consent of the next of kin is an actionable wrong for which a claim for damages may be maintained.”<sup>121</sup> Furthermore, an individual may decide how his body is to be disposed of after death.<sup>122</sup>

Additionally, in the context of section 521.405(b) of the Transportation Code, if a medical examiner takes organs from a deceased individual, the next of kin can claim deprivation of an interest in the organs of that individual.<sup>123</sup> The interest is not so much in the organs themselves, but in the right to bury the deceased without the state mutilating the body or in a way other than which death left it.

According to the United States Supreme Court, it must be shown that the conduct depriving an individual of due process regarding a property interest was caused by an “established state procedure rather than random and unauthorized action.”<sup>124</sup> In Texas, section 521.405 of the Transportation Code establishes a state procedure that authorizes medical examiners to procure organs without consent.<sup>125</sup> This state procedure, combined with the above factors, creates a constitutionally protected interest.<sup>126</sup>

### C. Statute Violates American Notions of Free Will

Free will as a theory “embraces the idea that individuals are self-determining agents, capable of being held morally responsible for their chosen actions.”<sup>127</sup> Furthermore, free will “does not focus so much on whether an act was freely chosen, but whether the individual had the freedom to make the choice.”<sup>128</sup> It can be argued that, since free will is valued highly in our society, it rises above the need for

120. *Terrill v. Harbin*, 376 S.W.2d 945, 947 (Tex. Civ. App.—Eastland 1964, writ dismissed).

121. *Id.* at 947 (citing *Love v. Aetna Cas. & Surety Co.*, 99 S.W.2d 646, 650 (Tex. Civ. App.—Beaumont 1936, writ dismissed)).

122. See TEX. HEALTH & SAFETY CODE ANN. § 711.002(g) (Vernon Supp. 2000).

123. See Tex. Transp. Code Ann. § 521.405(b) (Vernon 1999).

124. *Hudson v. Palmer*, 468 U.S. 517, 532 (1984).

125. See TEX. TRANSP. CODE ANN. § 521.405(b) (Vernon 1999).

126. See *supra* notes 117-122 and accompanying text.

127. Rachel J. Littman, *Adequate Provocation, Individual Responsibility, and the Deconstruction of Free Will*, 60 ALB. L. REV. 1127, 1131 (1997).

128. *Id.* True free will is limited by an individual’s “internal nature and original purpose.” Richard Lowell Nygaard, *Freewill, Determinism, Penology, and the Human Genome: Where’s a New Leibniz When We Really Need Him?*, 3 U. CHI. L. SCH. ROUNDTABLE 417, 424 (1996). “I believe we have a free will, but that it is limited to a degree that depends upon each person’s genetic, physical, mental, and emotional makeup, the sum of one’s life experiences, and the environment and circumstances in which the will is being exercised.” *Id.* Basically, our conscience, our past, and our values determine the choices we make. Such is the very basis of our democratic society.

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“general advancement of scientific knowledge.”<sup>129</sup> Widely recognized is the notion that Americans have freedom to make certain decisions about their lives. Freedom to contract, marry, and to have children, are among the choices we, as Americans, are able to make.<sup>130</sup> The same should be said about organ donation.

Of course, one can argue that there are restrictions upon those freedoms<sup>131</sup> and that we are restricted likewise from choosing whether to donate our organs when our personal representatives cannot be located. This is a flawed argument, however, because it presupposes that individuals assume the risk that medical examiners may allow procurement for transplantation of the individual's organs. For instance, a pregnant woman does not assume the risk that her baby will be aborted without consent. Moreover, men and women do not assume the risk that they will be forced to marry someone they do not want to without consent.<sup>132</sup> Similarly, individuals have a right to donate their organs, but they should not be forced to exercise that right in the absence of consent. If an individual has not exercised that right,

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129. Scarmon, *supra* note 100, at 442. As a country, the United States has historically moved from oppression towards free will. For example, “women and slaves were denied full legal responsibility because they were thought to lack the capacity to freely exercise their will.” Ronald J. Rychlak & Joseph F. Rychlak, *Mental Health Experts on Trial: Free Will and Determinism in the Courtroom*, 100 W. VA. L. REV. 193, 197 (1997) (footnotes omitted). Today, most adults “are legally presumed to have the ability to recognize the consequences of their actions and behave accordingly.” *Id.*

130. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”); E. ALLAN FARNSWORTH, *CONTRACTS* § 1.7 (2d ed. 1990) (“From a utilitarian point of view, freedom to contract maximizes the welfare of the parties and therefore the good of society as a whole. From a libertarian point of view, it accords to individuals a sphere of influence in which they can act freely.”); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“if the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion to matters so fundamentally affecting a person as the decision to bear or beget a child.”); see generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-10 (2d. ed. 1988).

131. For instance, contracts must be fair and just. See *TEX. BUS. COM. & CODE ANN.* § 2.302 (Vernon 1994) (allowing courts to refuse to enforce contracts with unconscionable provisions, enforce the contract only after severing the unconscionable provision, or limit the application of the unconscionable clause). Moreover, individuals are restricted from marrying certain people, such as those who are underage, see *TEX. FAM. CODE ANN.* §§ 2.101-103 (Vernon 1998) (allowing underage marriages only with parental permission or by court order), or who are relatives. See *TEX. FAM. CODE ANN.* §§ 2.004-2.009 (Vernon 1998) (prohibiting the county clerk from issuing licenses to those who are, *inter alia*, related to one another). Additionally, the right to terminate a pregnancy is limited. See *TEX. FAM. CODE ANN.* § 33.002-.003 (Vernon Supp. 2000) (allowing underage abortions only with parental notice or judicial approval).

132. While some cultures arrange marriages, in the United States, a marriage cannot be forced upon a person. See, e.g., *TEX. FAM. CODE ANN.* § 6.107 (Vernon 1998) (providing for the annulment of a marriage obtained through “fraud, duress, or force. . .”).

and has not registered with an organ procurement agency, their organs should not be procured.

The courts have little problem upholding the notion that live donors cannot be compelled to donate their tissues or organs. The case of *McFall v. Shrimp*<sup>133</sup> is illustrative. Here, a patient needed a bone marrow transplant and the only compatible donor was a close relative.<sup>134</sup> When the cousin refused to donate his marrow, the patient sought an injunction compelling his cousin to donate. In refusing the patient's request, the court held:

[T]he common law has consistently held to a rule which provides that one human being is under no legal compulsion to give aid or rescue or to take action to save another . . . . [T]he rule is founded upon the very essence of our free society . . . . For our law to compel the Defendant to submit to an intrusion of his body would change the very concept and principle upon which our society is founded. To do so would defeat the sanctity of the individual and would impose a rule which would know no limits, and one could not imagine where the line would be drawn.<sup>135</sup>

Evidently, in enacting Section 521.405,<sup>136</sup> Texas has drawn the line at the time of the person's death. However, this notion of taking organs without consent after death—i.e., presumed consent—goes against other statutes in Texas, which give the decedent or his next of kin the right to dispose of his body. For example, the Texas Health and Safety Code allows an individual to dispose of his body in a will, a prepaid funeral contract, or by a signed written instrument.<sup>137</sup> If the decedent did not leave any written instructions concerning the disposition of his body, his next of kin has the “right to control the disposition.”<sup>138</sup> This would seem to indicate that an individual or his next of kin have the right to choose how to dispose of the body. For a medical examiner to take organs without consent of the decedent or the next of kin, goes against this proposition.

#### D. Section 521.405(b) Conflicts with the UAGA

The fact that a person may choose whether to donate their organs implies that the system is voluntary. Texas adopted the language of the UAGA very closely. The UAGA clearly is based on encouraged voluntarism and not presumed consent.<sup>139</sup> After an individual's

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133. 10 Pa. D. & C.3d 90 (Pa. C.P. Allegheny County Ct. 1978).

134. *See id.* at 90.

135. *Id.* at 91.

136. TEX. TRANSP. CODE ANN. § 521.405(b) (Vernon 1997).

137. *See* TEX. HEALTH & SAFETY CODE ANN. § 711.002(g) (Vernon Supp. 2000).

138. *Id.*

139. *See* Gorsline & Johnson, *supra* note 6, at 20 (noting the United States system is based on “encouraged voluntarism”).

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death, the UAGA gives the individual a legal right to decide the disposition of their bodies.<sup>140</sup> An individual's intent is paramount.<sup>141</sup>

Texas, in essence, adopted a voluntary system and then contradicted itself by adopting Section 521.405, which is basically a presumed consent type of statute. In the absence of any indication that a person may not wish to donate, the medical examiner constructively presumes that the decedent consented to donation. However, Texas's presumed consent statute is not generally known by the public. More than likely, the average citizen believes that the only way their organs can be donated is by consenting to organ donation by obtaining an organ donor card. Little would they suspect that in situations where their next of kin cannot be located within a certain time period, Texas can decide for them whether their organs will be donated for transplantation purposes. Basically, this statute negates the voluntary system that Texas has purportedly adopted because it takes the decision-making power out of citizens' hands in certain situations. There is no system in Texas to allow those who do not want to donate their organs to express that intention. If Texas wants presumed consent laws, it needs to provide a registry for those who do not wish to donate their organs and make that system known to the public.

This particular statute also differs from the UAGA in that it contains no language requiring the medical examiner to make "a reasonable effort, taking into account the useful life of the [body] part, to locate and examine the decedent's medical records and inform [the next of kin or personal representative] of their option to make, or object to making, an anatomical gift."<sup>142</sup> In fact, the statute omits any language concerning reasonableness. The statute merely provides for a four-hour search that does not require that the medical examiner take into account the useful life of the body part. The UAGA version seems to take a totality of the circumstances approach in determining whether a medical examiner can take an organ, whereas Texas allows procurement if certain circumstances are present.<sup>143</sup> Basically, in Texas the only inquiry into whether a medical examiner should take organs is if four hours has elapsed after death is pronounced and if the decedent is on a patient support system.

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140. *See id.* at 32.

141. *See id.*

142. UNIF. ANATOMICAL GIFT ACT § 4(a)(2) (amended 1987), 8A U.L.A. 43 (1993).

143. Those circumstances are that the decedent is on a patient support system and that four hours have elapsed since the person has been declared dead. *See* TEX. TRANSP. CODE ANN. § 521.405(b) (Vernon 1998).

E. *Section 521.405(b) is Unreasonable in its Application*

1. Four Hours is Not Enough Time to Search for Family Members

Texas is the only state that has such a restrictive time-frame of four hours to search for the next of kin. Other states with similar statutes require that medical examiners conduct a reasonable search.<sup>144</sup> California is the only other state that has a specified time limit.<sup>145</sup> However, California's time limit of twelve hours is more reasonable than the Texas time limit. Four hours is not always enough time to find the next of kin as in situations where the deceased is unidentified or next of kin cannot be located because they are out of town or away from a telephone.

In July of 1999, the impracticality of this statute was proven in Fort Worth. An unidentified man was found unconscious in a far southeast Fort Worth field in the early hours of July 22.<sup>146</sup> Doctors declared him brain dead at 5:30 p.m. that same day.<sup>147</sup> At that point, section 521.405(b) took effect. The organ bank officials tried to identify the man and his family, but their efforts proved futile.<sup>148</sup> The medical examiner was hesitant to release the decedent's organs<sup>149</sup> and commented that four hours is not enough time to identify a John Doe.<sup>150</sup> Lawyers from the organ bank went to court at 1:00 p.m. on July 23 seeking an order to compel the Tarrant County Medical Examiner to release the organs for donation.<sup>151</sup> After state District Judge McGrath was satisfied that a reasonable search for the next of kin was conducted, he granted the order at 10:25 p.m. that night.<sup>152</sup> Early the

144. See ARIZ. REV. STAT. ANN. § 36-844 (West Supp. 1999); ARK. CODE ANN. § 20-17-617 (Michie 2000); CAL. HEALTH & SAFETY CODE § 7151.5 (West 1998); HAW. REV. STAT. ANN. § 327-4 (Michie 1996); IDAHO CODE § 39-3405 (1993); IND. CODE ANN. § 29-2-16-4.5 (West Supp. 1999); IOWA CODE ANN. § 142C.4A (West 1997); LA. REV. STAT. ANN. § 33:1565 (West 1988 & Supp. 2000); MD. CODE ANN., EST. & TRUSTS § 4-509 (Supp. 1999); MINN. STAT. ANN. § 525.9213 (West Supp. 1999); MISS. CODE ANN. § 41-61-71 (1999); MONT. CODE ANN. § 72-17-215 (1999); N.H. REV. STAT. ANN. § 291-A:5 (1999); N.M. STAT. ANN. § 24-6A-4 (Michie 1997); N.D. CENT. CODE § 23-06.2-04 (1991); OR. REV. STAT. § 97.956 (1999); R.I. GEN. LAWS § 23-18.6-4 (1996); UTAH CODE ANN. § 26-4-23 (1995); WIS. STAT. ANN. § 157.06(4) (West Supp. 1999).

145. See CAL. HEALTH & SAFETY CODE § 7151.5 (West Supp. 2000); see also *Jacobson v. Marin Gen. Hosp.*, 963 F. Supp. 866, 872 (N.D. Cal. 1997) (holding that a 48-hour search for a man's parents who lived in Denmark was reasonable where the statute only required a 12-hour search).

146. See Charlotte Huff, *When Every Second Counts*, FORT WORTH STAR-TELEGRAM, July 31, 1999, at 1A.

147. See *id.*

148. See *id.*

149. See Deanna Boyd, *Five Patients Receive Organs From John Doe Donation Ordered by Local Judge*, FORT WORTH STAR-TELEGRAM, July 25, 1999, at 1B.

150. See Huff, *supra* note 146, at 1A.

151. See *id.*

152. See Charlotte Huff & Deanna Boyd, *Organs of Brain-dead Patient Granted—A Court Order is Given Under a Little-Used State Law Regarding Unidentified Bodies*, FORT WORTH STAR-TELEGRAM, July 24, 1999, at 1B.

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next morning, five of the man's organs were harvested and sent to area hospitals for transplantation.<sup>153</sup>

Over fifteen hours elapsed from the time the hospital pronounced brain-death to when the judge ordered the organs' release. Several additional hours passed before the organs were harvested. It was not until six days later that the man was identified through a second set of fingerprints as Arthur Forge Jr. of Fort Worth.<sup>154</sup>

As this case illustrates, ordinarily four hours is not enough time to identify a John Doe and find his next of kin.<sup>155</sup> Fortunately, the trial judge employed a totality of the circumstances approach in deciding to allow removal of Forge's organs. Unfortunate would be the situation where a medical examiner allowed the removal of organs only after four hours and the family subsequently disapproved of the action.

## 2. A Neutral Magistrate Should Determine Whether a Reasonable Search was Conducted

In the previous example, the medical examiner chose not to exercise his authority and release Forge's organs.<sup>156</sup> Because the medical examiner made that decision, the only recourse the organ bank had was to file a motion to have the organs released.<sup>157</sup> An objective party, Judge McGrath, determined after *nine-and-one-half hours* of deliberation, whether the search for the man's family was reasonable.<sup>158</sup>

Unsettling is the fact that a medical examiner has the power to release organs for donation in only four hours from the time of death. Should a medical examiner have that kind of power? Evidently, the Legislature believes so. What if the medical examiner yields to pressure put upon him or her by the organ procurement agency to release the organs after four hours from time of death? Under the statute the medical examiner would have no liability because he is given the power to release those organs. However, the question is did the medi-

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153. See Boyd, *supra* note 149, at 1B.

154. See Charlotte Huff, *Fingerprint Tests Identify Organ Donor-Bedford Police Department Technician Makes Match*, FORT WORTH STAR-TELEGRAM, July 29, 1999, at 1B. Forge's nephew reported him missing on July 26, three days after Forge's organs were harvested. Despite the fact that there was a missing person's report on Forge, he was not identified because of this report. Forge was identified after a second set of fingerprints was taken. See *id.*

155. In this case, 32 hours of searching did not identify the John Doe or locate his family. See Huff, *supra* note 146, at 1A. The County Medical Examiner felt that more than four hours is necessary to locate the family. *Id.* ("From my experience, you do require a period longer than four hours to identify someone," [Tarrant County Medical Examiner Nizam Peerwani] said.).

156. See Boyd, *supra* note 149, at 1B.

157. See *id.*

158. See *id.* Judge McGrath was quoted as saying: "You make an equitable balance—the benefits vs. the potential objections." *Id.*

cal examiner take into account the useful life of the organ and whether a reasonable search for the next of kin was conducted, or was the decision made due to pressure from the organ procurement agency? This question would be solved if a neutral magistrate made the final decision to release the organs, taking into account the reasonableness of the search, the useful life of the organs, and the medical examiner's opinion regarding the circumstances.

#### F. *Alternatives*

##### 1. Texas Should Allow Individuals to Disclose Preference on Driver's Licenses

As mentioned in Part I, Texas no longer allows individuals to disclose on their driver's licenses whether they wish to donate their organs.<sup>159</sup> The procedure in place presently is that the Department of Public Safety (DPS) workers give interested individuals a donor card application provided by organ procurement agencies. In order for individuals to donate their organs, they must fill out a donor card and send it to the organ procurement agency.

There are definite problems with this system. First, it assumes that an average person on the street will know that he or she will have to obtain a donor card from the DPS in order to donate. A person may believe that since they had consented to donation on their driver's license in the past that they will continue to do so. Second, there is a chance that the DPS employee may not inform all individuals of the donation process. The Transportation Code does not specifically indicate how the donor cards will be distributed, only that the department will "provide a means to distribute donor cards."<sup>160</sup> If the DPS employee does not give an individual a donor application card, it may be six years before that person will be exposed again to organ donation information, thereby decreasing the chance that person will donate.<sup>161</sup> Additionally, people live busy lives and even assuming that they have the proper information in hand, it is no guarantee that they will fill out the application and send it in. Moreover, the application may get lost or be forgotten. Having the opportunity to say yes or no to organ donation eliminates the foregoing problem.

##### 2. National Registry Compiled by Way of Income Tax Returns

Another solution is to create a national registry of organ donors. To do this, each person filing an income tax form will indicate on the

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159. See TEX. TRANSP. CODE ANN. § 521.401 (Vernon 1999).

160. See *id.*

161. Texas driver's licenses are now renewed every six years as opposed to the previous practice of renewing every four years. See *id.* § 521.271(b). However, the Department of Public Safety may stagger license expirations so that a proportional number of licenses expire every year. See *id.* § 521.101 historical note [Acts 1997, 75th Leg., ch. 1372, § 8].

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form their willingness or unwillingness to donate. Organ procurement agencies as well as police, medical examiners, and hospitals will have instant computer access to the organ registry. Although the system would not be perfect (due to computer malfunctions) more people will participate simply because most people have to file tax returns. Consequently, there would be little need to procure organs without consent. This system used in conjunction with the above system of indicating preferences on driver's licenses, would reach many more people than any system in place now does.

### 3. Increased Public Education

Educating the public about organ donation would help increase the supply. Physicians should, on a regular basis, talk to their patients about donating their organs upon death. Let's face it, death is not the most enjoyable thing to talk about. However, death is inevitable. Who best can educate a person concerning their options to donate other than a doctor? Moreover, it is best to discuss these issues before a person becomes seriously ill. Studies have shown that doctors are reluctant to approach a bereaving family.<sup>162</sup> Patients approached while healthy may be more willing to donate their organs. Doctors can have their patients who are interested in donating fill out a donor card in the office and then forward that information to an organ procurement agency.

Public education should also be focused on promoting family discussion about donation.<sup>163</sup> The focus should not primarily rest on getting people to sign organ donation cards alone, but should also emphasize the importance of getting family members to discuss organ donation.<sup>164</sup> A 1992 Gallup survey indicated that ninety-three percent of pollers would be "somewhat" or "very likely" to donate a deceased family member's organs if the deceased had expressed to them that desire prior to death.<sup>165</sup>

Many times, families do not discuss organ donation because it does not occur to them to do so.<sup>166</sup> Perhaps the organ donor card itself could provide a stimulus for family discussion of the organ donation issue.<sup>167</sup> The donor card, if redesigned to include instructions to discuss one's desire to donate with family members and to require that one family member sign the card, may promote family discussions.<sup>168</sup>

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162. See Robert M. Tenery Jr., *Nation Must Face Organ Donation in a Meaningful Way*, 40 AM. MED. NEWS, Mar. 3, 1997, at 20.

163. See DeJong, *supra* note 18, at 463.

164. See *id.*

165. *Id.*

166. See *id.*

167. See *id.*

168. See *id.*



## CONCLUSION

Texas should repeal Section 521.405 of the Transportation Code. At the very least, the Legislature should provide a longer time period to search for the decedent's next of kin or personal representative after death is pronounced. Additionally, the statute should mandate the medical examiner to take into account the totality of the circumstances in determining whether the medical examiner permits procurement of an organ.<sup>169</sup>

Texas should not take away our right to determine the manner in which our bodies are to be handled after death. Our body is the thing most personal to us as humans. The decision to donate one's organs is a very personal one and should not be determined by the state. It is wrong for the state to take our organs and presume that is the decision we would have made for ourselves had we had the opportunity.

Perhaps those who do not desire to donate should tattoo "please do not take my organs" across their chest. In a less extreme fashion, those who do not want to donate should at least carry a card in their wallets or purses indicating that sentiment. In the event that their relatives cannot be located within four hours of death, it may be the only way their wishes will be respected.

*Jennifer Rutherford-McClure*

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169. In determining whether the totality of the circumstances approach is used, only the language on the face of the statute is analyzed. Perhaps in practice, a medical examiner would ordinarily have the prudence to take into account all the circumstances involved before permitting procurement of an organ.