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# COMMENTS

## A CRUMBLING KEYSTONE: REBUILDING PENNSYLVANIA'S TWENTY-YEAR-OLD ANATOMICAL GIFT LEGISLATION\*

### I. INTRODUCTION

On November 18, 2013, a Pennsylvania Court of Common Pleas judge presided over an emergency telephone hearing to render a seemingly impossible decision: permitting lifesaving surgery for a sick child or pursuing justice for a child already lost.<sup>1</sup> Two days prior, a two-year-old girl had been rushed to a Clearfield County emergency room, and later flown to Children's Hospital of Pittsburgh in Allegheny County, where she was declared brain dead.<sup>2</sup> After a discussion with the Center for Organ Recovery and Education (CORE), Baby Sophia's mother agreed to donate the child's organs.<sup>3</sup> Somewhere close by, surgeons began to prepare a terminally ill seven-year-old for the kidney and liver transplant that would save her life.<sup>4</sup>

The Clearfield County District Attorney, William Shaw, believed Sophia died from shaken baby syndrome, likely due to abuse at home.<sup>5</sup> As medical staff from Children's Hospital and CORE prepared to recover little Sophia's organs,

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1. Paula Reed Ward, *Allegheny County Judge Had to Choose: Investigate Child's Death, or Hurry to Save Another Life?*, PITTSBURGH POST-GAZETTE (Nov. 20, 2013, 11:59 PM), <http://www.post-gazette.com/news/health/2013/11/21/Judge-weighed-transplant-vs-investigation-Judge-weighed-transplant-vs-probe/stories/201311210241>.

2. *Id.* Pennsylvania's common law defined death as the irreversible cessation of cardiothoracic function. *See Commonwealth v. Kostra*, 502 A.2d 1287, 1289 (Pa. Super. Ct. 1985). However, modern medical technology allows doctors to keep essential bodily functions operating through artificial means. Eun-Kyoung Choi et al., *Brain Death Revisited: The Case for a National Standard*, 36 J.L. MED. & ETHICS 824, 825 (2008). A ventilator, for example, will keep a patient's heart beating long after she has lost brain function. *See id.* at 828. As such, all states have expanded their laws to include brain death criteria as a legal declaration of death. *E.g.*, 35 PA. STAT. AND CONS. STAT. ANN. § 10203 (West 2016); *see also* Choi et al., *supra*, at 825-26 (arguing for a nationally recognized definition of "brain death" to replace state-by-state codification).

3. Ward, *supra* note 1.

4. *See id.*

5. *See id.*

Shaw and the Clearfield County coroner objected, fearing the donation would hinder a full autopsy and perhaps a homicide investigation.<sup>6</sup> Dr. Karl Williams, the medical examiner (ME) in Allegheny County, asserted jurisdiction over the decision and insisted the organ recovery could proceed in such a way that would “carefully and duly” preserve any evidence needed for a criminal prosecution.<sup>7</sup> After hearing arguments from Shaw, Williams, and attorneys from CORE, Judge Robert J. Colville ultimately ruled that the medical staff could move forward with donation.<sup>8</sup> Within hours, Baby Sophia’s organs were successfully transplanted into the older girl, who otherwise would have died.<sup>9</sup> Over one year later, no charges had been filed related to little Sophia’s death, and her case remains unsolved.<sup>10</sup>

At the time of Baby Sophia’s death, Pennsylvania legislators were considering a major overhaul to the state’s organ donation laws.<sup>11</sup> The proposed Donate Life PA Act (the Act) aimed to increase organ donation through public education initiatives and to “reinforce the priority of transplantation in the law.”<sup>12</sup> Pennsylvania lawmakers were eager to update the state’s twenty-year-old procedures.<sup>13</sup> Yet, the Act met significant resistance from law enforcement and coroners who felt it prioritized organ donation over criminal investigations,<sup>14</sup> relying on Baby Sophia’s case to illustrate their point.<sup>15</sup> Despite various stakeholder meetings and revisions, the Pennsylvania State Coroners

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6. *Id.*

7. *Id.*

8. *Id.*

9. *See id.*

10. *Id.*; *see also* Kendra Nichols, *Will Organ Donation Bill Save Lives, or Interfere with Prosecutions?*, ABC27.COM (Jan. 28, 2015, 5:56 PM), <http://abc27.com/2015/01/28/will-organ-donation-bill-save-lives-or-interfere-with-prosecutions/>.

11. State Senator Stewart Greenleaf sponsored Senate Bill 850, *see* Press Release, Stewart J. Greenleaf, Senate Passes Senator Greenleaf’s Donate Life PA Act (Sept. 23, 2014), <http://www.senatorgreenleaf.com/2014/09/23/senate-passes-senator-greenleafs-donate-life-pa-act/> [hereinafter Greenleaf Bill], and State Representative Joseph Petrarca sponsored an identical proposal, House Bill 30, *see* Press Release, Pa. House of Representatives, Petrarca Bill Would Continue State’s Leadership in Tissue and Organ Donation (June 21, 2013), <http://www.pahouse.com/InTheNews/NewsRelease/?id=29734> [hereinafter Petrarca Bill]. Either bill, if enacted, would establish the Donate Life PA Act (the Act). Greenleaf Bill, *supra*; Petrarca Bill, *supra*. Both bills failed to pass the house judiciary committee before the end of the 2013–2014 legislative session. *See Legislation that Did Not Pass the General Assembly 2013–2014*, PA. COALITION AGAINST DOMESTIC VIOLENCE, <http://www.pcadv.org/Public-Policy/Pending-Legislation/Not-Passed-In-2013-2014/> (last visited Apr. 1, 2016). Senator Greenleaf reintroduced his legislation as Senate Bill 180 on January 15, 2015. *See* S.B. 180, 2015 Gen. Assemb., Reg. Sess. (Pa. 2015). That same month, Representative Petrarca reintroduced House Bill 30. *See* H.B. 30, 2015 Gen. Assemb., Reg. Sess. (Pa. 2015). Both bills were still pending in April of 2016.

12. *See* Greenleaf Bill, *supra* note 11; Petrarca Bill, *supra* note 11.

13. *See* Greenleaf Bill, *supra* note 11; Petrarca Bill, *supra* note 11.

14. Mary Wilson, *Organ Donation Process Could Change Under Senate Bill*, WITF (Nov. 20, 2013, 12:29 PM), <http://www.witf.org/state-house-sound-bites/2013/11/organ-donation-process-could-change-under-senate-bill.php>.

15. *See* Nichols, *supra* note 10.

Association (PSCA) persisted in opposing the Act.<sup>16</sup> As the 2013–2014 legislative session came to a close, the Act remained stagnant in the state House of Representatives.<sup>17</sup>

This Comment argues that passing the Donate Life PA Act is necessary for Pennsylvania to regain its place as a national leader in organ and tissue donation. Part II.A details the history of anatomical gift legislation in the United States, and Part II.B discusses the 1994 Pennsylvania law that not only influenced federal legislation, but became a model for best practices across the nation. In Part II.C, this Comment highlights how traditional legal frameworks that touch on property and death have changed to accommodate organ donation. Part II.D then discusses recent developments in anatomical gift policies and Pennsylvania's reluctance to adopt modern legislation due to the perception that such laws may interfere with criminal investigations. Section III discusses the merits of this concern and proposes some solutions to appease the Act's political opponents. In Part III.D, this Comment suggests that Pennsylvania enact the proposed legislation to modernize the Commonwealth's anatomical gift policy and reduce its transplant waiting list.

## II. OVERVIEW

The Donate Life PA Act is a proposed statute that would standardize Pennsylvania's organ donation policies with the rest of the country.<sup>18</sup> When doctors first started transplanting organs sixty years ago, there were no laws in place to guide the practice.<sup>19</sup> As transplantation became an increasingly viable solution to end-stage organ failure, Congress and state legislatures passed laws to promote and protect this new medical field.<sup>20</sup> Traditional notions of property law and ownership over one's body have likewise expanded.<sup>21</sup> Initially, Pennsylvania was a national leader in developing these new laws.<sup>22</sup> Over the past ten years, however, the state has fallen well behind the national standard for modern anatomical gift legislation.<sup>23</sup> Though the Donate Life PA Act would bring

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16. See, e.g., *id.*

17. See *Legislation that Did Not Pass the General Assembly 2013–2014*, *supra* note 11. See also *supra* note 11 for a brief description of how the bills were renumbered in the 2015–2016 legislative session. While this Comment focuses specifically on the legislative developments between 2013 and 2016, it is important to note that Representative Petrarca and Senator Greenleaf had been attempting to amend the Commonwealth's anatomical gift legislation since 2010. That year, Representative Petrarca first attempted to update Pennsylvania's laws by introducing House Bill 2700. See H.B. 2700, 2009 Gen. Assemb., Reg. Sess. (Pa. 2010). The bill was unsuccessful, and Representative Petrarca reintroduced the proposed legislation during the 2011–2012 legislative session as House Bill 100. See H.B. 100, 2011 Gen. Assemb., Reg. Sess. (Pa. 2011). That same year, Senator Greenleaf sponsored a tandem piece of legislation. See S.B. 750, 2011 Gen. Assemb., Reg. Sess. (Pa. 2011).

18. See *infra* Part II.B.

19. See *infra* Part II.A.

20. See *infra* Part II.A.

21. See *infra* Part II.C.

22. See *infra* Part II.B.

23. See *infra* Part II.B.

Pennsylvania in line with the national standard, opposition from special interest groups has kept the Pennsylvania General Assembly from passing it. This Section describes the transplant field's exponential growth in the past half century and the laws that have been enacted nationally and locally to accommodate it. It then discusses the aims of the Donate Life PA Act and some of the arguments of those challenging its passage.

A. *History of Organ Donation*

While current lawmakers are rushing to modernize anatomical gift legislation, the concept of anatomical gifts is fairly new.<sup>24</sup> Organ transplantation became a viable medical therapy to end-stage organ failure in 1954 when doctors in Boston completed the first successful kidney transplant.<sup>25</sup> In less than fifteen years, with the advent of increasingly effective immunosuppressant medications, doctors across the country were successfully transplanting kidneys and livers from nonrelated, deceased donors.<sup>26</sup> Following the first heart transfer in 1967,<sup>27</sup> it became clear that transplantation—once the stuff of science fiction stories—had become a legitimate and rapidly growing field of medicine.<sup>28</sup>

As more doctors performed transplants, lawmakers and ethicists saw the need for standardization across the field.<sup>29</sup> In response to these concerns, the National Conference of Commissioners on Uniform State Laws (NCCUSL) presented the first Uniform Anatomical Gift Act (UAGA) in 1968.<sup>30</sup> The UAGA set standards for the facilitation of transplants and established an “opt-in” process that required a person to affirmatively declare her willingness to become a donor.<sup>31</sup> The language established a donation as “a gift”<sup>32</sup> that may be

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24. See Alicia M. Markmann, Comment, *Organ Donation: Increasing Donations While Honoring Our Longstanding Values*, 24 TEMP. J. SCI. TECH. & ENVTL. L. 499, 504 (2005). Black's Law Dictionary defines “gift” as a “voluntary transfer of property to another without compensation.” *Gift*, BLACK'S LAW DICTIONARY (10th ed. 2014). It further defines “anatomical gift” as “[a] testamentary donation of a bodily organ or organs, esp[ecially] for transplant or for medical research.” *Anatomical Gift*, BLACK'S LAW DICTIONARY (10th ed. 2014).

25. *Timeline of Historical Events Significant Milestones in Organ Donation and Transplantation*, U.S. DEP'T HEALTH & HUM. SERVS., <http://www.organdonor.gov/legislation/timeline.html> (last visited Apr. 1, 2016) [hereinafter *Significant Milestones in Organ Donation*]; see Markmann, *supra* note 24, at 504.

26. *Significant Milestones in Organ Donation*, *supra* note 25. A transplant recipient requires ongoing immunosuppressant medication to restrain the body from rejecting the transplanted organ. See *Immunosuppressants*, NAT'L KIDNEY FOUND., <https://www.kidney.org/atoz/content/immuno> (last visited Apr. 1, 2016).

27. *Significant Milestones in Organ Donation*, *supra* note 25.

28. 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, 171–73 (2005).

29. See Gregory S. Crespi, *Overcoming the Legal Obstacles to the Creation of a Futures Market in Bodily Organs*, 55 OHIO ST. L. J. 1, 11–13 (1994) (describing how each state's piecemeal adoption of anatomical gift legislation resulted in medical uncertainty and failed to incentivize organ donation).

30. Kristi L. Kielhorn, Note, *Giving Life After Death: The 2006 Revision of the Uniform Anatomical Gift Act*, 56 DRAKE L. REV. 809, 811 (2008).

31. *Id.* at 813. Countries that use an “opt-in” system to determine organ donors require an individual or his next of kin to affirmatively assert his desire to donate. *Id.* Many European countries,

made by will or by any document signed in the presence of two witnesses.<sup>33</sup> Donors could gift an organ to a specific transplant patient or to a number of approved medical facilities for transplant, education, or research.<sup>34</sup> State legislatures quickly enacted the UAGA into law, effectively creating a national statutory right to legally gift one's organs for the purpose of transplantation.<sup>35</sup>

In 1987, the NCCUSL published a largely amended UAGA in response to the ever-increasing demand for organ transplants.<sup>36</sup> The new version touched on a variety of issues that had arisen as a result of improved technology unavailable at the time of the model law's first draft in 1968.<sup>37</sup> Its provisions included an express prohibition against the exchange of human organs for any "valuable consideration,"<sup>38</sup> a guarantee that a decedent's wish to donate would take priority over the wishes of her family,<sup>39</sup> and permission for coroners and MEs to donate a decedent's organs following an autopsy.<sup>40</sup>

Despite these new guidelines, medical professionals continued to defer to next of kin in deciding whether to donate, even if a decedent had a will or legally binding document expressing contrary wishes.<sup>41</sup> While some of these practices

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conversely, follow a "presumed consent" system, which assumes that a person is amenable to donating his organs unless he or a family member expressly states otherwise. *Id.*

32. See *supra* note 24 for *Black's Law Dictionary's* definitions of "gift" and "anatomical gift."

33. UNIF. ANATOMICAL GIFT ACT § 2 (1968); Kielhorn, *supra* note 30, at 811.

34. Mark D. Fox, *Directed Organ Donation: Donor Autonomy and Community Values*, in *ORGAN AND TISSUE DONATION: ETHICAL, LEGAL, AND POLICY ISSUES* 43, 43-44 (Bethany Spielman ed., 1997). If the donor or his family knows a specific individual who is in need of a transplant, the law allows the next of kin to direct the needed organ to that person. *Id.*

35. Kielhorn, *supra* note 30, at 811. Despite the UAGA's success in increasing the number of organs available for transplant, it did little to address interstate commerce in bodily organs. See Crespi, *supra* note 29, at 14. In response, Congress passed the National Organ Transplant Act (NOTA) in 1984, which remedied uncertainties about the legal status of bodily organs and transferred regulatory power of transplantation to the Secretary of Health and Human Services. See *id.* at 14-15.

36. See Kielhorn, *supra* note 30, at 811-12.

37. *Id.* Since publishing the first UAGA, "[t]he advent of [the immunosuppressant medication] cyclosporine along with the improvements in surgical techniques for transplanting organs helped to increase the demand for [deceased donor] organs." Sean R. Fitzgibbons, *Cadaveric Organ Donation and Consent: A Comparative Analysis of the United States, Japan, Singapore, and China*, 6 *ILSA J. INT'L & COMP. L.* 73, 81 (1999).

38. UNIF. ANATOMICAL GIFT ACT § 10(a) (amended 2006), 8A U.L.A. 223 (1987).

39. *Id.* § 2(h).

40. *Id.* § 4(a).

41. See, e.g., Leonard H. Bucklin, *Woe unto Those Who Request Consent: Ethical and Legal Considerations in Rejecting a Deceased's Anatomical Gift Because There Is No Consent by the Survivors*, 78 *N.D. L. REV.* 323, 333 (2002). *Black's Law Dictionary* defines "next of kin" as "[t]he person or persons most closely related to a decedent by blood or affinity." *Next of Kin*, *BLACK'S LAW DICTIONARY* (10th ed. 2014). Pennsylvania law allows next of kin to make a donation decision only when the decedent has failed to make the decision himself. 20 *PA. STAT. AND CONS. STAT. ANN.* § 8611 (West 2016). In such a case, an adult relative of sound mind may make the donation decision. *Id.* When multiple relatives fit this criterion, the statute establishes priority in the following order: (1) "[t]he spouse," (2) "[a]n adult son or daughter," (3) "[e]ither parent," (4) "[a]n adult brother or sister," (5) a "guardian of the person of the decedent at the time of his death," or (6) "[a]ny other person authorized or under obligation to dispose of his body." *Id.*

were blamed on the longstanding habit of deferring to next of kin, the vast majority of these deferrals were based on fear of a lawsuit or bad press for the hospital or organ procurement organization (OPO).<sup>42</sup> Indeed, bad press centered around organ donation could have a drastically negative effect on the number of consenting donors.<sup>43</sup> Yet, this fear of public outcry over a family's disagreement with its loved one's donation decision may have been overstated.<sup>44</sup> Furthermore, courts have long upheld a patient's right to make an informed decision about her health, regardless of her family's disagreement.<sup>45</sup> Such deferral from courts and among medical professionals evidences a moral interest in protecting patient autonomy.<sup>46</sup>

By 2005, the national transplant waiting list comprised over 90,000 people,<sup>47</sup> eighteen of whom were dying every day because the organs needed never became available.<sup>48</sup> In response, the NCCUSL revised the UAGA once more in 2006.<sup>49</sup> One of the purported goals of the newest revision was to strictly honor a decedent's wishes regarding donation despite her family's feelings to the contrary.<sup>50</sup> The revision also provided immunity for hospitals facing due process

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42. See Bucklin, *supra* note 41, at 339 (discounting the excuses that an OPO may be sued or that it may receive bad press from rejecting a decedent's donation); Erin Colleran, Comment, *My Body, His Property?: Prescribing a Framework to Determine Ownership Interests in Directly Donated Human Organs*, 80 TEMP. L. REV. 1203, 1206-07 (2007) (explaining that in history, courts recognized next of kin as having a quasi-property right over a relative's body, and awarded damages for the mishandling of organs). An organ procurement organization (OPO) is a nonprofit organization that is federally mandated to coordinate organ donation in a specific region. See *Organ Procurement Organizations*, U.S. DEP'T HEALTH & HUM. SERVS., <http://organdonor.gov/materialsresources/materialsopolist.html> (last visited Apr. 1, 2016). In the United States, fifty-eight OPOs exist, each having jurisdiction over a unique geographic region and specific list of hospitals. *Id.* Organ donation in the Commonwealth of Pennsylvania is coordinated by two separate OPOs: the Center for Organ Recovery and Education (CORE) in the western half of the state, and Gift of Life Donor Program (Gift of Life) in the eastern half of the state. *Id.*

43. A national survey in 2012 found that "news coverage ([including] TV, radio, newspaper, [and] Internet)" was Americans' number one source of information about organ donation. U.S. DEP'T OF HEALTH & HUMAN SERVS., 2012 NATIONAL SURVEY OF ORGAN DONATION ATTITUDES AND BEHAVIORS 60 (2013), <http://organdonor.gov/dtcp/nationalsurveyorgandonation.pdf>.

44. See Bucklin, *supra* note 41, at 339 ("[I]t is difficult to imagine a newspaper's editor siding with a next of kin who wants to prevent his deceased relative's decision to make an organ donation.").

45. See, e.g., *In re Janet S.*, 712 N.E.2d 422, 424 (Ill. App. Ct. 1999) (upholding a patient's advance directive despite protest by her next of kin).

46. See Kristin Cook, Note, *Familial Consent for Registered Organ Donors: A Legally Rejected Concept*, 17 HEALTH MATRIX 117, 142 (2007) (noting that "medical professionals' adherence to autonomy" regarding a patient's advance directive would be "morally inconsistent" with a failure to "place a similar importance on self-determination in the context of organ donation").

47. LEGISLATIVE BUDGET & FIN. COMM., A PERFORMANCE EVALUATION OF PENNSYLVANIA'S ORGAN & TISSUE DONOR AWARENESS PROGRAM S-9 (2007), <http://lbfc.legis.state.pa.us/Resources/Documents/Reports/145.pdf> [hereinafter LBFC REPORT]; *The Gap Continues to Widen*, U.S. DEP'T HEALTH & HUM. SERVS., <http://www.organdonor.gov/about/graphdescription.html> (last visited Apr. 1, 2016).

48. LBFC REPORT, *supra* note 47, at S-9.

49. REVISED UNIF. ANATOMICAL GIFT ACT § 8 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2006); see also Kielhorn, *supra* note 30, at 813.

50. REVISED UNIF. ANATOMICAL GIFT ACT, *supra* note 49, § 8; see also Kielhorn, *supra* note 30,

suits from these families.<sup>51</sup> In strengthening a donor's ability to gift her organs, while simultaneously denying families a right to sue over a perceived taking of those organs, the 2006 UAGA did little to clarify which rights a person's next of kin has to her remains.<sup>52</sup>

*B. Organ Donation Legislation in Pennsylvania*

As of 2015, Pennsylvania was one of just three U.S. states that had not adopted the 2006 revision of the UAGA.<sup>53</sup> The Commonwealth had not always been so resistant to new organ donation laws. In 1994, the Pennsylvania General Assembly passed Act 102, a groundbreaking anatomical gift law that incorporated and expanded on the 1987 version of the UAGA.<sup>54</sup> Unlike the model law, Act 102 established routine hospital referrals, which required medical staff to notify their local OPO of every death that occurred in the hospital.<sup>55</sup> Whereas prior law gave hospitals wide discretion in choosing which deaths to refer for donation, Act 102 recognized an OPO's enhanced expertise in evaluating potential donors.<sup>56</sup> Act 102's routine referral process proved so successful that the federal government made it a requirement for all Medicare and Medicaid providers.<sup>57</sup>

Act 102 also expanded on the UAGA by creating the first Organ Donation Advisory Committee (the Committee).<sup>58</sup> The Committee's goals were to develop educational programs that would encourage donor designation and to create a registry for those designations within the state's driver's license and ID card

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at 814.

51. REVISED UNIF. ANATOMICAL GIFT ACT, *supra* note 49, § 18(a).

52. Black's Law Dictionary defines "taking" as "[t]he act of seizing an article, with or without removing it, but with an implicit transfer of possession or control." *Taking*, BLACK'S LAW DICTIONARY (10th ed. 2014).

53. *Our Cause*, SAVE A LIFE NOW PA, <http://www.savealifenowpa.org/> (last visited Apr. 1, 2016) (follow "Our Cause" under main page header).

54. See LBFC REPORT, *supra* note 47, at S-5-6.

55. *Id.* at S-7.

56. Cf. John C. Render & James B. Hogan, *Health Care Law: A Survey of Significant 1998 Developments*, 32 IND. L. REV. 841, 852 (1999) (explaining that the Medicare and Medicaid requirements for routine referrals are "intended to relieve the hospital of its responsibility to . . . determine the medical suitability of potential organ donors" and instead give that authority to the OPOs).

57. DEP'T OF HEALTH & HUMAN SERVS., MEDICARE CONDITIONS OF PARTICIPATION FOR ORGAN DONATION: AN EARLY ASSESSMENT OF THE NEW DONATION RULE 8-9 (2000), <http://www.njsharingnetwork.org/document.doc?id=34>. "Routine referral" is a provision of Act 102 that requires every hospital in the state to contact its respective OPO—CORE or Gift of Life—when a patient dies in the hospital, or when death is imminent. *Id.* at 9; LBFC REPORT, *supra* note 47, at S-7. The OPO then makes a determination of whether or not the patient is a suitable candidate for organ donation. In the two years following the enactment of routine referral, Gift of Life saw a forty percent increase in organ donation rates. See DEP'T OF HEALTH & HUMAN SERVS., *supra*, at 8-9. By 1998, the U.S. Health Care Financing Administration had made routine referral a required practice at every hospital that receives Medicare. *Id.* at 8.

58. See LBFC REPORT, *supra* note 47, at S-3.

system.<sup>59</sup> These initiatives made Pennsylvania one of the most active regions in the country for transplantation and established the Commonwealth as a national leader in anatomical gift legislation.<sup>60</sup>

In 2006, House Resolution 698 ordered the Legislative Budget and Finance Committee (LBFC) to conduct a performance evaluation of the past ten years' efforts to increase donor awareness.<sup>61</sup> The ensuing report lauded the Committee for establishing Pennsylvania as a "best practices" state, but also put forth twenty-six detailed recommendations meant to "address the widening gap between the supply of transplantable organs and the number of patients on the waiting list."<sup>62</sup> The recommendations included expanding educational programs, strengthening Pennsylvania's commitment to first-person consent through the state's donor registry, and statutorily defining the roles of coroners in the donation process.<sup>63</sup> Moreover, the report acknowledged the most recent version of the UAGA and suggested that Pennsylvania's law may not meet the requirements of the updated model act.<sup>64</sup> In response, a number of community partners published the Pennsylvania Organ and Tissue Donation Action Plan (the Action Plan) in 2010.<sup>65</sup> The Action Plan acknowledged the LBFC's recommendations and set out a five-year strategic plan to increase donor designations in the state.<sup>66</sup> Its first objective was to pass the revised UAGA of 2006<sup>67</sup> and accord Pennsylvania law with the UAGA's new national standards.<sup>68</sup>

In the spring of 2013, over 6,000 people were waiting for an organ transplant in Pennsylvania, and one waiting list candidate died each day because of the lack of available organs.<sup>69</sup> At the time, Pennsylvania was one of the only U.S. states that had not yet adopted the revised UAGA.<sup>70</sup> In April, State Senator Stewart Greenleaf introduced Senate Bill 850, a proposed update to the state's twenty-year-old anatomical gift legislation.<sup>71</sup> The proposed legislation would strengthen

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59. *Id.* at S-10-11.

60. *Id.* at S-5.

61. *Id.* at S-4.

62. *Id.* at S-5.

63. *Id.* at S-15-41. "First-person consent" refers to a system that allows each individual person to decide for himself whether or not he wishes to donate his organs at the time of death. Karen Sokohl, *First Person Consent: OPOs Across the Country Are Adapting to the Change*, UNOS UPDATE, Sept.-Oct. 2002, at 1, 1, [http://www.unos.org/docs/registires\\_combined.pdf](http://www.unos.org/docs/registires_combined.pdf). A jurisdiction that recognizes first-person consent makes every effort to honor the decedent's wishes by strengthening relationships between hospitals and OPOs, and by considering the decedent's decision as paramount in the face of competing wishes by family members. *Id.*

64. See LBFC REPORT, *supra* note 47, at S-14.

65. PA. DEP'T OF HEALTH, THE PENNSYLVANIA ORGAN AND TISSUE DONATION ACTION PLAN 1 (2010).

66. *Id.*

67. *Id.* at 6.

68. By 2015, forty-seven states had updated their organ donation laws in accordance with the national standard. See *Our Cause*, *supra* note 53.

69. See S. Res. 89, 181st Gen. Assemb., Reg. Sess. (Pa. 2013).

70. See *Our Cause*, *supra* note 53.

71. See *Bills Prime-Sponsored by Senator Greenleaf*, STEWART J. GREENLEAF, <http://www.sen>

the language of the law to ensure that first-person consent to donation is binding, enumerate exactly who could make a gift in the absence of a first-person decision, and require that coroners and MEs work with Pennsylvania's OPOs to make all efforts to respect the decedent's donation wishes.<sup>72</sup> That following June, Representative Joseph Petrarca introduced the nearly identical House Bill 30 as a companion bill to Senator Greenleaf's Senate Bill 850.<sup>73</sup> The bills were reintroduced for the 2015–2016 legislative session as Senate Bill 180 and House Bill 30.<sup>74</sup> Passage of either bill would rename the state's anatomical gift law as the Donate Life PA Act.<sup>75</sup>

### C. *The Legalities of Death in the United States*

American property law derives largely from English jurisprudence, which originally refused to recognize property rights in human bodies.<sup>76</sup> Indeed, legal systems across the world have long struggled with how to address property claims to the dead.<sup>77</sup> In eighteenth-century England, the responsibility to provide all persons with a Christian burial fell largely to the church.<sup>78</sup> While common law courts were in the business of deciding issues of property law, disputes over human bodies lay solely within the ecclesiastical courts' jurisdiction.<sup>79</sup> The distinction drove an early wedge between developing definitions of property and the legal status of the body.<sup>80</sup> This "no-property rule" firmly disallowed ownership over human remains,<sup>81</sup> and yet its application was nuanced. While family members could not claim a property right over a loved one's body, courts willingly recognized that they had an interest, as well as a duty, in its burial.<sup>82</sup> By the late nineteenth century, the no-property rule gave way to a limited common-law interest in a loved one's remains for the purposes of burial.<sup>83</sup> As such,

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atorgreenleaf.com/legislation/ (last visited Apr. 1, 2016).

72. See S.B. 850, 181st Gen. Assemb., Reg. Sess. § 8627 (Pa. 2013).

73. See Petrarca Bill, *supra* note 11.

74. See *supra* notes 11 and 17 for more information on the legislative history of the Act.

75. See *supra* notes 11 and 17 for more information on the legislative history of the Act.

76. Remigius N. Nwabueze, *Biotechnology and the New Property Regime in Human Bodies and Body Parts*, 24 LOY. L.A. INT'L & COMP. L. REV. 19, 22 (2002); Colleran, *supra* note 42, at 1206–07.

77. Nwabueze, *supra* note 76, at 21–39.

78. Peterson, *supra* note 28, at 185.

79. Nwabueze, *supra* note 76, at 22.

80. See, e.g., *Williams v. Williams* (1881) 20 Ch. D. 659, 662–63 (Eng.) (establishing that there is "no property" in a dead body); *R. v. Fox* (1841) 114 Eng. Rep. 95, 95–96, 2 QB 242, 246–47 (holding that a corpse could not be seized to fulfill a debt).

81. Peterson, *supra* note 28, at 185. The term "no-property rule" refers to the common-law tenet that human bodies were never to be considered "property." *Id.*

82. See Michelle Bourianoff Bray, Note, *Personalizing Personalty: Toward a Property Right in Human Bodies*, 69 TEX. L. REV. 209, 226–27 (1990); Colleran, *supra* note 42, at 1206.

83. Bray, *supra* note 82, at 226–27. The limited interest in a family member's body was expressly distinguished from a property right. *Id.* at 226. A family member did not have a full property interest in the body, but rather had a strong interest in ensuring proper burial. *Id.* at 227. Recognizing such a right likely appeased mourning family members and simultaneously shielded the Crown from the costs of burial.

despite purporting to reject any property rights in the dead, England had effectively planted the seeds for change.<sup>84</sup>

Early American courts adhered to the English no-property rule in deciding claims to deceased bodies.<sup>85</sup> However, without an ecclesiastical court to decide disputes over the issue, American courts constructed a quasi-property right in human remains with the express goal of respecting the sanctity of the dead.<sup>86</sup> Whereas traditional property rights gave an owner a wide range of legal actions over his property, the exact nature of quasi property was unclear.<sup>87</sup> Courts struggled to qualify exactly which rights attached to human remains and who owned those rights.<sup>88</sup> As the nation grew, the meaning of quasi property became as expansive as the number of jurisdictions defining it.<sup>89</sup> Within a century, this once-championed rejection of ecclesiastical law had become “something evolved out of thin air” to protect the personal feelings of survivors “under a fiction likely to deceive no one but a lawyer.”<sup>90</sup>

The advancement of medical technology has completely changed the national conversation about quasi property and human remains.<sup>91</sup> Suddenly, a dead body has transformed from a mere “lump of earth”<sup>92</sup> to a highly valuable—and, in many cases, invaluable—resource for medical education, research, and lifesaving bioproducts.<sup>93</sup> While families continue to claim property rights for the purpose of burial, scientists applying for patents now lay claim to cell lines and

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84. Colleran, *supra* note 42, at 1206.

85. *Id.*

86. Tracie M. Kester, Note, *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, 575 (2007). Without an ecclesiastical court to handle matters of the church, American courts decided issues over dead bodies in a more secular way. *See id.* They ultimately took a stronger position—recognizing the next of kin as having some right to ensure burial, but no right to own or sell the body, as would be typical of a traditional property right. *See, e.g., id.* at 575–76. Thus, it came to be recognized as a “quasi-property” right. *Id.* at 575.

87. *Id.*; *see also* Joanne Belisle, Note, *Recognizing a Quasi-Property Right in Biomaterials*, 3 UC IRVINE L. REV. 767, 780 (2013) (explaining that the current law provides little guidance on assigning control of bodies, and courts have made decisions on an “ad hoc basis”).

88. Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 382–86 (2000).

89. *See id.* at 384–86 (discussing cases in various jurisdictions that explain the concept quasi-property).

90. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 63 (5th ed. 1984); *accord* Markmann, *supra* note 24, at 510.

91. *See* Nwabueze, *supra* note 76, at 41.

92. Kester, *supra* note 86, at 574 (quoting Haynes’ Case (1614) 77 Eng. Rep. 1389, 1389, 12 Co. Rep. 113, 113 (K.B.)).

93. In addition to recovering solid organs (such as a heart, liver, or kidney) for transplant, doctors can recover certain tissues (such as skin, ligaments, or bone) at the time of death. *See* Peterson, *supra* note 28, at 172 n.17. These tissues are often repurposed into bioproducts and used in surgical procedures. Donated skin tissue becomes an invaluable skin graft for a burn victim. Donated ligaments help repair a difficult knee injury. Donated bone replaces or fortifies parts of an injured spine. *See Donation FAQs*, MUSCULOSKELETAL TRANSPLANT FOUND., [http://www.mtf.org/donor\\_faq.html](http://www.mtf.org/donor_faq.html) (last visited Apr. 1, 2016).

manipulated DNA strands.<sup>94</sup> Modern courts not only grapple with the ambiguous definition of quasi property, but also must decide if that definition still serves its intended purpose in this brave new world of medical possibility.<sup>95</sup>

When a person dies in an unusual or unexpected way, her next of kin's claim to the body for burial purposes is often outweighed by a state's interest in determining her cause of death.<sup>96</sup> The United States uses a system of coroners and MEs to investigate suspicious deaths.<sup>97</sup> This system derives from the old English institutions, whereby a coroner was elected from the educated class to represent the Crown's interest.<sup>98</sup> Before a family could claim interest in a body for burial purposes, a coroner gained legal authority over the body to investigate the cause and manner of death.<sup>99</sup> Yet, because most coroners were not doctors, early American jurisdictions sometimes had to call on physicians to consult on difficult cases.<sup>100</sup>

In the United States, each jurisdiction may choose to fill this investigatory role with either a coroner or an ME.<sup>101</sup> Some states allow only MEs to investigate deaths, whereas others allow each county to implement its own system.<sup>102</sup> The latter is the case in Pennsylvania, where sixty-four counties elect coroners to public office, and three—Philadelphia,<sup>103</sup> Delaware,<sup>104</sup> and Allegheny

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94. See Roy Hardiman, Comment, *Toward the Right of Commerciality: Recognizing Property Rights in the Commercial Value of Human Tissue*, 34 UCLA L. REV. 207, 215 (1986); Belisle, *supra* note 87, at 777; see also *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107, 2119 (2013) (recognizing the patentability of “innovative method[s] of manipulating [human] genes”); *Diamond v. Chakrabarty*, 447 U.S. 303, 310 (1980) (finding that scientists could obtain a patent in modified bacterium because their modifications created something “with markedly different characteristics from any found in nature”).

95. Hardiman, *supra* note 94, at 215–17.

96. See Peterson, *supra* note 28, at 188–89.

97. In the United States, a coroner is an elected official with no required medical background. See John L. Flynn, *The Office of the Coroner vs. the Medical Examiner System*, 46 J. CRIM. L. & CRIMINOLOGY 232, 232–33 (1955). A medical examiner (ME) is a medical doctor appointed by a governor or a mayor. *Id.* at 236–37.

98. See *id.* at 232–33; JEFFREY M. JENTZEN, *DEATH INVESTIGATION IN AMERICA: CORONERS, MEDICAL EXAMINERS, AND THE PURSUIT OF MEDICAL CERTAINTY* 9–10 (2009).

99. JENTZEN, *supra* note 98, at 4 (explaining that early coroners had a legal responsibility to convene an inquest following an unexplained death); *id.* at 168 (describing the tension between a family's quasi-property interest in burial and the coroner's responsibility to investigate sudden deaths).

100. *Id.* at 13 (“Physicians performed autopsies only when some doubt about the cause of death existed . . .”).

101. *Id.* at 2 (“Death investigation systems across the United States are determined by a patchwork of state and local jurisdictions.”).

102. *Id.* (“Some counties and states have retained the traditional position of elected coroner; others have transferred the office's duties to appointed physician medical examiners.”); see also COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIS. CMTY., NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD* 245 (2009), <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf>.

103. *Medical Examiner's Office*, PUB. HEALTH CITY PHILA., <http://www.phila.gov/health/medicalexaminer/index.html> (last visited Apr. 1, 2016).

104. *Office of the Medical Examiner*, DEL. COUNTY, <http://www.co.delaware.pa.us/ome/> (last visited Apr. 1, 2016).

counties<sup>105</sup>—appoint MEs.<sup>106</sup> As medicine has advanced, MEs have become highly specialized in the field of forensic pathology.<sup>107</sup> Forensic pathologists, in comparison to general pathologists, complete additional coursework in investigative pathology and medicolegal investigations.<sup>108</sup> As such, MEs are highly qualified to handle a wide swath of death investigations.<sup>109</sup> Conversely, coroners are not required to have any medical training, so they rely on regional pathologists to perform autopsies.<sup>110</sup> Yet many jurisdictions continue to elect coroners because of a misperception that they cost less than MEs.<sup>111</sup> Some also feel that MEs would have trouble investigating politically sensitive deaths because of their loyalty to the office that appointed them.<sup>112</sup>

In Pennsylvania, the local coroner or ME receives authority at the time of death over any person whose death occurs without medical attendance or is caused by violence or other nonnatural means.<sup>113</sup> The official may then determine whether an autopsy is required, approve any necessary tests,<sup>114</sup> and coordinate with local law enforcement before “releasing” the body to the next of

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105. *Medical Examiner*, ALLEGHENY COUNTY, <http://www.alleghenycounty.us/medical-examiner/index.aspx> (last visited Apr. 1, 2016).

106. Zug G. Standing Bear, *Conflicts of Interest in U.S. Coroner System*, FUNERAL ETHICS ORG., <http://www.funeralethics.org/summary.htm> (last visited Apr. 1, 2016).

107. See JENTZEN, *supra* note 98, at 73–75 (explaining how forensic pathology grew increasingly specialized in the early twentieth century, inspired by newly recognized subdivisions in anatomic pathology and an increased demand for autopsies in death investigations).

108. *Id.* at 1–2; see COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIS. CMTY., *supra* note 102, at 244.

109. JENTZEN, *supra* note 98, at 78–82 (describing how general pathologists are often less able to identify criminal evidence than their forensically trained counterparts).

110. See *id.* at 1–2 (noting that most coroners are not medically trained in death investigations, and may be lawyers, law enforcement personnel, or funeral directors). See also *id.* at 58–62 for an explanation of how funeral directors often have a stronghold over local coroners’ offices, and how coroners must report their cases to medical schools or pathologists for potential autopsies.

111. See *Id.* at 154–163 for an account of how coroners in South Carolina successfully opposed a bill aiming to create an ME system in that jurisdiction by convincing the legislature that MEs cost more and create more bureaucracy. In truth, many MEs receive higher salaries than their elected counterparts. In 2011, the salary for the Clearfield County Coroner was \$42,736. Jeff Corcino, *Clearfield County Releases List of Employee Salaries*, PROGRESS (Jan. 5, 2011), <http://www.theprogressnews.com/default.asp?read=25318>. In contrast, that same year the salary for the Philadelphia ME was \$239,200. Haley Kmetz, *Top PA Public Employee Earner? Take a Guess*, PHILLY.COM (Jan. 18, 2012), [http://articles.philly.com/2012-01-18/news/30639486\\_1\\_public-employees-salary-sunshine-review](http://articles.philly.com/2012-01-18/news/30639486_1_public-employees-salary-sunshine-review).

Despite this, reports show that ME systems generally do not cost more than coroner systems—in fact, they sometimes cost less. See JENTZEN, *supra* note 98, at 22, 36–37; Flynn, *supra* note 97, at 237.

112. See JENTZEN, *supra* note 98, at 164 (highlighting a long-held notion that “medical examiners were biased because their appointments rested in the hands of politically motivated officials”); see also Flynn, *supra* note 97, at 233 (“The major argument made for retention of the coroner system is that . . . a democratic ‘check and balance’ is maintained against dishonest public officials who might otherwise conveniently cover up homicides by not reporting true causation of death.”). This argument is not entirely without merit. For example, there have been reports in the twenty-first century of courts ordering forensic pathologists to “amend their autopsy reports when they have implicated use of Tazer devices in police-related deaths.” JENTZEN, *supra* note 98, at 211.

113. See 16 PA. STAT. AND CONS. STAT. ANN. § 1237(a) (West 2016).

114. *Id.* § 1238(a)–(b).

kin for burial.<sup>115</sup> In Philadelphia, Delaware, and Allegheny counties, the appointed MEs rely on a team of pathologists and technicians to investigate the large volume of deaths each year.<sup>116</sup>

Coroners and MEs are often involved in organ donation cases because the vast majority of organ donors are declared dead according to “brain death criteria.”<sup>117</sup> Whereas most people are declared dead when their hearts stop (cardiac death), brain death indicates that a person has irreversibly lost all brain function,<sup>118</sup> sometimes due to a head injury or lack of oxygen to the brain.<sup>119</sup> Because these kinds of deaths are often sudden and without prior medical attendance, they typically fall under the umbrella of coroner or ME authority.<sup>120</sup> In a situation where a person has consented to and is an appropriate candidate for donation, organ recovery cannot begin until the coroner or ME has released the body.<sup>121</sup> Any delay caused by the forensic investigation could eradicate the possibility of successful donation due to the time-sensitive nature of organ recovery.<sup>122</sup> Consistent with the 2006 revision of the UAGA, the Donate Life

115. *See id.* § 1242.

116. *See Donate Life PA Act: Hearing on H.B. 30 Before the H. Comm. on the Judiciary*, 181st Gen. Assemb. 94 (Pa. 2014) (statement of Dr. Sam Gulino, Chief Medical Examiner) [hereinafter *Gulino Statement*]; *Autopsy and Histology: Medical Examiner*, ALLEGHENY COUNTY, <http://www.alleghenycounty.us/medical-examiner/about/autopsy.aspx> (last visited Apr. 1, 2016); *Pathology: Medical Examiner's Office*, PHILA. DEP'T HEALTH, <http://www.phila.gov/health/medicalexaminer/Pathology.html> (last visited Apr. 1, 2016); *Procedures: Office of the Medical Examiner*, DEL. COUNTY, <http://www.co.delaware.pa.us/ome/procedure.html> (last visited Apr. 1, 2016).

117. *See Donate Life PA Act: Hearing on H.B. 30 Before the H. Comm. on the Judiciary*, 181st Gen. Assemb. 18–20 (Pa. 2014) (statement of Richard D. Hasz, Vice-President of Clinical Services for Gift of Life) [hereinafter *Hasz Statement*] (explaining that organ donation is limited to patients with “a very acute neurologic devastating injury” and that “brain death testing” requires OPOs to call to a medical examiner or coroner to evaluate the patient for donation); JENTZEN, *supra* note 98, at 118 (describing how the definition of brain death criteria developed and how many potential organ donors fall under the jurisdiction of medical examiners and coroners); Crespi, *supra* note 29, at 5–6 (noting that deceased candidates for organ recovery are usually “victim[s] of a sudden death caused by traumatic brain injury or cerebral hemorrhage”).

118. Choi et al., *supra* note 2, at 825.

119. *See* Samantha Weyrauch, *Acceptance of Whole-Brain Death Criteria for Determination of Death: A Comparative Analysis of the United States and Japan*, 17 UCLA PAC. BASIN L.J. 91, 94 (1999) (“The most frequently cited causes of brain death include: (1) direct trauma to the head; (2) massive hemorrhaging into the brain due to an aneurysm; and (3) the lack of adequate oxygen to the brain because of cardiac or respiratory arrest.”); *see also* D. SCOTT HENDERSON, *DEATH AND DONATION: RETHINKING DEATH AS A MEANS FOR PROCURING TRANSPLANTABLE ORGANS* ch. 1 (2011).

120. JENTZEN, *supra* note 98, at 121 (“The majority of organ recoveries resulted from sudden, unexpected deaths—cases that were statutorily placed under the medical examiner’s [or coroner’s] authority.”); *Gulino Statement*, *supra* note 116, at 91.

121. JENTZEN, *supra* note 98, at 118 (“[D]eaths coming under the jurisdiction of medical examiners or coroners would first require investigation, followed by approval, before organ procurement could proceed.”).

122. *See* Peterson, *supra* note 28, at 214 (“[M]any organs remain viable for only a few hours after death . . . . Because time is of the essence, immediate action is necessary when a conflict arises between the interest of a state investigator and the family’s interest in organ donation.”). While delay is one concern, the fact that a coroner may refuse organ recovery altogether is even more concerning. *See infra* note 129.

PA Act aims to alleviate the tension between these competing interests.<sup>123</sup>

*D. Opposition to the Donate Life PA Act*

During the 2013–2014 legislative session, the Act faced resistance from three distinct interest groups: the PSCA, the Pennsylvania District Attorney's Association (PDAA), and the Pennsylvania Coalition Against Domestic Violence (PCADV).<sup>124</sup> All three groups took issue with one common provision (the coroners' provision), which would require a coroner or ME (or a designee) to be present on-site at the deathbed of a potential organ donor before they can forbid donation for forensic reasons.<sup>125</sup> Opponents of the Act feared this added requirement could stymie forensic investigations and impede law enforcement,<sup>126</sup> especially for crimes that lead to deaths that are difficult to determine, as was the case for Baby Sophia.

The coroners' provision would impose a new requirement on coroners and MEs before they can refuse to permit organ donation.<sup>127</sup> As the law currently stands, a Pennsylvania coroner can override a deceased individual's decision to be an organ donor without considering any physical evidence first.<sup>128</sup> The existing statute allows a coroner to override a decedent's wish to donate by phone. The proposed legislation would require that a coroner or his designee be physically present at a prospective donor's bedside before making such a determination.<sup>129</sup>

Specifically, the Act would require a coroner to notify the OPO in writing if he intended to deny recovery.<sup>130</sup> In such an instance, the OPO could request that the coroner observe the body and the transplantable organs before denial.<sup>131</sup>

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123. See *Gulino Statement*, *supra* note 116, at 95.

124. See generally *Donate Life PA Act: Hearing on H.B. 30 Before the H. Comm. on the Judiciary*, 181st Gen. Assemb. 49–73 (Pa. 2014).

125. See S.B. 180, 2015 Gen. Assemb., Reg. Sess. § 8626(b)(1)–(2) (Pa. 2015) for the provision that requires coroners and MEs, or their designees, to physically attend the organ recovery if they intend to deny donation of any organ. See also *Donate Life PA Act: Hearing on H.B. 30 Before the H. Comm. on the Judiciary*, 181st Gen. Assemb. 52, 55 (Pa. 2014) (statement of David Freed, Cumberland County District Attorney) [hereinafter *Freed Statement*] (explaining PDAA's "concerns regarding the process for denying organ harvesting"); *Donate Life PA Act: Hearing on H.B. 30 Before the H. Comm. on the Judiciary*, 181st Gen. Assemb. 61, 62 (Pa. 2014) (statement of Susan Shanaman, Pennsylvania State Coroners Association) [hereinafter *Shanaman Statement*] (arguing that the provision of Senate Bill 180 that allows coroners to watch organ recovery cannot replace effective autopsy).

126. See, e.g., *Freed Statement*, *supra* note 125, at 55 ("We believe law enforcement personnel in the county where the crime took place should have final determination [on organ recovery]."); *Shanaman Statement*, *supra* note 125, at 59 ("[The coroners] believe that the [Act] goes a little too far in terms of taking away the jurisdiction and the ability of the coroners to investigate those deaths.").

127. *Gulino Statement*, *supra* note 116, at 93.

128. *Donate Life PA Act: Hearing on H.B. 30 Before the H. Comm. on the Judiciary*, 181st Gen. Assemb. 17 (Pa. 2014) (statement of Howard M. Nathan, President and CEO, Gift of Life Donor Program) [hereinafter *Nathan Statement*] ("The decision to turn down an organ by a coroner is [currently] done without actual physical evidence of the donor organ.").

129. S.B. 180, 2015 Gen. Assemb., Reg. Sess. § 8626(b)(2)(ii) (Pa. 2015).

130. *Id.* § 8626(b)(1).

131. *Id.* § 8626(b)(2).

Once present, the coroner could request a number of tests to determine an organ's forensic value.<sup>132</sup> These tests include inspection, photographs, and x-rays before the body is taken for recovery.<sup>133</sup> The coroner could photograph the body cavity after a donor had been surgically opened, as well as each organ after removal.<sup>134</sup> He could inspect the organ, request a biopsy,<sup>135</sup> or request a surgeon's report on any abnormalities observed during recovery.<sup>136</sup> The coroner could still deny donation if, in his judgment, removal of that specific organ would "interfere with or impede the investigation of the cause, manner and mechanism of death."<sup>137</sup> If he did deny the recovery of an organ, he would be required to explain his reasoning in writing.<sup>138</sup>

Proponents of the law see these requirements as necessary inconveniences to an otherwise positive end; that is, fulfilling the written wishes of the decedent and ideally saving lives.<sup>139</sup> Opponents fear the law will prioritize organ donation over criminal justice, effectively removing a potential victim's organs and thereby erasing any possible evidence the state could use to prosecute the crime against her.<sup>140</sup> Opponents stress that the Act will "make it easier for murderers to avoid detection and prosecution."<sup>141</sup>

As the most outspoken opponent of the Act, PCSA points to a handful of cases in which an OPO was able to pursue organ recovery over a coroner's objection, resulting in inconclusive autopsy findings.<sup>142</sup> A 2010 article published in the *American Journal of Forensic Medical Pathology* highlights five such cases in Houston, Texas.<sup>143</sup> The article responds to a 2007 position paper by the National Association of Medical Examiners (NAME) and stresses that organ recovery and its subsequent effect on the autopsy process can eliminate evidence

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132. See *id.*; J. Keith Pinckard et al., *Position Paper: Medical Examiner Release of Organs and Tissues for Transplantation*, 4 NAT'L ASS'N MED. EXAM'RS 497, 500 (2006) [hereinafter *NAME Position Paper*], [http://www.mtf.org/documents/New\\_NAME\\_Position\\_Paper\\_Organs\\_and\\_Tissue\\_Donation\\_011315.pdf](http://www.mtf.org/documents/New_NAME_Position_Paper_Organs_and_Tissue_Donation_011315.pdf).

133. *Gulino Statement*, *supra* note 116, at 94.

134. *Id.*

135. *Id.* at 93.

136. *E.g.*, *NAME Position Paper*, *supra* note 132, at 503.

137. S.B. 180 § 8626(b)(2)(ii).

138. *Id.* § 8626(b)(2)(iii).

139. See, *e.g.*, *Our Cause*, *supra* note 53.

140. See Dick Teresi, *Want to Murder Someone? Pennsylvania's About to Make It Easier*, DAILY CALLER (Sept. 16, 2014, 10:21 PM), <http://dailycaller.com/2014/09/16/want-to-murder-some-one-pennsylvanias-about-to-make-it-easier/>.

141. *Id.*

142. *Shanaman Statement*, *supra* note 125, at 61; see also Dwayne A. Wolf & Sharon M. Derrick, *Undetermined Cause and Manner of Death After Organ/Tissue Donation*, *Am. J. Forensic Med. & Pathology* 113, 114-15 (studying five cases of organ recovery against an ME's wishes); Jeff Frantz, *Bill Would Streamline PA Organ Donation Process, But Coroners Say It Could Hurt Investigations*, PENNLIVE (May 13, 2014, 4:41 PM), [http://www.pennlive.com/midstate/index.ssf/2014/05/organ\\_donation\\_baby\\_sophia\\_pen.html?utm\\_source=rss&utm\\_medium=rss&utm\\_campaign=bill-would-streamline-pa-organ-donation-process-but-coroners-say-it-could-hurt-investigations](http://www.pennlive.com/midstate/index.ssf/2014/05/organ_donation_baby_sophia_pen.html?utm_source=rss&utm_medium=rss&utm_campaign=bill-would-streamline-pa-organ-donation-process-but-coroners-say-it-could-hurt-investigations) (discussing the inconclusive autopsy results following organ donation in the case of Baby Sophia).

143. Wolf & Derrick, *supra* note 142, at 113.

that is crucial to a criminal investigation.<sup>144</sup> The NAME paper points out that coroners deny organ donation in very few forensic cases.<sup>145</sup> These few denials almost always concern potential pediatric donors.<sup>146</sup> In response, the Houston study details five separate autopsies (one adult woman and four infants) and describes how pursuing organ recovery against the ME's wishes may have destroyed crucial evidence in each case.<sup>147</sup> The study concludes, however, with the admission that "[i]n some or all of these cases if the autopsy had been complete the cause of death may well have been undetermined."<sup>148</sup> In the case of Baby Sophia, a cause of death was never identified, despite ME Williams's careful investigation prior to, during, and after organ recovery.<sup>149</sup>

In addition to highlighting the tug-of-war between organ donation and forensic autopsy, Baby Sophia's story highlights PDAA's concerns about how jurisdictional challenges should be handled. The child was declared dead at Children's Hospital of Pittsburgh in Allegheny County but her suspected abuse took place in Clearfield County.<sup>150</sup> Typically, the location that a person dies determines which coroner has jurisdiction over her body.<sup>151</sup> Indeed, the death-declaring hospital's respective OPO almost always coordinates organ recovery in that hospital, regardless of where the decedent resided or where the injury or disease arose.<sup>152</sup>

In Pennsylvania, trauma patients are often treated in one of three counties: Philadelphia, Allegheny, or Dauphin (home to Penn State Hershey Medical Center).<sup>153</sup> This is especially true for children who are often transported to Children's Hospital of Pittsburgh or Children's Hospital of Philadelphia (CHOP) for emergency trauma care.<sup>154</sup> Therefore, the MEs or coroners in those areas would have jurisdiction over patients who die there. In opposing the Act, PDAA points out the incongruity in a forensic case where a possible organ donor dies in a different county from where the violence occurred.<sup>155</sup> In such an instance, the county of death makes the donation decision and performs the autopsy in conjunction with organ recovery. Yet the county where the crime occurred, which has no authority over the method of autopsy or the release of organs, is tasked with prosecuting the case.<sup>156</sup>

PCADV stresses that domestic violence, the suspected cause of a large

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144. *Id.*

145. *NAME Position Paper*, *supra* note 132, at 499.

146. *See id.* at 502 (explaining that the two major situations that will create the most difficult decisions for MEs and coroners both concern juvenile donors).

147. *See Wolf & Derrick*, *supra* note 142, at 114–15.

148. *Id.* at 116.

149. *See Ward*, *supra* note 1.

150. *Id.*

151. 16 PA. STAT. AND CONS. STAT. ANN. § 1237(a) (West 2016).

152. *See Hasz Statement*, *supra* note 117, at 18–22.

153. *Freed Statement*, *supra* note 125, at 52.

154. *Id.* at 51.

155. *See id.* at 52–53.

156. *Id.* at 52–54.

number of deaths requiring autopsies, is among the category of deaths where a cause is difficult to determine.<sup>157</sup> Further, such deaths and their ensuing criminal investigations are handled especially sensitively, so as to not further traumatize any innocent children or family members.<sup>158</sup> However, while spouses and other close relatives are often suspected perpetrators in these deaths, they also hold the highest spots in the Act's prioritized next-of-kin list.<sup>159</sup>

The question of whether a father should make the donation decision for his alleged victim arose in Baby Sophia's case.<sup>160</sup> District Attorney Shaw suspected that the child's father and stepmother were responsible for her death and objected to their ability to consent for Sophia's organ donation.<sup>161</sup> CORE agreed and sought consent from the child's biological mother, who struggled with a drug addiction and had not seen her daughter in eight months.<sup>162</sup> Although Sophia had been involved with Children and Youth Services in Clearfield County, Shaw was unsuccessful in convincing the judge to appoint a guardian from that organization to represent the child's best interests.<sup>163</sup> The decision was left to Sophia's biological mother, who authorized donation.<sup>164</sup>

In considering these arguments against the Act, it is helpful to note that at least fourteen other states have enacted such coroners' provisions with success, including neighboring New Jersey, where these requirements have been in place since 1991.<sup>165</sup> Similar laws have been in effect in Texas and California for at least ten years.<sup>166</sup> More extremely, MEs in New York and Tennessee lost all power to deny organ donation,<sup>167</sup> likely due to previous policies of categorical denials for all potential forensic donors. Such data suggest these coroners' provisions do not stand as complete bars to forensic investigation and law enforcement. As a final note, anecdotal evidence from the MEs in both Philadelphia<sup>168</sup> and Pittsburgh<sup>169</sup> revealed that proceeding with organ donation never hindered the criminal prosecution of any case they worked on.

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157. See *Donate Life PA Act: Hearing on H.B. 30 Before the H. Comm. on the Judiciary*, 181st Gen. Assemb. 69 (Pa. 2014) (statement of Ellen Kramer, Local Director, Pennsylvania Coalition Against Domestic Violence) [hereinafter *Kramer Statement*].

158. *Id.*

159. See *id.* at 69–70.

160. Ward, *supra* note 1.

161. *Id.*

162. *Freed Statement*, *supra* note 125, at 53–54.

163. *Id.* at 53–54.

164. Ward, *supra* note 1.

165. See *Nathan Statement*, *supra* note 128, at 22.

166. *NAME Position Paper*, *supra* note 132, at 498–99 nn.14–15.

167. *Id.* at 498 nn.11–12.

168. *Gulino Statement*, *supra* note 116, at 94 (underscoring that the Philadelphia ME has never encountered a situation where “permitting organ donation has hampered the preservation of evidence, has hampered the determination of cause and manner of death or has hampered successful prosecution”).

169. Ward, *supra* note 1 (stating that the ME in Pittsburgh “has never had a case where the donation of organs has interfered with charges being filed”).

### III. DISCUSSION

Proponents of the Donate Life PA Act must overcome their political adversaries if Pennsylvania ever hopes to regain its position as a national leader in anatomical gift legislation. Revisions to the proposed Act have largely appeased PDAA and PCADV, yet PSCA remained steadfastly opposed to the law in 2016. Part III.A first discusses the criticisms of the PSCA and highlights various reasons why coroner opposition to the Act is misguided. Parts III.B and III.C then discuss the concerns of PDAA and PCADV, and how those concerns were handled with slight revisions to the Act. Finally, Part III.D suggests possible responses to the PSCA and advocates for promoting the bill in such a way that aligns the Act's goals with those of its detractors.

#### A. *PSCA's Opposition to the Act Fails to Account for the "Big Picture"*

PSCA raises the ominous accusation that the Act would impede law enforcement, however, this theory is baseless.<sup>170</sup> There is weak evidence—indeed, contradictory evidence—to suggest that organ recovery in forensic cases has any effect on conviction rates.<sup>171</sup> Further, while the Act's new coroner requirements may increase administrative costs, the Act would require OPOs to pay at least some of those costs.<sup>172</sup>

PSCA's contention that the coroners' provision would impede criminal justice is supported by conjecture and weak, if any, scientific evidence. Despite the outcry that the proposed legislation would "make it easier for murderers to avoid detection and prosecution,"<sup>173</sup> the language and intent of the Act would do nothing to change a coroner's authority over deaths within his control. Coroners in Pennsylvania, as throughout the nation, have an obligation to investigate deaths that fall within their respective jurisdictions.<sup>174</sup> If passed, the Act would keep the decision for donation squarely within a coroner's discretion.<sup>175</sup> What the coroners' provision does change is the process by which coroners may deny donation.<sup>176</sup>

While the Act certainly would heighten the requirements for a coroner to deny organ recovery, these requirements are neither arbitrary nor

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170. See *supra* Part II.D for an explanation why PSCA believes the Act would impede law enforcement.

171. See *supra* notes 165–69 and accompanying text for a discussion of the data and personal accounts that weigh heavily against PSCA's contention.

172. See *supra* notes 127–38 and accompanying text for a discussion of the additional requirements the Act imposes on coroners. See also S.B. 180, 2015 Gen. Assemb., Reg. Sess. § 8626(b)(2)(v) (Pa. 2015) ("The applicable organ procurement organization shall reimburse the coroner or medical examiner for the reasonable costs of attendance at the recovery procedure.").

173. See Teresi, *supra* note 140.

174. See *supra* notes 127–38 and accompanying text for a discussion of coroners' jurisdiction.

175. See *supra* notes 127–38 and accompanying text for a discussion of the coroners' donation discretion under the Act.

176. See *supra* notes 127–38 and accompanying text for a discussion of Act's changes to coroner denial of donation.

insurmountable.<sup>177</sup> Statistically, coroners deny organ donation in very few forensic cases.<sup>178</sup> These few denials almost always concern potential pediatric donors.<sup>179</sup> With the extremely low incidence of pediatric organ donors,<sup>180</sup> failure to recover otherwise viable organs for transplant could very likely result in the death of several children on the waiting list.<sup>181</sup> The Act's time-consuming requirements for coroners would no doubt prove inconvenient.<sup>182</sup> Yet, in balancing administrative inconvenience with the strong likelihood that a denial would result in a waiting-list patient losing her chance for a lifesaving transplant—or a grieving family losing the opportunity to bring meaning to an otherwise senseless death—the inconvenience seems small.

PSCA's strongest argument paints a frightening picture of criminals left unprosecuted due to a system that prioritizes organ recovery, and yet that contention is factually baseless.<sup>183</sup> The only evidence PSCA relies on is the Houston study, where organ recovery supposedly impeded forensic investigation in five specific cases.<sup>184</sup> These cases are certainly concerning. The state has a moral and legal imperative to bring criminals to justice, and cases involving domestic violence and children are especially troubling.<sup>185</sup> The Houston study, however, is not representative of similar situations across the nation and itself concedes that organ donation was not necessarily the reason that causes of death remained unexplained.<sup>186</sup> In fact, the NAME position paper argues organ donation will never impede law enforcement efforts as long as both parties follow best practices.<sup>187</sup> The five cases detailed in the Houston study serve as cautionary tales of the effects of ME and OPO discord.<sup>188</sup> They provide only

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177. See *supra* notes 127–38 and accompanying text for a discussion of the additional requirements the Act imposes on coroners.

178. See *Shanaman Statement, supra* note 125, at 60.

179. See *NAME Position Paper, supra* note 132, at 502.

180. See *id.* at 497 (“[T]he scarcity of donor organs is especially acute for children since organ size matters for liver, heart, and lung transplantation and there are relatively few size-matched deaths in younger children.”).

181. See *Nathan Statement, supra* note 128, at 13–14 (explaining that on average more than 400 people die per year waiting for a transplant).

182. See *Shanaman Statement, supra* note 125, at 60–63.

183. See *NAME Position Paper, supra* note 132, at 503 (proposing best practices that would almost always allow ME release of transplantable organs).

184. See *supra* notes 142–48 and accompanying text for a discussion of the Houston study and its flaws.

185. See *supra* 142–48 and accompanying text for a description of the cases used in the Houston study. It would behoove the Act's proponents to agree with law enforcement in situations where poor processes lead to injustice. Indeed, the Act's express goal is to save lives, a concept not far removed from the goal of ensuring justice for lives lost to crime and wrongdoing. If executed carefully and correctly, the coroners' provision will never result in a loss of forensic evidence. See *infra* Part III.D.3 for a discussion of how the Act's proponents can shape their messaging to better address these perceived conflicts.

186. See *supra* notes 132–40 and accompanying text for a description of responses that allow organ recovery without interfering with determining cause of death.

187. See *NAME Position Paper, supra* note 132, at 503.

188. See *id.* at 499; see also *Gulino Statement, supra* note 116, at 94–95 (highlighting the lack of

weak evidence of PSCA's assertion that organ recovery in spite of ME denial will hinder criminal prosecutions.<sup>189</sup>

Highlighting a few specific cases, such as Baby Sophia's, seemingly provides acute support for PSCA's position that the Act eases organ donation at too high a cost. Yet, closer examination of these cases reveals the hypothetical nature of PSCA's argument.<sup>190</sup> The truth is that the manner of death in suspected shaken baby cases is often listed as "undetermined," regardless of the autopsy method used.<sup>191</sup> Even the consulting pathologist in Clearfield County agreed that Baby Sophia's cause of death would be difficult to prove, whether or not District Attorney Shaw had the opportunity to order a traditional autopsy.<sup>192</sup> Further, MEs from Philadelphia and Pittsburgh, cities that likely see the state's highest number of crime-related deaths per year, assert they have never worked on a case where performing an autopsy in conjunction with organ donation hindered a criminal investigation.<sup>193</sup>

In addition to the barrage of tests, photographs, and examinations pathologists perform prior to removals, coroners can also follow up on organs after donations.<sup>194</sup> The fact that a transplanted organ is functioning and keeping a person alive is perhaps the most basic evidence that the organ did not contribute to the donor's cause of death.<sup>195</sup> However, the converse is not necessarily true.<sup>196</sup> Post-transplant organ failure can result for any number of reasons and therefore is not "unequivocal evidence" that a perceived defect in an organ can be linked to a donor's cause of death.<sup>197</sup>

#### B. PDAA's Jurisdictional Argument Was Contrary to Actual Practices

Although PDAA opposed the bill in 2014, revisions to the proposed language of the Act may have satisfied its concerns.<sup>198</sup> Still, PDAA's assertion that the Act would impinge on prosecutorial discretion should have failed from the beginning because PDAA could never show that the new law would make

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cooperation between ME and OPO in the Houston study.).

189. See *supra* notes 165–69 and accompanying text for evidence that discredits PSCA's argument that the coroners' provision would impede forensic investigations.

190. See *supra* notes 165–69 and accompanying text for evidence contradicting PSCA's assertion that the Act's benefits are not outweighed by the costs.

191. See Ward, *supra* note 1.

192. *Id.*

193. See *supra* notes 168–69 and accompanying text for statements made by Philadelphia and Allegheny county MEs denying organ recovery's detrimental affect on criminal prosecutions.

194. See *supra* notes 127–38 for a discussion of MEs' and coroners' options for investigating organs after donations.

195. *Gulino Statement, supra* note 116, at 99.

196. Wolf & Derrick, *supra* note 142, at 115.

197. *Id.*

198. Compare S.B. 180 § 8626(c), 2015 Gen. Assemb., Reg. Sess. (Pa. 2015), which specifies a role for district attorneys during organ recovery, with S.B. 850 § 8626(c), 2013 Gen. Assemb., Reg. Sess. (Pa. 2013), which contains no such language.

any changes to the existing relationship between district attorneys and MEs.<sup>199</sup> The district attorneys argued that, by passing the Act, the Commonwealth would allow MEs from Philadelphia or Pittsburgh to decide what evidence the outlying counties would or would not need at trial.<sup>200</sup> In reality, the Act would never have changed anything about the process that district attorneys undergo when prosecuting out-of-county deaths caused by in-county crimes.

PDAA relied on Baby Sophia's story to predict a jurisdictional tug-of-war, despite the fact that Pennsylvania already had procedures in place to address those challenges.<sup>201</sup> Children's Hospital of Pittsburgh in Allegheny County declared the little girl dead, and yet her suspected abuse took place in Clearfield County.<sup>202</sup> The challenge in such a case is to respect the home county's interest in prosecuting the crime and equally acknowledge the time-sensitive requirements for organ recovery and transplant.<sup>203</sup> Typically, the location where a person dies determines which coroner has jurisdiction over the body.<sup>204</sup> To do otherwise would require a massive effort in transporting the ventilated decedent while ensuring the continued viability of her organ function.<sup>205</sup>

PDAA had a legitimate basis for arguing that the donation decision would be best left to a district attorney, who has the qualifications to determine what evidence (or lack thereof) would aid a criminal trial. PDAA pointed out that while a pathologist may have expertise in determining cause-of-death, an attorney is an expert in determining what evidence is needed to convince a jury of the cause of that death.<sup>206</sup> Yet, the MEs or coroners in those areas would have jurisdiction over patients who died there,<sup>207</sup> while the county where the crime occurred would have been tasked with prosecuting the case.<sup>208</sup> As District Attorney Shaw argued in Baby Sophia's case, the residents of the prosecuting county have a greater interest in seeing justice done.<sup>209</sup>

PDAA's jurisdictional argument was a sympathetic one, but ultimately failed to address the goal of the coroners' provision: recognizing a coroner or ME's interests alongside those of a local organ donation system.<sup>210</sup> In

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199. See *supra* Part II.D for a discussion of PDAA's opposition to the Act.

200. See, e.g., *Freed Statement*, *supra* note 125, at 52.

201. See *id.*; Ward, *supra* note 1 (detailing the Clearfield County District Attorney's frustration that the Allegheny County ME usurped his coroner's power to deny donation).

202. *Id.*

203. See *Freed Statement*, *supra* note 125, at 52–55.

204. 16 PA. STAT. AND CONS. STAT. ANN. § 1237(a) (West 2016).

205. See *id.*

206. See Ward, *supra* note 1. A district attorney would likely have more expertise than a coroner in determining the weight of evidence needed for trial. Yet MEs have special medicolegal training, and may have a better sense for how facts will weigh at trial than their coroner counterparts. See *supra* note 109 and accompanying text for a brief discussion of the specialized training MEs receive.

207. See *supra* note 151–52 and accompanying text.

208. *Freed Statement*, *supra* note 125, at 52–55.

209. See Ward, *supra* note 1.

210. See *supra* notes 124–29 and accompanying text for a discussion of how the Act affects the ME-OPO relationship.

Pennsylvania, it is the ME or coroner in the county of death that handles the case.<sup>211</sup> This is well-established policy, and it promotes efficiency and economy across the state.<sup>212</sup> PDAA's argument against the Act failed to take into account the expense and practicalities of transporting bodies across state lines, as well as how to handle deaths resulting from repeated instances of crime in multiple jurisdictions. The real question at issue, and one PDAA does not address, is how to handle a situation where the judgment of a county coroner clashes with that of a city ME.

C. *PCADV Raised Concerns About Next of Kin that Were Easily Fixed*

As was true with PDAA, revisions to the proposed Act subsequent to the 2013–2014 legislative session likely ameliorated PCADV's concerns.<sup>213</sup> Still, the argument originally raised by PCADV, much like its fellow opponents, failed to present credible evidence that the Act would negatively affect autopsy results or criminal conviction rates.<sup>214</sup> PCADV argued that domestic violence cases are very difficult to prosecute and organ recovery at the time of autopsy could effectively erase the smallest bit of evidence that a prosecutor might rely on to solve these cases.<sup>215</sup> It also argued next of kin suspected of contributing to unusual deaths should not have opportunities to make donation decisions.<sup>216</sup> These arguments, like those of PSCA and PDAA, relied more on sentiment than science, and PCADV failed to present any credible evidence that the donation decision affects autopsy in any way.<sup>217</sup>

PCADV argued organ donation efforts should yield to sensitive cases of suspected domestic violence, however, it failed to acknowledge that organ recovery and a full forensic autopsy are not mutually exclusive.<sup>218</sup> PCADV argued deaths involving a suspicion of domestic violence and their ensuing criminal investigations should be handled especially cautiously.<sup>219</sup> Accordingly, PCADV felt that any indication that organ recovery might impede investigation

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211. See *supra* notes 101–12 and accompanying text for an explanation of coroner and ME authority. See also 16 PA. STAT. AND CONS. STAT. ANN. § 1237 (West 2016) for Pennsylvania's statutory guidelines for coroners.

212. See *supra* notes 101–12 and accompanying text for a discussion of the factors contributing to a state's choice in electing either a coroner or an ME.

213. Compare S.B. 180 § 8611(b)(2), 2015 Gen. Assemb. Sess. (Pa. 2015), which prohibits a spouse from making a donation decision if divorce is pending, with S.B. 850 § 8611(b)(2), 2013 Gen. Assemb. Sess. (Pa. 2013), which contains no such language.

214. See *supra* notes 157–59 and accompanying text for a discussion of PCADV's opposition to the Act.

215. See *Kramer Statement*, *supra* note 157, at 69–71.

216. *Id.* at 69–70. See also *supra* notes 159–64 and accompanying text for a discussion of Baby Sophia's case and the competing interests at stake.

217. See *supra* Parts III.A and III.B for a discussion of the merits of PSCA's and PDAA's objections.

218. See *supra* Part III.A for a discussion of how coroners and organ procurement organizations can collaborate in the organ recovery and autopsy processes.

219. See *Kramer Statement*, *supra* note 157, at 69–7.

into these matters should effectively halt the donation process.<sup>220</sup> This contention ignored the simple fact that organ recovery, when performed correctly, will not interfere with forensic investigations.<sup>221</sup> As stressed by NAME, a competent pathologist should be able to document or preserve the same evidence that he would recover in a traditional autopsy.<sup>222</sup> If data suggested otherwise, states like New York likely would not have stripped MEs of all power to deny donation.<sup>223</sup> Deaths by domestic violence, like all violent deaths, should be handled sensitively, with the ME, coroner, and organ recovery personnel employing best practices.<sup>224</sup>

PCADV also highlighted that while spouses and other close relatives are often suspected perpetrators in domestic violence deaths, they also hold the highest spots in the Act's prioritized next-of-kin list.<sup>225</sup> A guilty spouse faced with a donation decision may consent with the hope of destroying evidence, PCADV argues.<sup>226</sup> With the crime of domestic violence so rooted in one's need for control, allowing a perpetrator to make the donation decision allows him to exert one final act of power over his victim.

Neither the Pennsylvania legislature, MEs, coroners, nor OPOs ever supported a policy that would allow a person to make the donation decision for his murder victim.<sup>227</sup> The Act is designed to save more lives, not provide incentives for perpetrators of domestic violence to destroy evidence.<sup>228</sup> That is why the Act would institute a system that allows full forensic investigation alongside organ recovery.<sup>229</sup> Both donation and criminal investigation should be possible, regardless of who makes the donation decision. Still, the latest revision of the Act prevents a spouse from making the donation decision where divorce proceedings are pending.<sup>230</sup> More stringent restrictions in the statutory language might infringe on civil liberties. Barring a spouse, for example, from consenting to donation because he is suspected to have played a role in her death ignores his right to a presumption of innocence.<sup>231</sup> If the spouse is innocent, denying him the ability to make end-of-life decisions for his partner could incite the type of

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220. *See id.*

221. *Id.*

222. *Id.*

223. *See id.* at 498 n.11. See also *supra* notes 165–67 and accompanying text for a discussion of states that override the power of an ME to deny organ donation.

224. *NAME Position Paper, supra* note 132, at 500–02.

225. *See Kramer Statement, supra* note 157, at 69–70.

226. *See id.*

227. *See supra* notes 160–64 and accompanying text for an example of a court balancing organ recovery interests with a domestic violence investigation.

228. *See supra* notes 160–64 and accompanying text for a comparison between the Act's aim and challenges related to its possible impact on criminal investigations.

229. *Id.*

230. *See S.B. 180 § 8611(b)(2)*, 2015 Gen. Assemb., Reg. Sess. (Pa 2015).

231. *See Donate Life PA Act: Hearing on H.B. 30 Before the H. Comm. on the Judiciary*, 181st Gen. Assemb. 80–81 (Pa. 2014) (discussing a situation where an accused spouse would lose consent for donation).

trauma that sensitive domestic violence investigations seek to avoid.<sup>232</sup> Had the decedent confided in only the suspected spouse about her end-of-life wishes, a contrary decision by a more distant family member could be devastating.<sup>233</sup> Whereas many donor families express the importance of their loved ones' donations for their own grief journey,<sup>234</sup> a wrongly accused spouse would lose this opportunity for healing if denied the chance to make the donation decision. Further, the initial suspects in a criminal investigation are often the victim's close relatives.<sup>235</sup> Because organ donation takes place so quickly after death, there is an increased likelihood that an innocent spouse would be under suspicion.<sup>236</sup>

#### D. Proposed Solution

The most pervasive opposition to the Donate Life PA Act focuses on the Act's perceived preference for organ donation to the detriment of law enforcement.<sup>237</sup> This argument relies more on fear tactics than statistics. There are no examples in the academic literature that conclusively demonstrate that organ donation has interfered with a properly conducted forensic investigation.<sup>238</sup> Moreover, there are no recorded instances of a prosecution definitively being thwarted by organ donation.<sup>239</sup> The Act calls for cooperation between an organ donation team and a criminal investigation team so that organ recovery will not prevent a full autopsy.<sup>240</sup> While some of these autopsies will fail to reveal the donor's cause of death, careful attention to the guidelines prescribed in the Act should ensure that such indetermination has no causal relationship to the donation process.<sup>241</sup>

Despite its tenuous logic, the argument that the Act would impede law enforcement remains its strongest barrier to passage.<sup>242</sup> While rhetoric in the media paints OPOs as body snatchers, a few minor changes to the Act could make it significantly more palatable to lawmakers. Further, key political changes

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232. See *supra* note 158 and accompanying text, which highlights the sensitive nature of domestic violence investigations.

233. See *supra* note 158 and accompanying text.

234. See *Donate Life PA Act: Hearing on H.B. 30 Before the H. Comm. on the Judiciary*, 181st Gen. Assemb. 25–29 (Pa. 2014) (statement of Elizabeth Wertz Evans) [hereinafter *Wertz Evans Statement*].

235. See *supra* notes 157–59 and accompanying text, which considers the tension inherent in an investigation where the individuals empowered to donate a victim's organs are also those suspected of committing the crime.

236. See *supra* notes 157–59.

237. See *supra* Part III.A for an analysis of PSCA's opposition to the Act.

238. See *supra* notes 144–51 and accompanying text for a discussion of the deleterious effects of discord between an ME and an OPO.

239. The strongest evidence to suggest that organ recovery could impede forensic investigation or prosecution is the Houston study. See *supra* notes 183–89 and accompanying text. Nonetheless, the study itself concedes that the five cases it reviews were difficult cases to prosecute, and the failure to bring charges may have had nothing to do with organ recovery.

240. See *supra* Part II.D.

241. See *supra* Part II.D.

242. See Frantz, *supra* note 142.

to the way CORE and Gift of Life operate could make all the difference in overcoming the PSCA and its supporters.

Because PSCA has successfully opposed the Act by relying on fear tactics and storytelling, the Act's proponents must respond in-kind with a marketing campaign that appeals to legislators' sentiments. To a large extent, Pennsylvania's OPOs have already taken this path.<sup>243</sup> In promoting organ donation and laws that facilitate it, OPOs and legislators should continue to highlight the fact that transplantation saves lives. In addition to ongoing efforts to educate Pennsylvanians about organ donation, proponents of the Act could benefit from efforts that mirror those of its detractors. Marketing that clearly paints the law as pro-transplant and pro-prosecution could be effective. Most importantly, supporters of the Act, including legislators, should continue to promote the Act as a tool to increase organ donation in response to the expanding waiting list.<sup>244</sup> The Act intends to save lives, an important and persuasive goal. Of course, saving lives has been the impetus for every anatomical gift law dating back the original UAGA.<sup>245</sup>

Organ donation professionals are well aware of the detrimental myths about organ recovery and transplant.<sup>246</sup> In addition to their clinical staff, many OPOs employ public relations professionals in order to steer the national conversation away from controversy.<sup>247</sup> The education initiatives created in Act 102, and that would be expanded in the Donate Life PA Act, arose specifically to combat pervasive misconceptions.<sup>248</sup> Even worse than public ignorance, one highly publicized news story about a negative donation experience can be detrimental for the organ donor registry.<sup>249</sup>

Notably, opponents to the Donate Life PA Act do not deny the incredible benefits of organ transplantation.<sup>250</sup> In fact, many have joined the donor registry.<sup>251</sup> They simply request that the law give as much deference to a deceased victim as it does to individuals on the waiting list.<sup>252</sup> In responding to such critiques, it would benefit OPOs to stress how meaningful transplant can be

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243. See *Donate Life PA Act: Hearing on H.B. 30 Before the H. Comm. on the Judiciary*, 181st Gen. Assemb. 25–37 (Pa. 2014) (statements of Elizabeth Wertz Evans and Monica Forte) for examples of how human stories can help promote the Act.

244. See generally *Donate Life PA Act: Hearing on H.B. 30 Before the H. Comm. on the Judiciary*, 181st Gen. Assemb. 80–81 (Pa. 2014).

245. See *supra* Part II.A for an overview of the history of organ donation law, and see *supra* Part II.B for a more detailed analysis regarding organ donation law in Pennsylvania.

246. LBFC REPORT, *supra* note 47, at 43–46.

247. *E.g., id.*

248. *Id.* at 57–61.

249. See *supra* note 42 and accompanying text for a discussion of the role of the media in dictating decisions regarding organ donation and denial.

250. See, e.g., *Freed Statement, supra* note 125, at 49–51 (identifying that the opponents to the Donate Life PA Act are otherwise supportive of organ donation).

251. *E.g., id.* at 50.

252. See *Kramer Statement, supra* note 157, at 68–73.

for grieving donor families.<sup>253</sup> Organ donation provides a legacy for the deceased person whose life is suddenly cut short. Knowing that a decedent, especially a victim of a senseless crime, has saved another person's life is often a source of great comfort to the donor's family.<sup>254</sup>

Proponents of the Act should align their concerns with those of their detractors. While a good portion of the proposed Act focuses on funding and education meant to increase donor designations, it also strengthens the commitment to honor those designations.<sup>255</sup> Saving lives is an important and time-sensitive priority for all organ donations. Making every effort to honor a decedent's end-of-life wishes is equally important. By couching support for the Act in these terms, legislators and OPOs can overcome some of the public rhetoric preventing the Act from passing.

#### IV. CONCLUSION

The Donate Life PA Act represents lifesaving legislation for thousands of Pennsylvanians awaiting organ transplants and must be passed in order to give them the same opportunities as other Americans across the country. Organ transplantation is a revolutionary field of medicine that has grown in efficacy and complexity since it began fifty years ago. When doctors started recovering deceased donor organs, the law was unprepared to regulate their use. As states began to pass legislation in order to regulate the donation process, so did the federal government. Traditional notions of property law and ownership of a human body have expanded to accommodate this new technology.

Pennsylvania has been at the forefront of this change, both in medical and legal innovation. In the mid-nineties Pennsylvania's anatomical gift legislation proved so effective that the federal government soon adopted its practices as a condition for Medicare and Medicaid. Twenty years later the Commonwealth has done little to update these laws. The Donate Life PA Act is a necessary revision to Pennsylvania's outdated policy. Opposition from the PSCA stands in the way of its passing. That opposition, while frightening in rhetoric, provides no scientific proof that the Act would hinder law enforcement or criminal prosecutions. The small administrative cost that would be imposed by the Donate Life PA Act pales in comparison to the great number of lives that would be saved.

It is time that Pennsylvanians stopped looking at little Sophia's story as representing a choice between organ donation and criminal prosecution. Both are possible, as long as all interested parties cooperate with one another in accordance with the proposed legislation. The Donate Life PA Act recognizes the weighty personal interest that we have in designating ourselves as organ donors, or designating our loved ones as such. In situations where we can have

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253. *E.g., Wertz Evans Statement, supra* note 234, at 25–29 (explaining the importance of her daughter's organ donation to her grieving process).

254. *See, e.g., id.*

255. S.B. 180, 2015 Gen. Assemb., Reg. Sess. (Pa. 2015).

justice and still respect our long-held interest in respecting the wishes and sanctity of the dead, our laws should help us to achieve both.