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# The Revised Uniform Anatomical Gift Act: Bringing “California Donation Law up to Contemporary Medical, Legal, and Bioethical Practices”<sup>1</sup>

Jacqueline Zee

## Code Sections Affected

Health and Safety Code §§ 7150, 7150.10, 7150.15, 7150.20, 7150.25, 7150.30, 7150.35, 7150.40, 7150.45, 7150.50, 7150.55, 7150.60, 7150.65, 7150.70, 7150.75, 7150.80, 7150.85, 7150.90, 7151.10, 7151.15, 7151.20, 7151.25, 7151.30, 7151.35, 7151.40 (new), §§ 7150, 7150.1, 7150.2, 7150.5, 7151, 7151.5, 7152, 7152.5, 7152.7, 7153, 7153.2, 7153.5, 7154, 7154.5, 7155, 7155.5, 7155.7, 7156, 7156.5 (repealed); Vehicle Code §§ 12811, 13005 (amended).  
AB 1689 (Lieber & Berryhill); 2007 STAT. Ch. 629.

## I. INTRODUCTION

Humans began experimenting with organ and tissue replacement centuries ago, with Hindus using skin from foreheads to repair mutilated noses as far back as the sixth century, and Italians repairing lip, nose, and ear defects with forehead and forearm skin in the fourteenth century.<sup>2</sup> The first human-to-human organ transplant was conducted in the United States in 1911, and such transplantations continued to improve throughout the twentieth century.<sup>3</sup> Great strides occurred in the late 1970s with the invention of an immunosuppressive drug that “led to an explosion in the number of organ transplants in the 1980s and 1990s.”<sup>4</sup> Xenotransplantation, the use of animal organs to replace human organs, developed in the late twentieth century simultaneously with the use of artificial organs.<sup>5</sup>

Centuries of technological development have paid off: “As of the end of 2004, there were 153,245 persons living with a functioning organ transplant in the United States. . . . a 1.7-fold increase since 1996.”<sup>6</sup> And in 2005 alone, there were 27,527 organ transplants in the United States.<sup>7</sup> Unfortunately, at the same time technology was making it easier to transplant organs, the supply of organs

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1. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1689, at 4 (Aug. 23, 2007).

2. Laurel R. Siegel, Comment, *Re-engineering the Laws of Organ Transplantation*, 49 EMORY L.J. 917, 919 (2000).

3. *Id.* at 920.

4. *Id.* at 920-21.

5. *Id.* at 921.

6. U.S. DEP'T OF HEALTH & HUMAN SERVS., 2006 OPTN/SRTR ANNUAL REPORT I-1 (2006), [http://www.ustransplant.org/annual\\_Reports/current/chapter\\_i\\_forprint.pdf](http://www.ustransplant.org/annual_Reports/current/chapter_i_forprint.pdf) [hereinafter OPTN REPORT] (on file with the *McGeorge Law Review*).

7. *Id.*

for transplantation got smaller.<sup>8</sup> In 2005, approximately 62,294 people were awaiting kidneys, 17,168 were awaiting livers, and 6,248 were awaiting a heart, lung, or both.<sup>9</sup> Our aging population accounts, in part, for the 96,983 people who were organ donation waiting list candidates as of July 19, 2007.<sup>10</sup> Nearly 20,000 of those on the waiting list are Californians, representing twenty-one percent of the national total.<sup>11</sup>

The shortage of organ donations is often attributed to problems with public understanding and confidence in the organ donation process.<sup>12</sup> Media hype in the form of medical thrillers and prime time news stories on “organ donations run-amok [has] spurred misconceptions” and instilled superstitions and distrust that ultimately leads to a potential donor’s unwillingness to donate.<sup>13</sup> Fears that a potential donor’s intended wishes will not be followed or that they will not receive the best medical care in order that their viable organs might be procured for donation are cited as some of the reasons for not donating.<sup>14</sup> And in light of an ever-mobile society, it makes matters worse that states cannot seem to agree on a uniform process for organ and tissue donation, so potential donors who have executed the appropriate donation documents in one state may find themselves having to start over again if they move to another state.<sup>15</sup> The Uniform Anatomical Gift Act was enacted to address these fears and concerns, and provide a solution for the increasing gap between the supply of and demand for anatomical donations.<sup>16</sup>

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8. See *id.* at 2 (noting that the number of wait-listed candidates for organ transplants rose fifteen percent between 1996 and 2005).

9. OPTN REPORT, *supra* note 6, at 2.

10. The Organ Procurement and Transplantation Network, <http://www.optn.org/> (last visited Sept. 21, 2007) (on file with the *McGeorge Law Review*).

11. Donate Life Cal., About Us, <http://www.donatelifecalifornia.org/about/> (last visited Sept. 21, 2007) (on file with the *McGeorge Law Review*).

12. 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 KAN. J.L. & PUB. POL’Y 640, 640 (2000).

13. *Id.*

14. See generally Robert W. Jinks, *California’s Response to the Problems of Procuring Human Remains for Transplantation*, 57 CAL. L. REV. 671, 687-91 (1969).

Perhaps much of the doubt about the ultimate wisdom of transplantation is rooted in the fear that using parts of one human being to save another can be subject to great abuse. . . . Possible premature pronouncements of death would appear to constitute the most feared abuse in the transplant field.

*Id.*

15. Cf. Tracie M. Kester, *Uniform Acts—Can the Dead Hand Control the Dead Body? The Case for a Uniform Bodily Remains Law*, 29 W. NEW ENG. L. REV. 571, 573-90 (2007) (discussing the evolution of the common law regarding the disposition of bodily remains, the differences existing among states, and the problems arising from these differences).

16. UNIF. ANATOMICAL GIFT ACT Prefatory Note (2006) (revised 2008), <http://www.law.upenn.edu/bl/archives/ulc/uaga/2006final.pdf> (on file with the *McGeorge Law Review*).

## II. LEGAL BACKGROUND

A. *Property Rights in Corpses and Living Tissues*

The need for nationally uniform legislation governing anatomical donations can be traced back to common law property rights.<sup>17</sup> Prior to 1968, jurisdictions resolved the question of the existence of rights in human corpses and living tissues without the benefit of any guidance, the result of which was inconsistency among the states.<sup>18</sup> Though English common law did not recognize property rights in a corpse, American courts generally recognized a quasi-right in a decedent's surviving relatives "for purposes of burial or other lawful disposition."<sup>19</sup> The refusal to grant an absolute property right in corpses is consistent with important differences recognized by the judiciary between human bodies and other property.<sup>20</sup> Though humans seemingly possess their bodies and all of its parts in a very absolute way, they nevertheless lack the ability to do with them what they are permitted to do with other things they own, such as sell them for valuable consideration or have judgments levied against them.<sup>21</sup>

This quasi-right, however, could be overruled by a "compelling state interest or statutory rights granted to either the coroner or the medical examiner,"<sup>22</sup> and jurisdictions that considered the question have differed in the limitations they set on this quasi-right.<sup>23</sup> For example, the Sixth Circuit, applying Ohio law, recognized in *Brotherton v. Cleveland* a widow's quasi-right in her decedent husband's corneas, which had allegedly been removed without consent for the purposes of donation.<sup>24</sup> However, the Georgia Supreme Court in *Georgia Lions Eye Bank, Inc. v. Lavant* limited parents' quasi-rights to their decedent child's corneas to a right to burial of the remains only; this decision upheld the constitutionality of the statutory presumption of consent for removal of corneas for donation.<sup>25</sup>

In the landmark case of *Moore v. Regents of the University of California*, the California Supreme Court refused to grant property rights to a leukemia patient

17. See Alfred M. Sadler, Jr. & Blair L. Sadler, *A Community of Givers, Not Takers*, HASTINGS CTR. REP., Oct. 1984, at 6, 7 ("In 1967, there was considerable variation in the law relating to dead bodies. . . . Each law was different: some required that a donation be made as part of a will; others said nothing about next-of-kin; some required three witnesses; still others, none.").

18. *Id.*

19. Siegel, *supra* note 2, at 927-28.

20. Kathryn E. Peterson, Note, *My Father's Eyes and my Mother's Heart: The Due Process Rights of the Next of Kin in Organ Donation*, 40 VAL. U. L. REV. 169, 182 (2005).

21. *Id.*

22. Siegel, *supra* note 2, at 927-28.

23. *Id.* at 928.

24. *Brotherton v. Cleveland*, 923 F.2d 477, 479-82 (6th Cir. 1991); see also Siegel, *supra* note 2, at 928 (discussing the *Brotherton* case).

25. *Ga. Lions Eye Bank, Inc. v. Lavant*, 335 S.E.2d 127, 128-29 (Ga. 1985); see also Siegel, *supra* note 2, at 929 (discussing the *Lavant* case).

whose living tissues (blood, sperm, bone marrow, spleen, and skin) had been sold to a researcher without his consent and patented into a cell line worth billions of dollars.<sup>26</sup> In its reasoning, the court held that California law did not recognize in Mr. Moore an ownership interest in his body because of public policy concerns over the fiscal impact that granting property rights in living tissue would have on biomedical research.<sup>27</sup> In contrast, the Tennessee Supreme Court in *Davis v. Davis* held that neither of the divorcing spouses had an absolute property right in their cryogenically preserved fertilized eggs, but both had an interest in their disposition.<sup>28</sup>

### B. An Effort to Obtain Uniformity

The growing importance of organ and tissue transplantation paired with the growing mobility of Americans means it is now more important than ever to ensure that documents expressing wishes for the donation of anatomical gifts are portable from state to state, and uniform laws are the vehicle through which this need is most efficiently met.<sup>29</sup> “Uniform laws are developed with the goal of consistency among state laws.”<sup>30</sup> They help “reduce the confusion created by the differences among state laws,” reduce litigation, and reduce the need to execute duplicate documents whenever a person makes an interstate move, such as those appointing an agent of representation or providing directives on how one wishes to have his or her bodily remains handled.<sup>31</sup> The demand for anatomical donations spurred significant legal developments to define “the rights involved in the organ donation process,” most notably, the National Organ Transplant Act of 1984 (NOTA) and the Uniform Anatomical Gift Act (UAGA).<sup>32</sup>

The “NOTA halted any development of a commercialized organ donation system, forbidding the exchange of human organs for any type of valuable consideration,” and provided “logistical structure to organ donation and procurement.”<sup>33</sup> The NOTA created “a nationwide Organ Procurement and Transplantation Network as well as regional Organ Procurement Organizations” to

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26. *Moore v. Regents of the Univ. of Cal.*, 51 Cal. 3d 120, 125-48, 793 P.2d 479, 480-97 (1990); see also Siegel, *supra* note 2, at 931 (discussing the *Moore* case).

27. *Moore*, 51 Cal. 3d at 142, 793 P.2d at 493-97; see also Siegel, *supra* note 2, at 931 (discussing the *Moore* case).

28. *Davis v. Davis*, 842 S.W.2d 588, 589-97 (Tenn. 1992); see also Siegel, *supra* note 2, at 931 (discussing the *Davis* case).

29. Cf. Kester, *supra* note 15, at 593 (discussing the need for a uniform bodily remains law that allows for the portability of executed documents from state to state).

30. *Id.* at 592.

31. *Id.* at 593.

32. Peterson, *supra* note 20, at 171, 173.

33. *Id.* at 173-74, 176; see also 42 U.S.C.A. § 274e (West 2000 & Supp. 2007) (prohibiting the transfer of human organs for valuable consideration).

maintain a computerized database of potential recipients and organ matching criteria, to

preserve[] quality and testing standards for donated organs[,] carr[y] out studies and projects to help improve organ donation rates, [and] establish agreements with local hospitals and health care entities to identify potential organ donors and to help educate medical professionals and other citizens about organ donation in order to acquire as many usable organs as possible.<sup>34</sup>

Its counterpart, the UAGA, was the product of the National Conference of Commissioners on Uniform State Laws (NCCUSL), comprised of “practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments.”<sup>35</sup> The NCCUSL is “charged with creating model statutes, which states may adopt, with any appropriate variations to accommodate local circumstances,” the goal of which “is to provide national consistency on issues that are solely within the province of state regulation and which, if they were handled differently from state to state, would create difficulty.”<sup>36</sup> The NCCUSL attempted to increase anatomical donations by providing “legal structure to the organ donation process” with the goal of “replacing a confusing mix of state statutes with a uniform process for obtaining consent.”<sup>37</sup> Chief among the UAGA’s concerns is that the donor’s right to give or withhold consent to donate is respected, not only by medical organizations but also by the donor’s next of kin or appointed representative, while opportunities for organ procurement are maximized to meet the increasing demand.<sup>38</sup> The security of knowing what will happen to one’s bodily remains upon death, whether it be anatomical donation, cremation, burial, or otherwise, is important to many people.<sup>39</sup>

### C. *The (Non)-Uniform Anatomical Gift Act*

#### 1. *The 1968 UAGA*

In 1968, the NCCUSL promulgated the UAGA, which “created the power, not yet recognized at common law, to donate organs, eyes and tissue, in an immediate gift to a known donee or to any donee that might need an organ to survive.”<sup>40</sup> By

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34. Peterson, *supra* note 20, at 174-75.

35. UNIF. ANATOMICAL GIFT ACT About NCCUSL (2006) (revised 2008), <http://www.law.upenn.edu/bll/archives/ulc/uaga/2006final.pdf> (on file with the *McGeorge Law Review*).

36. Glazier, *supra* note 12, at 644-45.

37. Peterson, *supra* note 20, at 176.

38. See *id.* at 176-78 (discussing the UAGA’s attempt “to increase the supply of transplantable organs” by “providing the legal framework for making and accepting anatomical gifts” and “encourage[ing] organ donation by giving hospitals an affirmative duty to obtain consent to organ donation”).

39. See generally Kester, *supra* note 15, at 573-90 (“For many people, knowing how and where one’s final remains will ultimately be disposed [or utilized] is important.”).

40. Nat’l Conference of Comm’rs on Unif. State Laws, UAGA Summary, <http://www.anato>

1973, every state in the nation had adopted the 1968 UAGA in a uniform and unchanged condition.<sup>41</sup> The 1968 UAGA contained provisions addressing five basic areas of anatomical donations law: (1) who could make an organ donation, (2) who could receive such a donation, (3) how an organ donation could be made, (4) how it could be amended or revoked, and (5) how an organ donation document could be delivered.

First, the UAGA provided that any individual of majority age and sound mind could gift all or any part of his body.<sup>42</sup> If a potential donor is deceased or otherwise unable to make a gift, and there is an “absence of actual notice of contrary indications by the decedent,” a gift could be made by the decedent’s spouse, adult child, parent, adult sibling, guardian, or any other person authorized or under obligation to dispose of the decedent’s bodily remains, so long as the gift is not opposed by another individual listed.<sup>43</sup>

Second, the UAGA allowed an anatomical gift to be made to any hospital, surgeon, physician, accredited medical or dental school, college, or university, or a bank or storage facility, for medical or dental education, research, or advancement of medical or dental science, therapy or transplantation.<sup>44</sup> A gift could also be made “to any specified individual for therapy or transplantation needed by him.”<sup>45</sup>

Third, the UAGA permitted an anatomical gift to be made by will, donor card, or by some other document signed by the donor and two present witnesses, or directed to be signed for the donor and two present witnesses.<sup>46</sup> A potential donor may also make a gift by a telegraphic, recorded telephonic, or other recorded message.<sup>47</sup>

Fourth, the UAGA provided that if an anatomical gift document had already been delivered to a donee, the potential donor could amend or revoke the gift by executing and delivering a signed statement to the donee, making an oral statement in the presence of two witnesses or an attending physician, or by a signed document on his person or in his effects.<sup>48</sup> If the document had not yet been delivered to a donee, the potential donor could also amend or revoke a gift by destroying, canceling, or mutilating the document of gift.<sup>49</sup>

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micalgiftact.org/DesktopDefault.aspx?tabindex=1&tabid=67 (last visited Sept 21, 2007) [hereinafter UAGA Summary] (on file with the *McGeorge Law Review*).

41. 2 JOAN M. KRAUSKOPF ET AL., *ELDERLAW: ADVOCACY FOR THE AGING* § 14:1 (2d ed. 1993 & Supp. 2006).

42. UNIF. ANATOMICAL GIFT ACT § 2(a) (1968), available at [http://www2.sunysuffolk.edu/pecorip/SCCCWEB/ETEXTS/DeathandDying\\_TEXT/Uniform%20Anatomical%20Gift%20Act.pdf](http://www2.sunysuffolk.edu/pecorip/SCCCWEB/ETEXTS/DeathandDying_TEXT/Uniform%20Anatomical%20Gift%20Act.pdf).

43. *Id.* § 2(b).

44. *Id.* § 3(1)-(3).

45. *Id.* § 3(4).

46. *Id.* § 4(a)-(b).

47. *Id.* § 4(e).

48. *Id.* § 6(a)(1)-(4).

49. *Id.* § 6(b).

Finally, the UAGA stated that if a “gift is made by the donor to a specified donee, the will, card, or other document, or an executed copy thereof, may be delivered to the donee to expedite the appropriate procedures immediately after death, but delivery is not necessary to the validity of the gift.”<sup>50</sup> The gift document could also “be deposited in any hospital, bank or storage facility or registry office that accepts them for safekeeping or for facilitation of procedures after death.”<sup>51</sup>

## 2. *The 1987 Revisions to the UAGA*

In 1987, in response to a dramatic increase in the demand for organ transplants due to the availability of new medical technologies and the resulting disparity between supply and demand, revisions to the UAGA were approved.<sup>52</sup> Specifically, the revisions provided that (1) hospitals could make routine inquiries of incoming patients of their donation status in an effort to increase organ donations;<sup>53</sup> (2) upon the donor’s death, the 1987 UAGA prohibits the attending physician from participating in the removal and transplantation of the anatomical donation;<sup>54</sup> and (3) the sale or purchase of body parts was prohibited and hospitals were required to coordinate with each other and organ procurement organizations for the procurement and use of anatomical donations.<sup>55</sup>

Only twenty-six states adopted the 1987 UAGA, including California in 1988,<sup>56</sup> causing “significant non-uniformity between the states,”<sup>57</sup> which worsened as the states themselves enacted revisions.<sup>58</sup> The federal government has also developed organ procurement laws, which were recognized neither by the 1968 nor the 1987 UAGA.<sup>59</sup>

## 3. *The 2006 Revisions to the UAGA*

Consistent with its goal of providing national consistency where state law may govern and in response to the explosion of biomedical research and “legal,

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50. *Id.* § 5.

51. *Id.*

52. Press Release, Nat’l Conference of Comm’rs on Unif. State Laws, New Revision to the Rules Governing Organ Donations Approved (July 13, 2006), <http://www.nccusl.org/Update/DesktopModules/NewsDisplay.aspx?ItemID=164> [hereinafter NCCUSL Press Release] (on file with the *McGeorge Law Review*).

53. UNIF. ANATOMICAL GIFT ACT § 5 (1987), available at <http://www.law.upenn.edu/bll/archives/ulc/fnact99/uaga87.pdf>; see also Glazier, *supra* note 12, at 645 (providing an overview of the UAGA of 1987).

54. UNIF. ANATOMICAL GIFT ACT § 8(b) (1987); see also Glazier, *supra* note 12, at 645-46 (providing an overview of the UAGA of 1987).

55. UNIF. ANATOMICAL GIFT ACT §§ 9-10 (1987); see also Glazier, *supra* note 12, at 646 (providing an overview of the UAGA of 1987).

56. 13 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Personal Property* § 6 (10th ed. 2005).

57. NCCUSL Press Release, *supra* note 52.

58. UAGA Summary, *supra* note 40.

59. *Id.*

sociological, technical, and medical changes” affecting organ donation,<sup>60</sup> the NCCUSL promulgated the 2006 Revised UAGA to address the critical shortage of organ donations for transplantation, the lack of uniformity and harmony in state laws, the resulting impediment created to transplantation, and the need for “organs, eyes, and tissue for research and education” to improve transplant and therapy success rates.<sup>61</sup> Chapter 629 represents California’s effort to put existing state anatomical donation law in harmony with the nationally promulgated standard.

### III. CHAPTER 629

Chapter 629 repeals the 1987 version of the Uniform Anatomical Gift Act currently followed in California and replaces it with the 2006 Revised Uniform Anatomical Gift Act.<sup>62</sup>

First, Chapter 629 expands the list of individuals who may make an anatomical gift on behalf of a donor to include the donor’s agent, “provided that the power of attorney for health care or other record expressly permits the agent to make an anatomical gift[,]” the “[a]dult grandchildren of the decedent[,]” and any adults who have “exhibited special care and concern for the decedent during the decedent’s lifetime.”<sup>63</sup> Chapter 629 also clarifies the order of priority for the classes of individuals who may make an anatomical gift.<sup>64</sup> In case “there is more than one member of a class” entitled to make an anatomical gift, he or she can do so unless that member “knows of an objection by another member of the class.”<sup>65</sup> When there is a known objection, Chapter 629 requires the authorization of “a majority of the members of the class who are reasonably available.”<sup>66</sup>

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60. Glazier, *supra* note 12, at 646.

61. UNIF. ANATOMICAL GIFT ACT Prefatory Note (2006) (revised 2008), <http://www.law.upenn.edu/bll/archives/ulc/uaga/2006final.pdf> (on file with the *McGeorge Law Review*).

62. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1689, at 1-2 (July 10, 2007).

63. CAL. HEALTH & SAFETY CODE §§ 7150.15(b), 7150.40(a)(1), (6), (8) (enacted by Chapter 629).

64. *See id.* § 7150.40(a) (enacted by Chapter 629). Priority is given in the following order: an agent of the decedent at the time of death, a spouse or domestic partner, adult children of the decedent, parents of the decedent, adult siblings of the decedent, adult grandchildren of the decedent, grandparents of the decedent, an adult who exhibited special care and concern for the decedent, guardians or conservators of the decedent, and any other person with the authority to dispose of the body (i.e. medical examiner or coroner). *Id.* § 7150.40(a)(1)-(10) (enacted by Chapter 629).

65. *Id.* § 7150.40(b) (enacted by Chapter 629).

66. *Id.* Reasonably available is defined as “able to be contacted by a procurement organization, without undue effort, and willing and able to act in a timely manner consistent with existing medical criteria necessary for the making of an anatomical gift.” *Id.* § 7150.10(a)(23) (enacted by Chapter 629).

Second, Chapter 629 restricts the receipt of anatomical donations made for research or education to “[a] hospital, accredited medical school, dental school, college, university, or organ procurement organization,” and provides that, except for directed gifts, organs intended for the purpose of therapy or transplantation shall pass “to the organ procurement organization as custodian of the organ.”<sup>67</sup>

Third, Chapter 629 allows donors to make an anatomical gift “[d]irectly through the Donate Life California Organ and Tissue Donor Registry Internet Web site.”<sup>68</sup> Chapter 629 authorizes certain California organ procurement organizations to establish a non-profit organization to “be designated the California Organ and Tissue Donation Registrar.”<sup>69</sup> It also allows Californians renewing or applying for a new driver’s license or identification card with the Department of Motor Vehicles to register as a donor, with such registration notated on the driver’s license or identification card with a preprinted donor symbol.<sup>70</sup>

Lastly, Chapter 629 provides that a gift may be made, amended, or revoked by a donor through a third party if the donor “is physically unable to sign a record” so long as the gift is “witnessed by at least two adults, at least one of whom is a disinterested<sup>71</sup> witness, who have signed at the request of the donor” or third party.<sup>72</sup> Chapter 629 also provides measures for handling a donor’s advance health care directive whose provisions conflict with the procedures necessary to ensure the viability of anatomical donations; namely, such conflicts are to be resolved by the attending physician and the prospective donor or a person authorized to make medical decisions on behalf of the donor.<sup>73</sup>

#### IV. ANALYSIS

##### A. “A Community of Givers, Not Takers”<sup>74</sup>

The decision to rely upon voluntary anatomical donations rather than a commercial or involuntary process reflects Americans’ belief that something as personal as anatomical donations must be protected from market forces and

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67. *Id.* § 7150.50(a)(1), (h) (enacted by Chapter 629).

68. *Id.* § 7150.20(a)(2) (enacted by Chapter 629).

69. *Id.* § 7150.90(a) (enacted by Chapter 629).

70. CAL. VEH. CODE § 12811(b)(1) (amended by Chapter 629).

71. A disinterested witness is defined as anyone other than the donor’s “spouse, child, parent, sibling, grandchild, grandparent, or guardian of the individual who makes, amends, revokes, or refuses to make an anatomical gift” and includes any other “adult who exhibited special care and concern for the individual.” CAL. HEALTH & SAFETY CODE § 7150.10(5) (enacted by Chapter 629).

72. *Id.* §§ 7150.20(b)(1), 7150.25(a)(1)(C), (b)(1) (enacted by Chapter 629).

73. *Id.* § 7151.10(b) (enacted by Chapter 629).

74. Sadler, Jr. & Sadler, *supra* note 17, at 6.

coercion.<sup>75</sup> Volunteerism is embedded in deeply held values concerning the inviolability of human life and bodies, and the “routine salvage” of body parts from the dead, dying, or living strikes a chord of alarm and horror.<sup>76</sup> The term “anatomical gift” reflects, by design, the notion of a *gift*—a consensual giving of renewed health and life from one human to another—which “meets the measure of authentic community among men.”<sup>77</sup> Long has society recognized that man has a right to complete certainty that “his doctor does not become his executioner” and that no one can violate the sanctity of his life by claiming a right to his body or any of its parts.<sup>78</sup> A uniform law ensures the “rights of individuals and families are clear and simplified mechanisms of consent are in place” so that “public support for transplantation continues to exist [and] the principles of giving rather than taking are maintained.”<sup>79</sup>

Until such time as both the technological and ethical issues of engineered human organs are resolved, people with defective organs will continue to rely on voluntary anatomical donations.<sup>80</sup> Theoretically, a supply system based on volunteerism has the potential to meet the growing demand.<sup>81</sup> Almost any person is a potential donor, with absolute exclusions limited to, for example, persons

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75. See generally *id.* at 6-8.

In Los Angeles, headlines in the *Los Angeles Times* revealed that a technician in the County Coroner’s Office was accused of removing pituitary glands from cadavers during autopsy without having obtained consent. In Hennepin County, Minnesota, the coroner’s authority to remove human parts for other purposes was also questioned. This information surfaced in emotionally charged newspaper articles that sharply criticized a Federal government agency’s role in supporting the taking of human cadaver material without consent. This unauthorized taking, even for humanitarian purposes, was described with alarm and even horror and threatened to undermine if not destroy the enterprise.

*Id.*

76. See *id.* at 8.

The patient must be absolutely sure that his doctor does not become his executioner . . . His right to this certainty is absolute, and so is his right to his own body with all its organs. Absolute respect for these rights violates no one else’s rights, for no one has a right to another’s body.

*Id.* (quotations omitted).

77. *Id.* (quotations omitted).

78. *Id.* (quotations omitted).

79. *Id.* at 9.

80. See Siegel, *supra* note 2, at 926-27.

Several companies and laboratories are transforming tissue engineering into a successful industry. Geron, a facility in Menlo Park, California, believes a market will develop within ten to fifteen years for transplantation of engineered organs. Within the next few years, the growth of the tissue engineering industry will reach the importance of present genetic technology. The ethical issues involved with fetal tissue sources pose a barrier to commercialization. Some scientists think that this can be overcome if adult cells are used or if parents consent for their children’s cells to be taken at birth for possible future use.

*Id.* (footnotes omitted).

81. Cf. OrganDonor.Gov, Who Can Donate, [http://www.organdonor.gov/donation/who\\_donate.htm](http://www.organdonor.gov/donation/who_donate.htm) (last visited Sept. 21, 2007) (on file with the *McGeorge Law Review*) (noting that people of all ages are potential donors).

who are HIV positive or have active cancer.<sup>82</sup> Existing technology allows for kidneys, hearts, lungs, livers, pancreata, and the intestines to be transplanted.<sup>83</sup> In addition, “[c]orneas, the middle ear, skin, heart valves, bone, veins, cartilage, tendons, and ligaments can be stored in tissue banks and used to restore sight, cover burns, repair hearts, replace veins, and mend damaged connective tissue and cartilage in recipients.”<sup>84</sup>

Potential donors may donate in multiple ways.<sup>85</sup> Some anatomical donations, such as blood, blood platelets, bone marrow, a single kidney, part of the liver, one lung, part of the pancreas, or part of the intestine, may be made by living persons whose bodies either generate replacements or can function without them.<sup>86</sup> But “[m]ost of the organs used in transplants come from people who have suffered brain death,” defined as the “total cessation of brain function, including brain stem function[,] . . . [where] the brain no longer functions in any manner and will never function again.”<sup>87</sup> Finally, donors can make arrangements in advance to donate their entire bodies to medical science.<sup>88</sup>

### *B. Increased Opportunities and Protections*

Implicit in Chapter 629 is the idea that what is standing between the potentially ample volunteer supply of organs and tissues and the ever increasing donee demand is a more efficient nationwide donation process.<sup>89</sup> However, underlying the objective of increased efficiency is an expansion of the provisions to ensure compliance with a potential donor’s wishes so that people will feel more confident in making a decision to donate.<sup>90</sup> The 2006 UAGA addressed this continuing concern by broadening the means through which a donor may plan for donations to be made, increasing the number of parties who may authorize a donation, and increasing protections to ensure a donation is made in accordance

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82. *Id.*

83. OrganDonor.Gov, What Can Be Donated, [http://organdonor.gov/donation/what\\_donate.htm](http://organdonor.gov/donation/what_donate.htm) (last visited Jan. 5, 2008) (on file with the *McGeorge Law Review*).

84. *Id.*

85. See OrganDonor.Gov, Types of Donations, <http://www.organdonor.gov/donation/typesofdonation.htm> (last visited Sept. 21, 2007) (on file with the *McGeorge Law Review*) (discussing the various methods in which a donation may be made, from solid organ or tissue donation by living donors, to donation after brain death or cardiac death, to whole body donation).

86. *Id.*

87. *Id.*

88. *Id.*

89. ASSEMBLY COMMITTEE ON HEALTH, COMMITTEE ANALYSIS OF AB 1689, at 3 (Apr. 17, 2007).

90. A.B.A., NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, REPORT TO THE HOUSE OF DELEGATES, RECOMMENDATION ON THE UNIFORM ANATOMICAL GIFT ACT (2006) (2007), <http://www.abanet.org/yld/midyear07/docs/105A.pdf> [hereinafter NCCUSL REPORT] (on file with the *McGeorge Law Review*) (“Importantly, the 2006 UAGA strengthens prior language barring others from attempting to override an individual’s decision to make or refuse to make an anatomical gift.”).

with the donor's wishes.<sup>91</sup> For example, the increased availability of Internet registries and motor vehicle donor designations provide the potential donor with greater opportunity to plan their anatomical donations according to their wishes.<sup>92</sup> Further, provisions requiring the participation and consent of at least two witnesses, one of whom is disinterested, in cases where a potential donor is terminally ill or injured provide added assurance that a potential donor's wishes will not be overridden or ignored.<sup>93</sup>

The 2006 UAGA also recognizes the need to improve communication and cooperation between organ and tissue procurement organizations so that anatomical donations are put to their most effective use.<sup>94</sup> Because of the unusually time-sensitive nature of an anatomical donation, increased cooperation among the organizations involved will provide a greater level of peace of mind to the potential donor that his donation will not be legally or administratively delayed by an inefficient donation system, but will be utilized in a medically timely manner to save a life or otherwise improve the health of another person.<sup>95</sup>

### C. *The Need for Uniformity*

Though California adopted the 1987 revision to the UAGA, it joined only twenty-five other states.<sup>96</sup> What started out as a truly uniform law, promulgated in 1968 by the NCCUSL and uniformly adopted by every state by 1973, has become non-uniform over the past thirty-four years, with some states following

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91. *Id.*

92. See NCCUSL Press Release, *supra* note 52.

The revision also allows for the making of anatomical gifts on donor registries, which are already in use in some states. The act encourages the creation of donor registries, whether maintained by the state or by another entity. Minimum requirements for a donor registry include making the registry electronic and accessible at all times.

*Id.*

93. CAL. HEALTH & SAFETY CODE §§ 7150.20(a)(4), 7150.30(a)(3) (enacted by Chapter 629); ASSEMBLY COMMITTEE ON HEALTH, COMMITTEE ANALYSIS OF AB 1689, at 1-2 (Apr. 17, 2007).

94. See NCCUSL REPORT, *supra* note 90.

The 2006 UAGA encourages and establishes standards for donor registries and better enables procurement organizations to gain access to documents of gift in donor registries, medical records, and records of a state motor vehicle department. This access will make it much easier for procurement organizations to quickly determine whether an individual is a donor.

*Id.*

95. See UNIF. ANATOMICAL GIFT ACT Scope of the 2006 Revised Act (2006) (revised 2008), <http://www.law.upenn.edu/bil/archives/ulc/uaga/2006final.pdf> (on file with the *McGeorge Law Review*) ("Transplantation occurs across state boundaries and requires speed and efficiency if the organ is to be successfully transplanted into a recipient. There simply is no time for researching and conforming to variations of the laws among the states.").

96. See *Effort to Get Revised UAGA Adopted by All 50 States Off to Promising Start*, TRANSPLANT NEWS, Mar. 1, 2007, [http://www.accessmylibrary.com/coms2/summary\\_0286-30242760\\_ITM](http://www.accessmylibrary.com/coms2/summary_0286-30242760_ITM) [hereinafter UAGA Adoption Effort] (on file with the *McGeorge Law Review*) (stating that the UAGA of 1987 was only approved by twenty-six states); see also 13 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Personal Property* § 6 (10th ed. 2005) (stating that California adopted the UAGA of 1987 in 1988).

the 1968 UAGA, some following the 1987 UAGA, and many states making subsequent changes that further increased the non-uniformity.<sup>97</sup> The unique, time-sensitive nature of the organ and tissue donation process, paired with the shortage of potentially life-saving donors, makes it vital that the surrounding legal framework operates to facilitate rather than impede the donation process if our system of voluntary donations is to live up to its potential.<sup>98</sup>

Diversity in anatomical gift laws among the states is an impediment to the procurement of organs for transplantation, and, as a result, one person on the organ donation waiting list loses his or her life every hour because of the failure to obtain a properly matched organ.<sup>99</sup> Organ procurement and transplantation is a delicate, time-sensitive process.<sup>100</sup> “[A] centralized computer network links all organ procurement organizations (OPOs) and transplant centers.”<sup>101</sup> When an organ becomes available, the computer generates a list of potential recipients who are ranked according to “blood type, tissue type, size of the organ, medical urgency of the patient, time on the waiting list, and distance between donor and recipient.”<sup>102</sup> Once the organ is placed with a suitable and available recipient, surgical personnel for both the donor and the donee must be assembled.<sup>103</sup> However, driving this process is the amount of time the donor may survive in conjunction with the amount of time an organ can be expected to remain viable for transplant.<sup>104</sup> Hearts and lungs are viable for only six hours, while livers are viable for twenty-four hours.<sup>105</sup> Some organs, such as kidneys and pancreata, need to be tested first to assess compatibility with the potential donee.<sup>106</sup> In addition, the logistics of both the donor and donee families must be accommodated as much as possible.<sup>107</sup> Because such “[l]ittle time is available to prepare, transport

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97. KRAUSKOPF ET AL., *supra* note 41, § 14:1; NCCUSL REPORT, *supra* note 90.

98. See UNIF. ANATOMICAL GIFT ACT Scope of the 2006 Revised Act (2006) (revised 2008).

Recent technological innovations have increased the types of organs that can be transplanted, the demand for organs, and the range of individuals who can donate or receive an organ, thereby increasing the number of organs available each year and the number of transplantations that occur each year. Nonetheless, the number of deaths for lack of available organs also has increased. While the Commissioners are under no illusion that any anatomical gifts act can fully satisfy the need for organs, any change that could increase the supply of organs and thus save lives is an improvement.

*Id.*

99. NCCUSL REPORT, *supra* note 90.

100. See generally *id.* (“The anatomical gift law of the states is no longer uniform, and diversity of law is an impediment to transplantation. Harmonious law through every state’s enactment of the 2006 UAGA will help save and improve lives.”).

101. Organ Procurement & Transplantation Network, Donor Matching System, <http://www.optn.org/about/transplantation/matchingProcess.asp> (last visited Sept. 21, 2007) (on file with the *McGeorge Law Review*).

102. *Id.*

103. *Id.*

104. See *id.* (discussing time constraints associated with organ transplants).

105. *Id.*

106. *Id.*

107. See *id.* (“The OPO coordinates the logistics between the organ donor’s family, the donor organs,

across state lines, and transplant life-saving organs,”<sup>108</sup> time spent assessing and complying with variations in state law only serves to delay and perhaps undermine the success of the donation.<sup>109</sup>

In addition to accommodating the urgency inherent in the donation process, uniformity among the states serves other purposes.<sup>110</sup> Uniform acts encourage efficiency by reducing the need for individual states to conduct their own research on current technologies, bioethical views, and relevant law in other states.<sup>111</sup> The Uniform Acts “facilitat[e] the development of a repository of judicial decisions that aid interpretation of statutory terms,” codifying law that is most consistent with the newest available technologies and most widely held bioethical views.<sup>112</sup> In addition, a uniform law reduces confusion, as well as the hardship imposed on citizens who travel or move around the country and are left to wonder if their current donation directives will be valid.<sup>113</sup> The increasing mobility of Americans means it is more important now than ever before to ensure documents are portable across state lines and updates are not required in order to ensure compliance with a potential donor’s wishes.<sup>114</sup>

The NCCUSL “vowed to conduct an all out effort to get the [2006 UAGA] passed by all 50 [states] within the next two years.”<sup>115</sup> Twenty states have already enacted the 2006 UAGA, including California through Chapter 629, and five additional states have introduced bills for legislative consideration.<sup>116</sup> Chapter 629 incorporates the major revisions of the 2006 UAGA into California law with the goal of increasing the supply of anatomical donations to meet the increasing demand of Californians who are currently on waiting lists, while at the same time

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the transplant center(s), and the potential transplant candidate.”).

108. NCCUSL REPORT, *supra* note 90.

109. *Id.*

110. *See cf.* Kester, *supra* note 15, at 591-93 (discussing, in the context of uniform bodily remains laws, the unnecessary confusion created by differences in state laws and the role uniformity would serve to minimize this confusion as well as “provide guidelines for interested lawmakers as to what their legislation should include” and “provide a means for those individuals who [have] certain beliefs or desires concerning the disposition of bodily remains to be sure that their wishes [will] be carried out”).

111. *See cf. id.* (discussing, in the context of uniform bodily remains law, that a uniform law “would address novel methods of preservation, such as cryonics” and provide “a repository of judicial decisions that aid interpretation of statutory terms” in “emerging areas of the law” (quotations omitted)).

112. *Id.* at 591-92 (quoting Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131, 140 (1996)).

113. *See cf. id.* at 593 (discussing, in the context of uniform bodily remains laws, “substantial interstate implications,” including that an individual who executes a document in one state would not need to update the document upon moving to another state (quotations omitted)).

114. *See cf. id.* at 592 (discussing, in the context of uniform bodily remains laws, that “the differences in the laws from state to state create a hardship for people who frequently move or travel”).

115. UAGA Adoption Effort, *supra* note 96.

116. Nat’l Conference of Comm’rs on Unif. State Laws, Enactment News, <http://www.anatomicalgiftact.org/DesktopDefault.aspx?tabindex=2&tabid=72> (last visited Jan. 5, 2007) (on file with the *McGeorge Law Review*).

ensuring the utmost protection for the rights of Californian donors and their families.<sup>117</sup>

## V. CONCLUSION

The 1968 UAGA remains one of the most widely accepted uniform acts in the history of the NCCUSL, with its success attributed in part to the Act's twin aims of encouraging anatomical donations while protecting "the principles of informed consent and voluntary donation."<sup>118</sup> The system of anatomical donations in the United States has from the very beginning been based on "a community of givers rather than takers," preferring voluntary donations to the "routine salvage" of organs.<sup>119</sup> However, for this volunteer system to meet the growing demand for organ and tissue transplants that biomedical research has made possible, a potential donor must be informed of their options and feel confident that their wishes will be protected no matter which state they happen to call home at the time of their death.<sup>120</sup> Additionally, our nationwide health care systems must function as well-oiled machines to ensure that procured organs are put to use where they are needed most and in a manner in which they will provide the highest chance of survival in the donee.<sup>121</sup> Chapter 629 will put California at the forefront of contemporary donation law, protecting the wishes of its donor residents and ensuring a better chance of survival for potential donees.<sup>122</sup>

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117. See generally SENATE HEALTH COMMITTEE, COMMITTEE ANALYSIS OF AB 1689 (June 20, 2007) (describing the effect of the non-uniformity of state law as being an impediment to organ and tissue transplantation and how AB 1689 (Chapter 629) addresses this concern).

118. Sadler, Jr. & Sadler, *supra* note 17, at 7.

119. *Id.* at 8.

120. See UNIF. ANATOMICAL GIFT ACT Prefatory Note (2006) (revised 2008), <http://www.law.upenn.edu/bll/archives/ulc/uaga/2006final.pdf> (on file with the *McGeorge Law Review*).

Furthermore, the decision to be a donor is a highly personal decision of great generosity and deserves the highest respect from the law. Because current state anatomical gift laws are out of harmony with both federal procurement and allocation policies and do not fully respect the autonomy interests of donors, there is a need to harmonize state law with federal policy as well as to improve the manner in which anatomical gifts can be made and respected.

*Id.*

121. *Id.* ("Transplantation occurs across state boundaries and requires speed and efficiency if the organ is to be successfully transplanted into a recipient. There simply is no time for researching and conforming to variations of the laws among the states. Thus, uniformity of state law is highly desirable.")

122. SENATE HEALTH COMMITTEE, COMMITTEE ANALYSIS OF AB 1689, at 7 (June 20, 2007).