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Cadavers in Commerce: Regulating under a Federal Body of Laws

Alexandra C. Piscitello
Maurice A. Deane School of Law at Hofstra University

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NOTE

CADAVERS IN COMMERCE: REGULATING UNDER A FEDERAL BODY OF LAWS

"[I]n this world, nothing is certain except death and taxes."
Benjamin Franklin, 1789.1

I. INTRODUCTION

Donating one's body to science is one of the last, most altruistic gifts that a person can make.2 Through the furtherance of scientific research, anatomical donations have led to numerous breakthroughs that have resulted in the preservation and extension of life.3 In fact, the use of cadavers in research has spanned centuries4 and has aided countless medical professionals in understanding the intricacies that lie within the human body.5 As a result of cadaveric study, surgery techniques have evolved and a number of diseases have ceased to exist.6 For example, a recent medical breakthrough resulting from research on a donated body, specifically the pancreas, yielded a potential cure for type 1 diabetes.7

Unbeknownst to many, questionable cadaver sourcing has transpired for nearly as long as the practice of using cadavers in

1. NCC Staff, Benjamin Franklin's Last Great Quote and the Constitution, CONST. DAILY (Nov. 13, 2018), https://constitutioncenter.org/blog/benjamin-franklins-last-great-quote-and-the-constitution (emphasis added).
5. See In the U.S. Market for Human Bodies, supra note 3.
6. See id.
7. Id. According to Dr. Armand Krikorian of Chicago, “It’s a kind of treatment that would have never come to light if we did not have whole-body donation.” Id. According to the American Diabetes Association's 2018 statistics, 1.6 million Americans have been diagnosed with type 1 diabetes. Statistics About Diabetes, AM. DIABETES ASS'N, https://www.diabetes.org/resources/statistics/statistics/about-diabetes (last updated Mar. 22, 2018).
research.8 Beginning as early as the 1800s, eager medical professionals, and students seeking bodies to practice medicine on, robbed the graves of the recently deceased.9 Two hundred years later, the need for cadavers in research, as well as the problem of sourcing them, persists.10

Today in the United States, donated bodies are big business.11 Loopholes in the model code that has inspired each state’s codified law, the Revised Uniform Anatomical Gift Act of 2006 (“UAGA”),12 compounded by a fragmented regulatory framework throughout the fifty states, have led to a black market of non-transplant whole-body and body part sales.13 This practice is known as body brokering.14 While not for the faint of heart, those who have set up shop as purveyors in the body trade have made millions in what has become a multi-billion dollar industry.15 While the true breadth of the market is still unknown,16 the unfortunate realities of body brokering have the ability to impact donors and their families regardless of race, origin, age, sex, or location within the United States,17 though, the practice is particularly impactful on lower socioeconomic classes of individuals.18 The poor and less-educated tend to fall prey, as they are more vulnerable to the targeted tactics of brokers.19

This Note seeks to address the problems posed by the lack of uniform whole-body donation regulation by introducing significant

10. See In the U.S. Market for Human Bodies, supra note 3.
11. Id.
13. See infra Part II.F.
17. See id.
18. Id.
19. Id.
amendments to the UAGA.\textsuperscript{20} This Note’s proposed reformation in regulation will utilize portions of existing law, as well as House Bill 1835 ("H.R. 1835"), a bill that was introduced by Congress in 2019.\textsuperscript{21} The intent of this proposed reform is to expand the regulatory reach of the UAGA by creating the first all-encompassing federal regulatory scheme governing whole-body donation.\textsuperscript{22} The goals of this revision in legislation are as follows: (1) to prevent bodies from being used in non-scientific or non-medical projects, (2) to provide transparency as to the process and preserve the individual and/or next of kin’s rights at death, and (3) to provide consistent regulations for purposes of health and safety without stifling cadaver availability.\textsuperscript{23}

Part II of this Note discusses what constitutes a whole-body donation, the history of anatomical donations, and the composition of today’s whole-body donation industry.\textsuperscript{24} Part II also distinguishes between organ and whole-body donation in an attempt to resolve long-standing misconceptions.\textsuperscript{25} Part III defines the legal issue by exploring gaps in the current law and sets forth a theory of broadened anatomical ownership that some members of the anatomical community believe has the potential to incentivize body donation, and in turn, cure research shortages.\textsuperscript{26} Part IV argues that a higher level of regulation is necessary as both the UAGA, which has been adopted in varying degrees by the states, and newly-introduced H.R. 1835, do not have the requisite regulations in place to successfully police all of the pitfalls of the whole-body donation industry.\textsuperscript{27} Part IV also sets forth a possible solution: expanded transparency and autonomy rights for the next of kin in deciding what happens to their loved one’s remains and increased punishment if the newfound legal requirements are not adhered to.\textsuperscript{28} Finally, for purposes of uniformity, this Note advocates for federal adoption of the amended legislation, and in making its case, this Note provides an overview of the powers found within the United States Constitution that make way for a federal legislative overhaul.\textsuperscript{29}

\begin{thebibliography}{99}
\bibitem{20} \textit{See infra} Part IV.
\bibitem{22} \textit{See infra} Part IV.C.
\bibitem{23} \textit{See infra} Part IV.A.
\bibitem{24} \textit{See infra} Part II.
\bibitem{25} \textit{See infra} Part II.
\bibitem{26} \textit{See infra} Part III.
\bibitem{27} \textit{See infra} Part IV.
\bibitem{28} \textit{See infra} Part IV.C.2–3.
\bibitem{29} \textit{See infra} Part IV.B.
\end{thebibliography}
II. BACKGROUND AND HISTORY OF WHOLE-BODY DONATION

Today, copious misconceptions exists as to what constitutes as whole-body donation versus organ donation. Notably, the donation process, consent requirements, and regulations differ significantly between the two methods of tissue donation. The UAGA defines an anatomical gift as “a donation of all or part of a human body to take effect after the donor’s death for the purpose of transplantation, therapy, research, or education.”

Did you check the box on your license indicating your intent to be a donor at death? While that falls under the umbrella of anatomical gifts, there are two subsections within the broader category: organ donation for transplantation and whole-body donation for medicine, education, and research, which is commonly referred to as “donating your body to science.” The agreement on the back of your license makes you an organ donor for purposes of transplant in another, but does not represent donative intent for purposes of whole-body donation. Organ donation is the process by which a medical professional “remov[es] an organ from one person and surgically plac[es] it in another person” through transplantation. Transplantable organs include, but are not limited to, the liver, heart, pancreas, bones, skin, kidneys, and lungs.

On the other hand, whole-body donation is typically only for purposes of education or research. Under Section 5 of the UAGA, consenting to whole-body donation before death requires written consent in a will or other like-document, or if the donor is terminally ill or injured, by any form of communication made to at least two adults.

30. Booth, supra note 2.
33. See 11 Myths About Whole Body Donation, supra note 31.
34. REVISED UNIFORM ANATOMICAL GIFT ACT § 2(3).
36. 11 Myths About Whole Body Donation, supra note 31.
38. Id.
acting as witnesses, one of whom must be disinterested.40 If executed after death by an authorized person, the agreement must be documented and signed by the person making the gift, or, if oral, recorded electronically.41

Contingent on the circumstances, a person can elect to be neither an organ donor nor a whole-body donor, simply by not acting before death; either an organ or a body donor; or finally, an organ then a body donor, with organ donation taking priority if the conditions at death allow for harvesting.42

The third category of tissue donation—living donation—falls outside the umbrella of anatomical gifts under the UAGA.43 A living donation occurs when a living donor donates an organ, such as a single kidney or a portion of their liver, for transplant in another living recipient whose natural organs have failed or whose organs show signs of failure.44 As this Note seeks only to address legal issues posed by whole-body donations, organ donations, including living donations, remain outside the scope of and will not be addressed in Part IV’s solution.45

At death, individuals or their next of kin have the option to donate bodies directly to state agencies, such as public universities or hospitals; private universities; or private non-profit or for-profit non-transplant tissue banks who then process and match the donation with the needs of buyers throughout the country.46 Unlike organ donation, which is governed in part by the federally-enacted National Organ Transplant Act ("NOTA")47 and in part by relevant portions of the UAGA adopted at

41. Id. § 10(a).
43. See REVISED UNIFORM anATOMICAl GIFT ACT § 2 cmt. at 14.
45. See supra Part I.
47. See National Organ Transplant Act, 42 U.S.C. §§ 274, 274e (2012). According to the language of NOTA, "It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce." Id. § 274e(a) (emphasis added). In addition to outlawing the sale of bodily organs, NOTA established the Organ Procurement and Transplantation Network ("OPTN") to facilitate the procurement of organs. Id. § 274(a). "The [OPTN] maintain[s] a national registry for organ matching." Yvette Brazier, Organ Donation: Most Are Willing to Give, so Why Is There a Donor Shortage?, MEDICALNEWSTODAY (Mar. 10, 2016), https://www.medicalnewstoday.com/arti
the state-level, there is no federal law that governs the sale of bodies or body parts for use in medicine or research today. As a country, the United States places greater emphasis on regulating organs to, first and foremost, save lives by attempting to cure organ shortages, but also to prevent human exploitation, trafficking, and murder of the living or those nearing death for their organs—which is speculated to occur throughout the world.

Subpart A explores the differences between donations made directly to research facilities versus donations made to non-transplant anatomical tissue banks. Subpart A goes on to explain how typical non-profit anatomical banks, including body brokers, structure their business, attract donors, and turn profits. Subpart B explores the history and scope of the model law—the Revised Anatomical Gift Act, which has been adopted, at least in part, by all fifty states. Subpart C advises on accreditation opportunities, as well as requirements, under today’s law. Subpart D explains that, irrespective of today’s rapid advancements in technology, the need for cadavers in medical and scientific research persists and is arguably growing each day with the number of individuals charting their life courses as medical professionals. Subpart E delineates the various abuses that have plagued the whole-body donation industry, with emphasis placed on a few recent cases that have caught the media and the judiciary’s attention. Subpart F delves into the inconsistencies in law and regulation and hints that it could be the patchwork of state laws that is

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48. In the U.S. Market for Human Bodies, supra note 3. As discussed in the forthcoming sections of this Note, the Consensual Donation and Research Integrity Act was introduced and is currently under congressional consideration, but the Act has not been passed into federal law. H.R. 1835 – Consensual Donation and Research Integrity Act, supra note 21. “Non-transplant tissue banks are not covered under the same laws that cover organ and tissue transplantation.” Nat’l FuneralDirs. Ass’n, Congress Moves to Regulate Body Brokers, CONNECTING Dirs. (Mar. 19, 2019), https://connectingdirectors.com/53964-congress-moves-to-regulate-body-brokers.

49. See In the U.S. Market for Human Bodies, supra note 3.

50. Brazier, supra note 47. In 2016, it was estimated that as a result of organ shortages, for every seventy-nine people that receive a transplant, at least twenty people died waiting for a viable organ. Id


52. See infra Part II.A.

53. See infra Part II.A.1.

54. See infra Part II.B. Note that while the UAGA has been adopted by all fifty states, each state has adopted the law in varying degrees with amendments made over time. Katie Robinson, 50th Anniversary of the Uniform Anatomical Gift Act, UNIFORM L. COMMISSION (Dec. 6, 2018, 10:44 AM), https://my.uniformlaws.org/blogs/katie-robinson/2018/12/06/50th-anniversary-of-the-uniform-anatomical-gift-ac.

55. See infra Part II.C.

56. See infra Part II.D.

57. See infra Part II.E.
perpetuating the nationwide problem. \textsuperscript{58} Finally, Subpart G reviews the previous attempts made by Congress to federally regulate the whole-body donation industry. \textsuperscript{59} Subpart G also evaluates the progress that each regulatory attempt has made in the federal legislative process. \textsuperscript{60}

\textbf{A. Direct Donation Versus Non-Transplant Anatomical Tissue Banks}

State agencies and research institutions, such as the University of Minnesota Medical School's Anatomy Bequest Program, accept direct whole-body donations from donors. \textsuperscript{61} Research institution acceptance criteria are often more limited, as institutional programs are known to shy away from accepting bodies that are diseased, obese, or that have experienced physical trauma, unless of course the line of research being conducted calls for such conditions. \textsuperscript{62} Oftentimes, with donations made directly to research facilities, the donors are responsible for making arrangements to transport the remains to the facility, and, in some instances, including donations made to the University of Alabama, direct donors are responsible for paying a fee to cover the cost of "transportation, preservation, maintenance, and ultimately cremation." \textsuperscript{63} Once accepted by the state agency or institution, bodies tend to remain at that facility for the duration of their use, which is vastly different than the approach taken by body brokers. \textsuperscript{64} Citing the sensitive nature of the donation and their limited budgets, research institutions limit their active solicitation, \textsuperscript{65} and, where feasible, rely on other non-transplant anatomical tissue banks to supplement their supply beyond what is bequeathed. \textsuperscript{66}

In stark contrast to the research-driven nature of state agencies and research institutions, non-transplant tissue banks operating as body

\begin{enumerate}
\item See infra Part II.F.
\item See infra Part II.G.
\item See infra Part II.G.
\item Sager, supra note 35; What Is Whole Body Donation?, supra note 31.
\item Cuthbert, supra note 42. The University of Alabama requires that donors pay a fee of $750 to cover any costs associated with the donation. Id. It is common for medical schools to ask families to cover the cost of a funeral home to deliver the donated body to. Matt McCall, The Secret Lives of Cadavers, NAT’L GEOGRAPHIC (July 29, 2016), https://www.nationalgeographic.com/news/2016/07/body-donation-cadavers-anatomy-medical-education.
\item See Booth, supra note 2.
\end{enumerate}
brokers are privately owned and their business is profit-driven. As such, they engage in buying as well as selling. While non-transplant anatomical tissue banks, including body brokers, operate independently of medical and scientific institutions, recent questionable body broker operations have cast doubt on the entire industry's work.

1. The Body Broker Business Model

For-profit non-transplant tissue banks, like Southern Nevada Donor Services ("SNDS"), invoke intensive marketing efforts to attract donors. Their efforts target families in grief and their message is simple: families can make one final, selfless gift using their own or their loved one's remains, it will cost them nothing, and the broker will take care of all of the details. The text of the brochures read: "You can benefit humanity. We can help. No cost whole body donation for research [and] medical education," and, "Pay it forward. Without paying a thing." Funeral homes, nursing homes, and hospices bolster non-transplant tissue bank business by distributing broker brochures and promoting broker services. Brokers further incentivize donations by offering free cremations of any unutilized remains. According to the National Funeral Directors Association, the average cost of a funeral is over $7000, which many families confer is simply beyond their means. As such, broker tactics target financially and emotionally vulnerable individuals, with a particularly disparate impact on the poor. For families stifled by debt or medical bills, body donation may be their only

67. In the U.S. Market for Human Bodies, supra note 3.
68. Id.
69. Id.; see supra Part II.A.
70. See In the U.S. Market for Human Bodies, supra note 3. SNDS has since been dissolved following accusations of health concerns and abuse. Id.
71. See id. From roughly 2000 through 2010, body broker, Science Care Inc., spent over $1,000,000 on marketing and branding efforts to attract donors, which equates to approximately $100,000 per year. See How an American Company, supra note 15.
72. See id.
75. Id. One family member who donated her relative's body reported being suspicious of the "ashes" returned to her from the anatomical tissue bank. In the U.S. Market for Human Bodies, supra note 3. Testing proved that what was returned was not ashes, but rather sand. Id.
option. During the course of solicitation, body brokers present the next of kin with a consent form. While the language varies, agreements are often drafted "in technical language that many donors and relatives say they find hard to understand."

Body brokering is a business built on low overhead cost, high demand, and few barriers to entry. From a business perspective, brokers obtain the key element of their business—the raw materials, if you will—for free. Today, whole-bodies sell anywhere between $3000 and $10,000. In instances where demand was heightened, bodies that were broken down and sold in pieces commanded upwards of $100,000.

Body brokers rely on the limited and somewhat undefined rights associated with human remains to keep their freezers stocked. As compared to medical and research institutions, body brokers eager to bolster their inventory, and thus their bottom line, are more inclined to accept bodies that are obese or diseased.

Non-transplant tissue banks operating for profit are permitted to engage in brokering under a technicality in the language of the UAGA. Section 16(a) of the UAGA states that it is illegal for a person to "knowingly purchase[] or sell[] a part for transplantation or therapy," but under Section 16(b), a person "may charge a reasonable amount for the removal, processing, preservation, quality control, storage, transportation, implantation, or disposal of a part." Although the text of the UAGA fails to directly address the legality or illegality of purchases and sales of adult donations made for medical and scientific purposes, experts believe that it is "perfectly legal."

79. A Business Where, supra note 78.
80. Id.
81. See Gerencher, supra note 66; How an American Company, supra note 15.
82. In the U.S. Market for Human Bodies, supra note 3.
83. Id.
85. See infra Part III.A.
86. See infra notes 163-64, 173 and accompanying text.
87. How an American Company, supra note 15. As an example of the profit potential of body brokers, Science Care Inc., a for-profit non-anatomical tissue bank, reported $27,000,000 in annual sales in 2017. Id.
88. See REVISED UNIFORM ANATOMICAL GIFT ACT § 16(b) (amended 2009) (NAT’L CONF. OF COMM’RS ON UNIF. STATE LAWS 2006).
89. Id. § 16(a)–(b) (emphasis added).
90. A Reuters Journalist Bought, supra note 77. In contrast, it is illegal to sell human fetus
Nonetheless, brokers are vigilant when transacting. They emphasize that they do not sell the bodies. They also emphasize that they do not charge fees for the physical goods. Instead, they charge “reasonable” fees for their services, which includes transportation, storage, refrigeration, preparation, and matching services based on need, which is all wholly permissible under the language of Section 16(b).

After embalming and dissection, the bodies are sold or leased to a network of middlemen: “medical researchers, training organizations, and other buyers.” Who are these other buyers, you ask? In 2016, a Reuters journalist with no medical or scientific credentials utilized the Internet to purchase the cervical spine of a man named Cody Saunders, who died at the age of twenty-four. Fraught with bills from their son’s lifelong medical ailments and unaware of the non-transplant industry pitfalls, Cody’s parents elected to bequeath his body to a private donation company with the belief that the company would use samples of his skin to research his condition. After a brief e-mail exchange with a representative at Restore Life USA, a non-transplant anatomical tissue bank based in Tennessee that possessed Cody’s body, the Reuters reporter paid $300 plus shipping for the man’s cervical spine. In a separate transaction conducted by the same Restore Life USA broker with identical ease, the journalist purchased two human heads for $300 each. Research indicates that “[n]either the sales nor the shipments violated any [state or federal] laws.”

The body broker business model sees bodies regularly traveling in the mail and through interstate commerce. In fact, employees working

91. See In the U.S. Market for Human Bodies, supra note 3.
92. Id.
93. See id.
94. Id.; REVISED UNIFORM ANATOMICAL GIFT ACT § 16(b).
95. In the U.S. Market for Human Bodies, supra note 3 (emphasis added).
96. See id.
97. A Reuters Journalist Bought, supra note 77.
100. A Reuters Journalist Bought, supra note 77.
101. Id.
102. Id.

https://scholarlycommons.law.hofstra.edu/hlr/vol48/iss4/7
the Delta Cargo counter at the Detroit Metro airport, who in the past have intercepted packages belonging to notorious body broker, Arthur Rathburn, will tell you that human remains are a part of the everyday stream of cargo. More on Mr. Rathburn later. The situation involving body brokers is further complicated by the fact that bodies are dissected and separated for several uses. In addition, bodies are often reused—they are dissected, then bought and sold or leased multiple times—which makes tracking their use and physical whereabouts cumbersome. Again, because no authority says otherwise, this is permissible under the law as it stands today.

B. The Revised Uniform Anatomical Gift Act of 2006

In 2006, the National Conference of Commissioners on Uniform State Laws—a non-partisan association comprised of attorneys serving as legislators, judges, and legal scholars who “research, draft and promote enactment of uniform state laws”—drafted the UAGA to regulate anatomical donations. Earlier versions of the UAGA were published in 1968 and 1987. The UAGA sets forth model legislation for regulating both organ donation and whole-body donation. As of 2017, all fifty states adopted laws based on one of the three versions of the UAGA. While all states have adopted some UAGA provisions, the degree of whole-body donation policing and regulation varies

Limbs and Heads, REUTERS (Feb. 8, 2018, 12:00 PM), https://www.reuters.com/investigates/special-report/usa-bodies-export [hereinafter Made in America]. While this Note focuses primarily on the domestic issue, today’s transactions are transnational. Made in America, supra. Foreign doctors and scientists look to brokers in the United States to obtain cadavers because of restrictions in their own countries. Id. Shipments from American body brokers have entered at least forty-five countries, including Israel, Saudi Arabia, China, and parts of Europe. Id. Michel Antebay, a professor of organizational behavior at Boston University who has conducted several studies on the global body industry, lamented that, “In some ways, it crystallizes American business and capitalism... I know of no other country where you have a legal trade in human cadavers.” Smith, supra note 84.

104. Smith, supra note 84.
105. See infra notes 151-73 and accompanying text.
106. In the U.S. Market for Human Bodies, supra note 3.
107. Id.
108. See id.
110. Id. For the duration of this Note, any mention of the UAGA made will be in reference to the 2006 iteration. Id.
dramatically by state.\textsuperscript{113} Compounding the problem is the fact that state UAGA laws do not work intermittently with federal law as it pertains to whole-body donations.\textsuperscript{114} That is simply because today, there are no federal laws regulating whole-body donation for use in research or education.\textsuperscript{115}

As the United States does not have a federal law regulating whole-body donation, nor a centralized governing agency, the American Association of Anatomists ("AAA"), a privately funded organization, has drafted "policy [guidelines] for how bodies should be handled when they are donated. For instance, the policy states that donations must follow all state and local laws, and 'donation literature should describe all possible uses of donated bodies at that institution.'\textsuperscript{116} While this is a suggested policy, it is not required by law.\textsuperscript{117} The solution discussed in Part IV of this Note incorporates some AAA ideals and policies.\textsuperscript{118}

\section*{C. Accreditation and Registration}

Today, the only independent agency that earnestly polices non-transplant tissue on a national-level is the American Association of Tissue Banks ("AATB").\textsuperscript{119} The AATB, a non-profit and non-governmental professional agency, provides accreditation to both transplant and non-transplant tissue banks to establish "that the level of medical, technical and administrative performance ... meets or exceeds the standards set by the AATB."\textsuperscript{120} AATB accreditation is not required by law for non-transplant tissue banks.\textsuperscript{121} Instead, non-transplant tissue banks "that desire a higher level of scrutiny from an outside organization, and in turn, increased transparency and public trust, can voluntarily seek accreditation from the [AATB]."\textsuperscript{122} By opting not to register with the AATB, brokers can "reduce expenses by forgoing the meticulous quality control procedures and sophisticated training called

\begin{thebibliography}{9}
\bibitem{113} See infra Part II.F.
\bibitem{114} See \textit{In the U.S. Market for Human Bodies, supra} note 3.
\bibitem{115} \textit{Id.}; see, e.g., Consensual Donation and Research Integrity Act of 2019, H.R. 1835, 116th Cong. (2019) (pending approval, but not yet passed into federal law at the time of this publication).
\bibitem{116} Cuthbert, supra note 42; see also \textit{In the U.S. Market for Human Bodies, supra} note 3.
\bibitem{117} See Cuthbert, supra note 42.
\bibitem{118} See infra Part IV.B.1.
\bibitem{119} See Booth, supra note 2.
\bibitem{120} AM. ASS'N OF TISSUE BANKS, https://www.aatb.org (last visited July 10, 2020) (detailing the strict accreditation process that tissue banks must adhere to if they pursue AATB accreditation); Alabama Organ Center Earns Accreditation, U. OF ALA. AT BIRMINGHAM (Mar. 31, 2008), https://www.uab.edu/reporterarchive/42025-alabama-organ-center-earns-accreditation.
\bibitem{121} Alabama Organ Center Earns Accreditation, supra note 120.
\end{thebibliography}
for by [the AATB]."123 To date, the AATB has accredited seven private non-transplant tissue banks.124

Additionally, some but not all, states require licensure with their state’s department of health.125 Because of the anonymity cloaking the industry,126 and because neither accreditation nor registration is required by federal law at this time,127 it is unknown how many body brokerage firms are currently operating in the United States today.128

D. The Scientific and Medical Need for Cadavers in Research

Medical students, medical professionals, pharmaceutical companies, scientists, automakers, and the government all rely on cadavers in developing their research.129 A donated body may “be used to advance robotic or arthroscopic surgery, perfect heart valve transplants, test laser treatments for acne, teach surgeons to administer local anesthetic blocks, [] give first responders a chance to learn life-saving techniques,” or test new technology.130 Cadavers are also used in crash safety tests for automobiles.131 As such, “the dead teach the living” has become a tenet of science.132 The common thread of cadaver

123. In the U.S. Market for Human Bodies, supra note 3.
124. Booth, supra note 2. To draw a comparison and to give an idea of the breadth of the estimated market, in 2017, Reuters identified thirty-four body brokers that were active across America in the five years prior. In the U.S. Market for Human Bodies, supra note 3. Twenty-five of the thirty-four body brokers were for-profit corporations whereas the rest were non-profits. Id.
126. In the U.S. Market for Human Bodies, supra note 3.
127. Cuthbert, supra note 42; see also Tissue and Tissue Product Questions and Answers, U.S. FOOD & DRUG ADMIN. (May 7, 2019), https://www.fda.gov/vaccines-blood-biologics/tissue-tissue-products/tissue-and-tissue-product-questions-and-answers. Registering with the United States Food and Drug Administration’s database is required only for tissue banks that handle tissue “intended for implantation, transplantation, infusion, or transfer into a human recipient.” Id.
128. See supra note 124 and accompanying text. Although estimates have been made based on a limited number of states tracking donations and sales, the number of firms and the breadth of the market remain a mystery. In the U.S. Market for Human Bodies, supra note 3.
129. Booth, supra note 63.
130. Booth, supra note 2. To put flesh on the bones, cadavers have more specifically been utilized by “anesthesiologists learning how to perform epidurals and sonograms; private firms training customers how to install a dental implant; pharmaceutical companies; scientists studying transcranial direct stimulation; [and] engineers who still test crashes on real flesh and bone even as cars become autonomously controlled.” Smith, supra note 84.
sourcing and research is a resounding benefit to future generations through advancements in health and science.133

In the United States, over 21,600 students enrolled as first-year medical students for the 2018-19 school year.134 Today, nearly all medical students in the United States begin their educational journey by dissecting a cadaver.135 This statistic fails to take into account the number of osteopathic medicine, nursing, physician assistant, dental, and upper-level medical students, as well as independent research institutions and privately-owned entities, like Johnson & Johnson, who are believed to use human tissue in their research and development.136 Comparatively, approximately 20,000 Americans donate their bodies each year.137 Though no dependable national statistics exist, numbers from individual agencies suggest a shrinking donor pool.138 Hence, there is a shortfall.139

As technology and science continue to innovate, the need for cadavers has never been greater.140 In the past decade, innovations in minimally invasive surgery techniques have sparked an uptick in the commercialization of body parts, as cadavers are the preferred method by which new techniques are developed.141 While technology companies and research institutions are working to replicate the cadaver experience in order to cure shortages, most experts, citing a preference for variation and the study of the unknown to further education,142 agree that technology has not yet made the requisite strides to teach in the same

19/story?id=70144804. When translated from Latin, the phrase means, "This is the place where death rejoices in teaching the living." Id.
133. Simon Davis, The Bizarre Crimes of Detroit's Underground Cadaver Dealer, VICE (Feb. 12, 2016, 1:09 AM), https://www.vice.com/en_us/article/8gk33b/the-bizarre-crimes-of-detroit-underground-cadaver-dealer. "Skin grafts from corpses can be used to treat burn victims, bone grafts can be used in orthopedic and oral surgery, [and] human tissue can be incredibly useful for medical training." Id.
135. McCall, supra note 63.
136. Gerench, supra note 66; In the U.S. Market for Human Bodies, supra note 3.
137. McCall, supra note 63.
138. Id.
139. See id. Medical schools in particular have felt the impact of the shortages, which they do not necessarily attribute to a lack of donations, but rather, savvy body broker marketing tactics. How an American Company, supra note 15. "We have lost many donations because of them, and we've not been able to meet the needs of our schools," said Clariza Murray of Humanity Gifts Registry, a state agency in Pennsylvania that coordinates the donation process" on behalf of state schools. Id. "We're seeing six students per donor in a first-year anatomy lab, when it should be three or four students per donor." Id.
140. McCall, supra note 63. In early 2020, cadaver research and autopsies proved valuable in the race to understand COVID-19. See Baldwin, supra note 132.
141. Gerench, supra note 66.
way that human cadavers teach.\textsuperscript{143} Today, the cadaver experience remains the universally-preferred method of anatomical study.\textsuperscript{144}

Susan Potter, an eighty-seven-year-old woman, left her body to science.\textsuperscript{145} In 2017, her body was frozen, sawed into 27,000 thin slices, and photographed.\textsuperscript{146} The digitalized images are currently in the process of being coalesced together to form the high resolution, virtual 3-D cadaver which also has the ability to speak to viewers using recordings obtained during Ms. Potter’s lifetime.\textsuperscript{147} Once complete, Ms. Potter’s virtual cadaver will be used as a multifaceted training tool in the medical community.\textsuperscript{148} In today’s climate, Susan Potter is considered one of the lucky ones, as her body was used for the purpose that she intended, and her loved ones were privy to gaining an understanding of what exactly would and did come of Ms. Potter.\textsuperscript{149} Unlike Ms. Potter, the unfortunate reality is that not all donations end up serving the altruistic purpose that their donor bequeathed.\textsuperscript{150}

E. Recent Abuses in the Whole-Body Donation Industry

The whole-body donation industry is plagued with misuse, secrecy, and health concerns resulting from lax regulations and a patchwork of laws.\textsuperscript{151} In 2013, the Federal Bureau of Investigations ("FBI") raided the rural Michigan warehouse of Arthur Rathburn.\textsuperscript{152} Mr. Rathburn’s company, International Biological, Inc. ("IBI"), operated as a private corporation for over twenty years and acted primarily as a middleman between independent sourcing body brokers and research institutions.\textsuperscript{153} Years of both state and FBI investigations revealed that Mr. Rathburn was engaged in unsanitary and morally incomprehensible, but perhaps


\textsuperscript{144} Elizabeth Cullford, Cadavers in the Ballroom: Doctors Practice Their Craft in America’s Favorite Hotels, REUTERS (Dec. 15, 2017, 5:30 PM), https://www.reuters.com/investigates/special-report/usa-bodies-hotels; see also Nichols, supra note 143 (concluding that following a study involving medical students, the consensus among medical professionals is that studying physical cadavers is often more beneficial than studying digital replications).

\textsuperscript{145} Newman, supra note 132.

\textsuperscript{146} Id.

\textsuperscript{147} Id.; Cuthbert, supra note 42.

\textsuperscript{148} Newman, supra note 132.

\textsuperscript{149} Id.


\textsuperscript{151} See In a Warehouse of Horrors, supra note 125.

\textsuperscript{152} United States v. Rathburn, 771 F. App’x 614, 618 (6th Cir. 2019).

\textsuperscript{153} See Davis, supra note 133.
not completely illegal, behavior, which resulted in an estimated $13,000,000 in profits.\footnote{154}

State health inspectors from New York visited his facility on multiple occasions and temporarily suspended his right to conduct business with organizations in New York.\footnote{155} Beyond regulating for their own jurisdiction, the New York State health inspectors’ hands were tied.\footnote{156} This was because Michigan, the state where IBI had its principal place of business, did not have a state regulatory agency to take the investigatory reins.\footnote{157} Thus, any chance of an investigation fell into a jurisdictional chasm of state agency responsibility.\footnote{158} FBI Special Agent Leslie Larsen’s testimony was summarized in the federal judicial decision as follows:

Rathburn’s facility was all but clean. [She] testified that upon entering Rathburn’s warehouse, she observed, among other things: “upwards of 10 to 20” piles of dead flies and other insects; “dirt and dust... caked” on the floor; multiple specimens “frozen together... flesh-to-flesh,” with no barriers to prevent cross contamination, and dried blood splattered across the floor.\footnote{159}

Not only is that kind of abuse disrespectful to the dead, but it is also dangerous for the living.\footnote{160} Mr. Rathburn was convicted of federal wire fraud and illegal transportation of hazardous materials.\footnote{161} As to the first charge, the court concluded that Mr. Rathburn fraudulently intended to deceive researchers when he sold specimens billed as “clean.”\footnote{162} Mr. Rathburn purchased the bodies at a discounted rate with the awareness that the bodies were discounted because they tested positive for infectious diseases, such as HIV and hepatitis.\footnote{163} Nevertheless, he sold the diseased bodies for profit without alerting the buyers.\footnote{164} His negligent actions put lives at risk, especially those who handled the

\footnote{154} Tresa Baldas, Feds: Grosse Pointe Businessman Made $13M Selling Diseased Body Parts, DETROIT FREE PRESS (May 11, 2018, 11:20 AM), https://www.freep.com/story/news/local/michigan/wayne/2018/05/11/grosse-pointe-cadaver-dealer/596104002. Prosecutors estimated that twenty percent of Mr. Rathburn’s business, or $2,700,000, was derived from “renting remains infected with HIV or hepatitis to researchers involved in 142 medical courses.” \textit{Id.; see also In a Warehouse of Horrors, supra note 125.}

\footnote{155} \textit{In a Warehouse of Horrors, supra note 125.}

\footnote{156} \textit{Id.}

\footnote{157} \textit{Id.}

\footnote{158} \textit{See id.}

\footnote{159} United States v. Rathburn, 771 F. App’x 614, 619 (6th Cir. 2019).

\footnote{160} \textit{Id.}

\footnote{161} \textit{Id. at 617.}

\footnote{162} \textit{Id. at 617, 621.}

\footnote{163} \textit{See Bever, supra note 84.}

\footnote{164} Rathburn, 771 F. App’x at 619.
cadavers in transport and others who conducted experiments on the remains. 165

The second charge, illegal transportation of hazardous materials, stemmed from an accusation that Mr. Rathburn “shipped [an] infected specimen to Tel Aviv for an overseas training course, and back to Detroit, Michigan in only a trash bag placed inside a camping cooler” via Delta Cargo. 166 An inspection at the Detroit airport revealed that the cooler contained at least eight heads and was dripping with a reddish liquid. 167 Mr. Rathburn told authorities that the “human heads he shipped from overseas were embalmed, and that the fluid discovered in the bottom of the cooler and dripping from the packaging was ‘Listerine,’ and not blood,” which the government worked to disprove at trial. 168 The Sixth Circuit affirmed both counts in May of 2019. 169

Mr. Rathburn, and many other body brokers, have not been charged with any crimes related to corpse abuse, misrepresentation, or fraud in their dealings with donors. 170 The reason is that under Article I, Section 9 and Article I, Section 10 of the United States Constitution’s ex-post-facto provisions, 171 and the legal principle nulla poena sine lege, without any law on-point defining the crime at the time that the incident occurred, there can be no punishment for that crime. 172

Of course, Arthur Rathburn is not the only broker to capitalize on the loopholes of the United States’ patchwork of whole-body donation laws and lax enforcement. 173 Having previously been diagnosed with a

165. Made in America, supra note 103; see also In a Warehouse of Horrors, supra note 125.

166. Rathburn, 771 F. App’x at 619. Although no federal law expressly regulates body broker behavior, “there is one situation in which the U.S. government does exercise oversight: when body parts leave or enter the country. Border agents have the authority to ensure that the parts are not infected with contagious diseases and are properly shipped.” Made in America, supra note 103.

167. In a Warehouse of Horrors, supra note 125.

168. Rathburn, 771 F. App’x at 627; see also In a Warehouse of Horrors, supra note 125.

169. Rathburn, 771 F. App’x at 618, 628.

170. See id. at 617.

171. U.S. CONST. art. I, § 9, cl. 3; U.S. CONST. art. I, § 10, cl. 1. “No bill of attainder or ex post facto law shall be passed.” U.S. CONST. art. I, § 9, cl. 3. “No state shall . . . pass any Bill of Attainder, ex post facto Law . . . .” U.S. CONST. art. I, § 10, cl. 1. Article I, Section 9 limits federal legislative powers whereas Article I, Section 10 applies that same limitation to the states. Id.; U.S. CONST. art. I, § 9, cl. 3; Ex Post Facto, LEGAL INFO. INST., https://www.law.cornell.edu/wex/ex_post_facto (last visited July 10, 2020). Ex post facto laws are laws that punish retroactively; thereby punishing for conduct that was legal when it was performed. Ex Post Facto, supra.

172. Nullum Crimen Sine Lege, Nulla Poena Sine Lege Law and Legal Definition, USLEGAL, https://definitions.uslegal.com/n/nullum-crimen-sine-lege-nulla-poena-sine-lege (last visited July 10, 2020). The legal principle of nulla poena sine lege means “no crime or punishment without a law” and requires, as a prerequisite to just punishment, fair notice to the public that the conduct is classified as criminal. Id.

rare form of Alzheimer’s disease, Doris Stauffer’s body was donated to the BRC with the hope of furthering research on her disease’s mutation. In exchange, BRC promised to cremate her remains. Upon signing her remains over to BRC, her son, Jim Stauffer, specified that Ms. Stauffer was not to be used in any “non-medical projects that could involve exposure to destructive forces[,] e.g. impacts, crashes, ballistic injuries, and blasts.” Three years later, her son was informed by the media that his mother’s body was not actually cremated. It was also not used to study Alzheimer’s disease. In fact, it was not used to study medicine at all. BRC sold Ms. Stauffer’s body to the United States government for $5893, and records show that her cadaver was used to test the effects of explosives on the human body in a physical impact study using military-grade bombs.

Stephen Gore, owner of Biological Resource Center (“BRC”), shared a close working relationship with Arthur Rathburn and was also accused of buying and selling diseased parts. Meagan Flynn, Human Chop Shop That Sold Body Parts for Experiments Without Consent Ordered to Pay $58 Million to Donors’ Families, WASH. POST (Nov. 20, 2019, 7:40 AM), https://www.washingtonpost.com/nation/2019/11/20/arizona-human-chop-shop-sold-body-parts-experiments. In fact, Mr. Gore “was one of Rathburn’s main body-part suppliers.” Id. Mr. Gore’s shipment of a bloody cooler vis-à-vis his company, BRC, was addressed to Mr. Rathburn. Id. The shipment sparked the aforementioned investigation by authorities at the Detroit Airport and resulted in a fraud conviction of Mr. Gore by state officials in Arizona and a federal conviction of Mr. Rathburn. Id. Stephen Gore pled guilty in October 2015 to illegal control of an enterprise and received “one-year deferred jail time, four years probation and [payment of] $121,000 in restitution.” Janet Winikoff, Stephen Gore: 5 Fast Facts You Need to Know, HEAVY, https://heavy.com/news/2019/08/stephen-gore (last updated Nov. 3, 2019). As a result of the misuse and abuse uncovered at BRC, the state of Arizona reconsidered their laws. A Business Where, supra note 78.

175. See id.
176. Id.
177. Id. Mr. Stauffer received only the ashes of his mother’s cremated hand. Id.
178. Id.
179. Id.
180. Id. The United States military maintains that they were unaware of the wishes of the next of kin, as they rely on BRC to vet bodies and provide them with specimens that have consented to use in military activity. Id. In 2015, approximately twenty-one plaintiffs, including Jim Stauffer, brought a civil suit against BRC and its owner, Stephen Gore, alleging fraud and deception. Flynn, supra note 173. “The 21 plaintiffs in the civil action . . . say [that] the remains of their family members were obtained through ‘false statements,’ that body parts were being sold for profit, and that they were not stored, treated or disposed of with dignity or respect.” Stephanie Innes, Lawyer: Plaintiffs Deserve $13.2 Million Each in Body Donation Case, AZCENTRAL (Nov. 12, 2019, 3:33 PM), https://www.azcentral.com/story/news/local/arizona-health/2019/11/12/body-donation-case-plaintiffs-deserve-settlement-lawyer-biological-resource-center/2577841001. The case went to trial and ended in late 2019. Flynn, supra note 173. An Arizona jury in the Maricopa County Superior Court presided over the case and:

[The] jury awarded $58 million in damages to the plaintiffs, finding that the Phoenix body donation company and its owner deceived the families into donating their loved ones’ bodies only for them to end up dismembered and distributed for profit all over the country. Ten out of 21 plaintiffs were awarded the damages, which included $50 million in punitive damages and $8 million in compensatory damages.
Boston College law professor Ray Madoff reasons that these situations have sprung up because changes in technology and business have outpaced changes in law.\(^{181}\) As a result, she notes that “[m]ost people are surprised to learn . . . that once a body is donated, relatives surrender legal control over what happens next. Any instructions you leave with regard to your body are really advice for what you would like to see happen.”\(^{182}\)

Further instances of abuse and misleading body broker conduct have come to light in Nevada, Colorado, Hawaii, and New Mexico, among others.\(^{183}\)

\(F. \) The Current State Patchwork

Ten states provide meaningful oversight of the movement of cadavers in commerce.\(^{184}\) While each of the fifty state’s legislation is based on the UAGA framework, almost all of them execute differently.\(^{185}\) Of the ten, New York arguably exercises the most stringent control over the whole-body donation industry.\(^{186}\) New York requires licensing, inspections, and annual statistical reports from all brokers, including those not incorporated or based in the state of New York, but whom ship remains to customers in the state.\(^{187}\) Comparatively, New Jersey exercises minimal regulations.\(^{188}\) A 2008 law passed by the New Jersey legislature “restricting the business to non-profits and requiring brokers to register with health authorities,” has not been implemented because the legislature has consistently failed to allocate the necessary funds to enact and police the law.\(^{189}\)

Arizona and Colorado were among the first states to reconsider regulations following the recent onslaught of mismanagement and abuse.\(^{190}\) In 2016, Arizona, which historically had few regulations leading to an influx of brokers in the state, amended their legislation

with House Bill 2307 ("H.B. 2307").\(^{191}\) The law requires, among other things, that body brokers become licensed, hire a medical director who is a licensed physician to supervise operations, and adhere to regular and unannounced inspections.\(^{192}\) The law has sat in unenforced limbo since it was passed in 2016.\(^{193}\) The Arizona Health Department cites "technical issues" as the reason for the four-year delay.\(^{194}\) Colorado's Human Remains Disposition Sale Businesses Act requires non-transplant tissue banks to register with state regulators and to keep records with an increased level of detail.\(^{195}\)

G. Prior Federal Legislative Attempts at Governing Whole-Body Donation

A 2004 call for federal regulation went unanswered by Congress.\(^{196}\) In 2014, United States House of Representative ("Rep.") Paul Gosar of Arizona introduced a federal bill to regulate "the labeling, transporting and licensing of human tissues by body donation programs."\(^{197}\) The bill was never passed into law.\(^{198}\) Subsequently, in 2019, United States Reps. Bobby Rush of Illinois and Gus Bilirakis of Florida introduced H.R. 1835.\(^{199}\) The bipartisan bill is called the "Consensual Donation and Research Integrity Act of 2019."\(^{200}\) The bill targets health and safety in advocating for a uniform registry for donated bodies.\(^{201}\) It also calls for a "respectful disposition."\(^{202}\) The bill remains at the introductory phase.\(^{203}\)

III. LEGISLATIVE INADEQUACIES

Because the United States does not have a centralized law governing whole-body donations, a patchwork of laws built on UAGA principles govern state by state.\(^{204}\) Years of marginal oversight have

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191. H.R. 2307, 52nd Leg., 2nd Reg. Sess. (Ariz. 2016); A Business Where, supra note 78; Innes, supra note 73.
193. Innes, supra note 73. Arizona passed the 2016 law in response to the BRC case and the subsequent conviction of owner, Stephen Gore. See supra note 173 and accompanying text.
194. Innes, supra note 73.
195. Id.; Roberts, supra note 190.
196. In a Warehouse of Horrors, supra note 125. In 2004, a federal health advisory panel asked that the United States government, "apply the same strict oversight to the body parts trade that already governed organ transplantation." Id. Nothing came of the request. Id.
197. Innes, supra note 73.
198. Id.
199. Id.
200. Id. For more information, please reference the Consensual Donation and Research Integrity Act of 2019, H.R. 1835, 116th Cong. (2019).
201. Innes, supra note 73.
202. Id.
203. See supra note 48.
204. See supra Part II.B. F.
allowed an industry built on misuse, secrecy, and abuse to flourish into a cash cow, and differences in laws have led to forum shopping among body brokers in establishing their principal place of business. Christina Song, a New Jersey lawyer who co-wrote standards for the organ transplant industry that many states have adopted, stated that “[i]t would not be a stretch to envision a uniform state law which requires that those who recover, distribute and use human bodies adhere to uniform standards of transparency, traceability and authorization.” Todd Olson, an anatomy and structural biology professor at Yeshiva University’s Albert Einstein College of Medicine, further contends that “without consistent laws or a clear oversight authority – local, state or national – nobody is accounting for anything . . . . Nobody is watching. We regulate heads of lettuce in this country more than we regulate heads of bodies.”

Subpart A explores the language of the UAGA and analyzes the common law legal principles that guide human matter possession in facilitating an understanding of the rights of the dead and their next of kin. Subpart B challenges the legal norm and floats an argument for allowing a regulated system of cadaver sales.

A. Who Owns What?

In the United States, ownership rights over human matter are muddled, both in life and after death. During life, a person may receive compensation for the time and effort expended in donating their eggs or sperm. One may also receive compensation in exchange for donating their blood plasma. As the current law does not say otherwise, women may sell their breast milk. Conversely, individuals do not have ownership rights over tissue, such as cells, once surgically

205. See generally In the U.S. Market for Human Bodies, supra note 3 (explaining how because of lax state laws, body brokers play by their own rules).
206. See In a Warehouse of Horrors, supra note 125; In the U.S. Market for Human Bodies, supra note 3.
207. In the U.S. Market for Human Bodies, supra note 3.
208. Id.
209. See infra Part III.A.
210. See infra Part III.B.
214. Wagner, supra note 211.
removed from the body.\textsuperscript{215} In the same vein, one may not sell, nor be compensated in any way, for their transplantable organs—neither at death nor during life.\textsuperscript{216} In addition, in forty-nine out of fifty states, a person is forbidden from selling their body by engaging in sexual activity for compensation—prostitution.\textsuperscript{217}

While the Thirteenth Amendment of the United States Constitution forbids slavery, or the “condition in which one human being . . . [is] owned by another” during life, neither the Thirteenth Amendment nor any other part of the Constitution, speaks to ownership at death.\textsuperscript{218} Courts have grappled with the question of how the law treats possession and rights over the dead for well over one hundred years.\textsuperscript{219} Notable is the judiciary’s analysis in the 1905 case of \textit{Louisville & Nashville Railroad Co. v. Wilson}:

Death is unique. It is unlike aught else in its certainty and its incidents. A corpse in some respects is the strangest thing on earth. A man who but yesterday breathed and thought and walked among us has passed away. Something has gone. The body is left still and cold, and is all that is visible to mortal eye of the man we knew. Around it cling love and memory. Beyond it may reach hope. It must be laid away. And the law—that rule of action which touches all human things—must touch also this thing of death. It is not surprising that the law relating to this mystery of what death leaves behind cannot be precisely brought within the letter of all the rules regarding corn, lumber and pig-iron. . . . And the law, in its all-sufficiency, must furnish some rule, by legislative enactment or analogy, or based on some sound legal principle, by which to determine between the living questions of the disposition of the dead and rights surrounding their bodies.\textsuperscript{220}

In sum, the law of bodies is not a clear-cut “bundle of rights” property analogy.\textsuperscript{221} Dead human matter has been deemed to belong to \textit{no one}, thus recognizing no property rights in or of the body of a deceased in the commercial or legal sense.\textsuperscript{222} Over time, state common

\begin{thebibliography}{99}
\bibitem{215} Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 480 (Cal. 1990).
\bibitem{216} National Organ Transplant Act, 42 U.S.C. § 274e(a) (2012).
\bibitem{217} Madeleine Kearns, \textit{Don't Legalize Prostitution}, NAT'L REV. (Aug. 8, 2019, 10:07 AM), https://www.nationalreview.com/magazine/2019/08/26/dont-legalize-prostitution. Throughout the United States, prostitution is regulated by the states, not the federal government. \textit{See id.} Within the one state that permits prostitution, Nevada, it is only legal in a few of their counties. \textit{Id.}
\bibitem{219} \textit{Louisville & Nashville R.R. Co. v. Wilson}, 51 S.E. 24, 25 (Ga. 1905).
\bibitem{220} \textit{Id.}
\bibitem{221} \textit{See 22A AM. JUR. 2D Dead Bodies § 3 (2019)}.
\bibitem{222} \textit{Id.}
\end{thebibliography}
law has extended a quasi-property right to the next of kin in granting them the legal right to take possession of their loved ones’ remains, but only for the limited purpose of disposal.\textsuperscript{223} Section 4 of the UAGA underscores the common law quasi-property right in granting next of kin the limited autonomy to donate on the decedent’s behalf, but only if the donor meets the relationship qualifications delineated in the statute.\textsuperscript{224}

B. The Right to Sell Argument

The “my body, my choice” argument coined by pro-choice advocates in the abortion arena, and rooted in the concept of personal sovereignty, has been extended to rally for social laissez-faire policies pertaining to prostitution, drug and junk food availability, and organ sales, as well as post-mortem whole-body sales.\textsuperscript{225} The argument asserts that individuals have autonomy vis-à-vis a fundamental right to privacy, which is guaranteed by the Due Process Clause’s liberty provision, to make decisions pertaining to what happens to their own being.\textsuperscript{226} Those who facilitate this argument believe that the legislature, when drafting laws of this kind, is crossing into a realm that reaches beyond their power under the Constitution.\textsuperscript{227}

Divergent to the stare decisis principle\textsuperscript{228} that underscores post-mortem body possession rights, which seemingly holds that the

\textsuperscript{223} See Spates v. Dameron Hosp. Ass’n., 7 Cal. Rptr. 3d 597, 608-09 (Cal. Ct. App. 2003) (“The duty to bury a corpse and to preserve its remains is a legal right which courts of law will recognize and protect; such right, in the absence of any testamentary disposition, belongs exclusively to the next of kin.”); Lascurain v. City of Newark, 793 A.2d 731, 740-43 (N.J. Super. Ct. App. Div. 2002).

\textsuperscript{224} REVISED UNIFORM ANATOMICAL GIFT ACT § 4 (amended 2009) (NAT’L CONF. OF COMM’RS ON UNIF. STATE LAWS 2006). Unless otherwise documented by the decedent, the following person(s) may make an anatomical donation on the decedent’s behalf (in order of priority):

(1) an agent of the decedent at the time of death who could have made an anatomical gift under Section 4(2) immediately before the decedent’s death; (2) the spouse of the decedent; (3) adult children of the decedent; (4) parents of the decedent; (5) adult siblings of the decedent; (6) adult grandchildren of the decedent; (7) grandparents of the decedent; (8) an adult who exhibited special care and concern for the decedent; (9) the persons who were acting as the [guardians] of the person of the decedent at the time of death; and (10) any other person having the authority to dispose of the decedent’s body.

Id. § 9 (alteration in original). For purposes of this Note, they will be referred to as next of kin. Id.


\textsuperscript{227} See Somin, supra note 225.

\textsuperscript{228} Timothy Oyen, Stare Decisis, LEGAL INFO. INST., https://www.law.cornell.edu/wex/stare_
only property right vested in the next of kin is possession for purposes of disposal.\textsuperscript{229} A question exists as to whether the next of kin can engage in the whole-body sales market?\textsuperscript{230} This begs a further question: should next of kin be able to engage in the market?\textsuperscript{231} While the question may shock the conscious initially, there is an argument to be made that the next of kin can and should be able to reap the same benefits that body brokers are reaping, as it could result in a more regulated society and an increase in the availability of cadavers for research.\textsuperscript{232}

Under the UAGA standard, the question should be framed as: should the next of kin be able to “charge a reasonable amount”\textsuperscript{233}—in the vein of Benjamin Franklin’s aforementioned quote, a tax\textsuperscript{234}—for facilitating the transaction, just as body brokers are seemingly permitted to do under the laws of this country today?\textsuperscript{235} The federal government has long held that it is illegal to sell organs intended for transplant for fear that it will lead to greed, corruption, and a slippery slope of temptation for society’s most vulnerable class: the poor.\textsuperscript{236} Beyond endorsing the UAGA for adoption at the state level at its earliest conception, which as a standard, does not necessarily prevent sales and at the very least, allows fees to be charged, Congress has not moved quickly to set forth legislation, or even an opinion, to guide the whole-body ownership and donation debate.\textsuperscript{237}

Under the language of Section 16(b) of the UAGA “[a] person may charge a reasonable amount for the removal, processing, preservation, quality control, storage, transportation, implantation, or disposal of a part,” with “person” being defined in Section 2(19) as “an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal
decisis (last updated Mar. 2017). Stare decisis is Latin for “to stand by things decided” and courts cite to stare decisis when an issue has been previously brought to the court and a ruling has been issued. Id.

\textsuperscript{229} See supra note 224 and accompanying text.

\textsuperscript{230} See supra note 90 and accompanying text.

\textsuperscript{231} See supra note 90 and accompanying text.

\textsuperscript{232} See infra text accompanying notes 238-57.

\textsuperscript{233} REVISED UNIFORM ANATOMICAL GIFT ACT § 16(b) (amended 2009) (NAT’L CONF. OF COMM’RS ON UNIF. STATE LAWS 2006).

\textsuperscript{234} See supra note 1 and accompanying text.

\textsuperscript{235} See REVISED UNIFORM ANATOMICAL GIFT ACT § 16(b).


\textsuperscript{237} REVISED UNIFORM ANATOMICAL GIFT ACT § 16(b); Andrew Y. Schiefer, Note, Robbing the Grave: Amending the Uniform Anatomical Gift Act to Curtail Abuses Within the Whole-Body Donation Industry, 29 HEALTH MATRIX: J. OF L.-MED. 371, 377 (2019). Congress’s last attempt to regulate was the Consensual Donation and Research Integrity Act of 2019, also known as H.R. 1835, which was introduced in 2019 and remains at the introductory phase of congressional proceedings. See supra note 21 and accompanying text.
or commercial entity." So to answer the question posed earlier, yes, the next of kin can technically engage in the market.

This leaves the question of whether they should be able to engage by commanding their price based on the fair market value, just as brokers do. If this were a simple business transaction guided by principles of economic liberty, the answer would likely be yes. From an ethical and legal perspective, the answer is unknown. The possibility sits in a grey area somewhere between fairness and societal morality, with further uncertainty injected by the loose construction of the quasi-property right found in the UAGA.

Putting emotions aside and reviewing the argument strictly under a business lens, donors and next of kin are handing over bodies, which are the brokers’ raw materials. In exchange, body brokers incur minimal costs, including transportation, and if any remains are left over, the cost of cremation. Brokers then sell the bodies for profit. In some cases, the profit margin can be close to one hundred percent. Medical programs benefit by obtaining the bodies. Doctors, automakers, and scientists benefit through the utilization of the bodies in their studies, which in turn results in a salary. Funeral homes feed the broker’s business through partnerships and promotions, which often result in

238. Revised Uniform Anatomical Gift Act §§ 2(19), 16(b) (emphasis added).
239. See id.
240. See In the U.S. Market for Human Bodies, supra note 3.
242. See supra note 90 and accompanying text.
243. See supra notes 224, 238-39 and accompanying text.
244. See In the U.S. Market for Human Bodies, supra note 3.
245. See id. Cremations in the United States can cost as much as $1000. Exclusive: Dutch Hospitals, supra note 103.
246. In the U.S. Market for Human Bodies, supra note 3.
247. See id. (explaining how body brokers sell a donated product).
248. See McCullar, supra note 63.
249. Id.
250. In the U.S. Market for Human Bodies, supra note 3. Unfortunately, funeral directors have not just been on the receiving end of kickbacks and referral fees. See id. They have also actively engaged in the brokering business. Ralph R. Ortega, Mother and Daughter Morticians Charged with Shipping a Human HEAD Infected with Hepatitis-C, Selling Dead Bodies and Charging $1,000 for Fake Cremations, Daily Mail (Mar. 20, 2020, 1:28 PM), https://www.dailymail.co.uk/news/article-8133485/Mother-daughter-morticians-charged-1-000-cremations-never-sold-diseased-body-parts.html. In March of 2020, Megan Hess and her mother, Shirley Koch, both morticians at Sunset Mesa Funeral Directors in Colorado, were charged under federal law with “six counts of mail fraud involving 38 decedents and three counts of illegal transportation of hazardous materials.” Id. The charges stemmed from accusations that the mother-daughter duo contracted to cremate bodies, but instead, sold them. Id. The women are alleged to have “sold diseased body parts through a non-profit body brokerage business, which they also owned.” Id. From 2010 to 2018, their funeral home was believed to have shipped diseased bodies via mail and on commercial flights and provided altered documents assuring buyers that the
referral fees and kickbacks.251 Yet, the person who is offering the indispensable part of the transaction, the donor or their next of kin, does not receive compensation.252 Put best by the dissent in Moore v. Regents of the University of California, "[w]hile he [or she] may be a silent partner, [the donor's] contribution to the venture is absolutely crucial."253

Families like that of Cody Saunders254 are the majority, and not the minority, in that a growing subset of next of kin are choosing donation over burial because they live below the poverty line, or because they have found themselves saddled with bills following long-term illnesses.255 The argument to allow donors to collect fees is supported by the fact that donors are already receiving a financial benefit under the current framework: the cost of cremation.256

Mindful that it would not be beneficial to anyone to have the next of kin taking to the streets to shop for the best deal on Aunt Jane or Uncle John's body, the idea would call for a government-run system that sets limits on the who, what, where, and when, as the government does with organ donation today.257 The result in allowing a regulated system of non-transplant whole-body tissue sales, including rights vested in next of kin as sellers, could potentially inspire a reduction in the industry-wide cadaver shortage through incentivization, while also increasing process transparency.258

On the other hand, if the requisite regulations are not sound and tightly constructed, sales by the next of kin could raise further health and safety concerns and perpetuate an already vast black market.259 Nonetheless, the debate is riddled with fears from both sides that a black

bodies had tested negative for infectious diseases. Id. In addition, they failed to inform families of the deceased of such practices, with injurious results. Id. This case highlights the fact that despite calls for increased punishment for body broker misconduct, in 2020, federal criminal indictments beyond mail fraud and illegal transportation of hazardous materials, the same charges filed against Arthur Rathbun in 2016, have not been expanded to specifically address and increase criminalization of any aspect of the abuses found throughout the industry. Id.; Bever, supra note 84.

251. In the U.S. Market for Human Bodies, supra note 3.
252. Id.; see Hall, supra note 236.
254. See supra note 98 and accompanying text.
255. See How an American Company, supra note 15; Nat'l Funeral Dir. Ass'n, supra note 48; see also A Business Where, supra note 78. Reuters analyzed body broker BRC's donor profiles and found that "[t]he vast majority of BRC donors came from neighborhoods where the median household income fell below the state average. Four out of five donors didn't graduate from college, about twice the ratio of the country as a whole." A Business Where, supra note 78.
257. See National Organ Transplant Act, 42 U.S.C. § 274e(a) (2012). Note that while the federal government thoroughly regulates the ins and outs of organ donation, the sale of organs by either the donor or their next of kin is illegal at this time. Id.
258. See supra Part II.D–E.
259. See Bever, supra note 84.
market for bodies will spring up. 260 Those who make this argument fail to understand that this market already exists and that perhaps an adaptation of sales rights coinciding with uniform federal regulation could present a solution. 261

IV. A CALL FOR ACTION

This Note takes the position that for purposes of cohesion and uniformity, whole-body donation must be regulated at the federal level akin to organ donation. 262 This reform will consider H.R. 1835, as well as the 2006 version of the UAGA, in crafting an all-encompassing reform that goes beyond both documents to narrowly tailor new federal legislation that governs broadly from coast to coast. 263 This legislation will utilize the UAGA as a textual template in making additions that include a governmental regulating agency and a regulatory framework to competently police the whole-body donation industry. 264 Those who argue in favor of decreased regulation and increased personal sovereignty make thoughtful points as set forth in Subpart B of Section III. 265 Ultimately, the solution of this Note does not adopt the requisite shift in legal and social policy encompassed in that ideology. 266

Subpart A sets forth the purpose of the proposed reform and explains that this reform is not intended to put body brokers out of business. 267 Rather, the proposed reform calls for thoughtful measures and precautions that balance public health and safety with aspects of individual, but not necessarily complete, next of kin autonomy. 268 Subpart B sets forth the two means by which Congress may harness their constitutional power in drafting legislation that federally regulates the industry—the Taxing and Spending Clause and the Commerce Clause. 269 In addition, Subpart B weighs the pros and cons of Congress using their Taxing and Spending Clause powers versus their Commerce Clause powers. 270 Finally, Subpart C reflects on issues that persist in the current landscape and sets forth three amendments to the UAGA that are aimed towards resolving those issues and that serve the basis of this federal reform. 271

260. See supra text accompanying note 257.
261. See Bever, supra note 84.
262. See supra Part II.
263. See infra Part IV.C.
264. See infra Part IV.C.
265. See supra Part III.B.
266. See infra Part IV.C.
267. See infra Part IV.A.
268. See infra Part IV.A.
269. See infra Part IV.B.
270. See infra Part IV.B.
271. See infra Part IV.C.
The first amendment found in Subpart C proposes that an entirely new section be added to the federal version of the UAGA. The new section grants the United States Department of Health and Human Services ("HHS") the power to oversee, regulate, and sanction any wrongdoings committed by members of the anatomical non-transplant donation industry. Among other requirements, the new section requires that non-transplant entities become licensed by the federal government, and promotes a mandatory licensing fee as a barrier to industry entry. The second amendment found in Subpart C adds broker requirements to the existing version of UAGA Section 11 with the intent being to increase transparency of the process in hopes that if more people are aware of, and are comfortable with, how the industry operates, they will donate. Resulting, hopefully, in an increase in the national supply of cadavers for use at respected medical and scientific institutions. Finally, the third amendment found in Subpart C suggests updates to UAGA Section 16 aimed at increasing punishment for parties who do not adhere to the newly minted HHS policies found in amendments one and two.

A. The Purpose of Reform: A Balancing Act

It is certainly not the glamour of the job that attracts entrepreneurs to the body trade. For some brokers, it is the desire to perpetuate scientific and medical research. For most, it is the loose laws and the unlimited profit potential. Garland Shreves, who serves as CEO of non-transplant tissue bank, Research for Life, recognizes that abuses in the industry have led many to question his practice of charging fees. He contends that "[n]othing can be done unless [body brokers] recover fees—[that's] just the sad reality."

The purpose of this legislative reform is not to eradicate body brokering, as oftentimes, body brokers are essential to sourcing and matching researchers with the tools necessary to conduct their studies. Working based on the assumption that body brokers would not do what they do for free, over-regulation by way of closing the UAGA loophole

272. See infra Part IV.C.1.
273. See infra Part IV.C.1.
274. See infra Part IV.C.1.
275. See infra Part IV.C.1.
276. See infra Part IV.C.2.
277. See infra Part IV.C.2.
278. See infra Part IV.C.3.
279. See A Business Where, supra note 78.
280. See In the U.S. Market for Human Bodies, supra note 78.
281. See Innes, supra note 77.
282. See Smith, supra note 84.
that permits “fees” to be charged will disincentivize non-transplant tissue banks from continuing operations, and thus is not an option. 284 Instead, this reform aims to tighten restrictions and to universally standardize the laws that incentivize safe whole-body donation, with the goal of restoring dignity to the process, increasing donations, and protecting the wishes of the deceased. 285

B. A New Federal Standard: Congressional Power to Regulate

Congress wields the power to regulate the body business under two distinctly different powers found within the Constitution. 286 First, under Article I, Section 8, Clause 1, the Taxing and Spending Clause. 287 By attaching conditions to federal funds, such as grants given to state research and medical institutions, Congress can trigger a trickle-down regulatory effect impacting body brokers and sellers alike. 288 Second, under Article I, Section 8, Clause 3, the Commerce Clause, Congress may directly regulate commerce moving in interstate commerce, 289 as cadavers are today, and thus Congress has the ability to directly regulate body broker operations. 290

1. Congressional Taxing and Spending Power

Each year, the National Institutes of Health ("NIH"), a wing of the HHS that is tasked with furthering biomedical and public health, invests over forty-one billion federal dollars in research to benefit Americans. 291 They accomplish this through grants to "more than 300,000 researchers at more than 2,500 universities, medical schools, and other research institutions in every state." 292 The University of Minnesota, which has an Anatomy Bequest Program, is one example of an institution that receives funding from the NIH. 293

Under the constitutional standard adopted in South Dakota v. Dole, the federal government is permitted to condition the receipt of federal funds by state institutions, so long as the funding is conditioned in a way

284. See supra notes 281-82 and accompanying text.
285. See infra Part IV.C.
287. See infra Part IV.B.1.
288. See U.S. CONST. art. I, § 8, cl. 3.
289. See infra Part IV.B.2.
that is “reasonably calculated to address” the purpose of the funding, it is “in pursuit of ‘the general welfare,’” and it does not amount to anything more than “relatively mild encouragement to the States.” As such, Congress may require adoption of the provisions set forth in the succeeding amendments as a condition on funding for state medical facilities and research institutions, which would include the University of Minnesota’s Medical School, a public university. In conditioning the funds, the government may limit where cadavers can be purchased from and by whom. For instance, they may limit state-actors from transacting with any entity that is not federally licensed. The federal government may also set forth increased transparency requirements, such as a requirement that families are briefed on the specifics of what may become of their donation in line with the AAA guidelines.

While the enumerated congressional powers found within the Spending Clause would allow Congress to legislate in regulating a substantial portion of the market, Congress’s constitutional reach would likely not extend Congress the power to directly regulate those who operate privately—that is, body brokers, middlemen, and private companies who buy cadavers and who are not state-affiliated. Body brokers do not typically receive federal funding, either because they do not qualify or because they have opted to keep their operations secret by operating as a privately held corporation. Nonetheless, they would be indirectly impacted by the changing dynamic of their supply chain and buyers, and as a result, they would be forced to adhere, exit the business, or find another legal loophole.

295. Id. In Dole, as a condition meant to encourage safe driving among the states’ citizens on interstate highways, the Court ruled that the federal government was permitted, under the National Minimum Drinking Age Act, to withhold a small percentage of federal highway funds given to states if they did not adopt the twenty-one-year-old minimum drinking age. Id. at 203-04, 211-12. The Court further held that, “Congress conditioned the receipt of federal funds in a way reasonably calculated to address this particular impediment to a purpose for which the funds are expended.” Id. at 209. Any legislation must be designed to give the states a choice in the matter. Id. at 211.
296. See A Reuters Journalist Bought, supra note 77. Conditions on funding are aimed at eliminating what has been described as the “Wild West” of buying and selling body parts. Id.
297. See supra Part II.B–C. In supplementing Congress’s spending power, “[t]he ‘broad’ scope of Congress’s power under the Necessary and Proper Clause has been held to leave ‘Congress a large discretion as to the means that may be employed in executing a given power.’” BRIAN T. YEH, CONG. RES. SERV., R44797, THE FEDERAL GOVERNMENT’S AUTHORITY TO IMPOSE CONDITIONS ON GRANT FUNDS 2 (2017) (internal citation omitted).
298. See supra Part II.B.
299. See CONG. RES. SERV., R44797, at 4-5.
300. Id.; see supra text accompanying notes 67-68.
301. See supra text accompanying notes 12, 284; infra text accompanying notes 364, 366.
2. Congressional Commerce Clause Power

In casting a broad regulatory net over research institutions, private buyers, and body brokers, with the ultimate goal of consistency, Congress’s Commerce Clause power is the exemplary power to tap in order to legislate more directly.\(^ {302} \) Under Article I, Section 8, Clause 3 of the United States Constitution, Congress has the power to regulate commerce moving “among the several States.”\(^ {303} \)

In the 1824 case of *Gibbons v. Ogden*, the Court held that intrastate activity could be regulated by the legislative branch of the federal government under the Commerce Clause—so long as the activity is part of the greater national interstate marketplace.\(^ {304} \) Following *Gibbons*, the Court set out to slowly define what does, and what does not, qualify as an activity that substantially impacts interstate commerce in accordance with the Constitution.\(^ {305} \)

In 1942, the Court in *Wickard v. Filburn* held that under the Commerce Clause, Congress has the power to regulate activities that have an indirect, yet cumulative effect on interstate commerce.\(^ {306} \) As such, Congress was deemed to have the power to regulate activity within a single state so long as the activity in that state had an effect on interstate commerce, because even if minimal, the failure to regulate that class of activity would, in the aggregate, undercut the regulation of the interstate market in that commodity.\(^ {307} \) In *Wickard*, the Court held that the national market price that would be impacted by the activity undertaken by that lone person in Ohio.\(^ {308} \) That was because, if every person were to undertake the activity, the cumulative economic effect


\(^{303}\) U.S. Const. art. I, § 8, cl. 3.

\(^{304}\) See 22 U.S. 1, 177, 182, 189, 200 (1824) (underscoring the fact that Congress has the power to regulate commerce moving between the states).

\(^{305}\) Id.; see e.g., *United States v. Lopez*, 514 U.S. 549, 549 (1995) (holding that the 1990 Gun Free School Zones Act, which was passed using Commerce Clause power with the intent to forbid individuals from possessing guns in school zones, was deemed unconstitutional and an excessive overreach of power). The *Lopez* Court held that gun possession in a school zone is not an economic activity that, through repetition elsewhere, would have a substantial impact on interstate commerce. *Lopez*, 514 U.S. at 549. Notably, depending on the makeup of the Court, the interpretation of Commerce Clause power—whether narrow or broad—has wavered. Linda R. Monk, *The Commerce Power*, PBS, https://www.pbs.org/ptp/constitution-usa-peter-sagal/federalism-commerce-power (last visited July 10, 2020). During the early 1900s, as part of the Progressive Era, the Supreme Court limited the power of Congress to regulate interstate commerce. *Id*. During the Great Depression and through the 1960s, the Supreme Court took on a more expansive interpretation of the Commerce Clause power in allowing the federal government to regulate broadly. *Id*. By the 1990s, the Court was more prone to limiting congressional Commerce Clause power. *Id*.


\(^{307}\) *Id*.; see also *Gonzales v. Raich*, 545 U.S. 1, 2 (2005).

\(^{308}\) 317 U.S. at 115, 127-29.
would be substantial, and perhaps, even detrimental to the national economy. 309

In 2005, the Court in Gonzales v. Raich permitted Congress to regulate "purely local activities," that is, commerce only loosely related to interstate economic activity, including homegrown marijuana production by individuals. 310 Akin to Wickard, the Court held that the activity had a substantial impact on interstate commerce. 311

More recently, in National Federation of Independent Business v. Sebelius, the majority held that when exercising Commerce Clause power, Congress may regulate only economic activity—not inactivity. 312

Based on the following reasoning, it is concluded that Congress has the power to regulate the donated dead under the powers bestowed to the legislative branch in Article I, Section 8, Clause 3 of the United States Constitution. 313 Bodies are actively moving interstate and are being sold for profit. 314 The activity is economic because money is changing hands, and when reviewed cumulatively akin to Wickard, the activity has a substantial effect on commerce throughout the nation’s several states. 315 In conclusion, providing that the drafters include a jurisdictional hook in the text of the legislation explaining the nexus between the regulated activity and national commerce, 316 Congress has the power to directly regulate body broker activity by implementing a federal UAGA inclusive of the below amendments. 317

C. The Proposed Amendments to the UAGA

While H.R. 1835 is a strong first step in expanding whole-body donation regulation, it focuses primarily on health concerns by introducing a national body registration system with documentation and labeling requirements, 318 but it falls short in addressing other pertinent issues associated with whole-body donation, such as misinformation, misuse, and sales to non-scientific entities. 319 Hence, there is a call for more robust reform. 320

309. Id.
310. 545 U.S. at 17, 19.
311. Id.
313. See U.S. CONST. art I, § 8, cl. 3.
314. In the U.S. Market for Human Bodies, supra note 3.
315. See supra notes 304-11 and accompanying text.
317. See U.S. CONST. art I, § 8, cl. 3.
319. See supra Part II.E.
320. See supra Part I.
1. Amendment One: A Federal Oversight Agency

Never before has a single federal or state entity had the power to oversee the whole-body donation industry.\(^\text{321}\) Hence, the current state of affairs: a patchy state-by-state approach to regulation.\(^\text{322}\) Today’s system is riddled with confusion and resulting, a burden-shifting approach between enforcement agencies when questions of oversight and responsibility surface.\(^\text{323}\) To remedy this, this Note concurs H.R. 1835 in vesting a single federal entity with the power to set forth regulations, such as licensing, labeling, packaging, and tracking requirements for tissue acquired and transported by non-transplant tissue banks.\(^\text{324}\)

This Note proposes a further requirement that both private and publicly owned receivers of non-transplant tissue, operating for purposes of medical and scientific research, become licensed by the Secretary’s office of the HHS.\(^\text{325}\) The HHS is the most natural agency to effectively police the industry in that the Health Resources and Service Administration (“HRSA”), an agency of the HHS,\(^\text{326}\) currently oversees organ donation laws, their regulation, and the federal organ registry.\(^\text{327}\) In officially granting the federal government vis-à-vis the HHS oversight responsibility, and in emphasizing the importance of this vast change in administration, it is proposed that this amendment be encompassed in Section 28, a new section added to the proposed federal version of the UAGA.\(^\text{328}\)

With the goal of protecting public welfare at the forefront of this amendment, both receivers who interface directly with donors, and those

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321. See In a Warehouse of Horrors, supra note 125.
322. Id.
323. See supra text accompanying notes 155-58.
324. See Consensual Donation and Research Integrity Act of 2019, H.R. 1835, 116th Cong. § 2(a) (2019). On the matter, U.S. Representative Bobby L. Rush said: [The] bill represents a significant step towards ensuring that those who selflessly choose to advance scientific research do not do so at the expense of their dignity. This bill also provides safeguards for survivors, who are often approached to donate, and ensures that they are not misinformed or swindled and that there have been no false promises made to them by the unregulated bad actors in this space. Rush and Bilirakis Introduce Bill to Create Registry System for Body Parts Donated for Research, U.S. CONGRESSMAN BOBBY L. RUSH (Mar. 19, 2019), https://rush.house.gov/media-center/press-releases/rush-and-bilirakis-introduce-bill-to-create-registry-system-for-body.
325. See About HHS, HHS.GOV, https://www.hhs.gov/about/index.html (last visited July 10, 2020). The HHS works “to enhance and protect the health and well-being of all Americans . . . by providing for effective health and human services and fostering advances in medicine, public health, and social services.” Id.
328. See REVISED UNIFORM ANATOMICAL GIFT ACT (amended 2009) (NAT’L CONF. OF COMM’RS ON UNIF. STATE LAWS 2006). The 2006 version of the UAGA has twenty-seven sections. Id.
who operate in the shadows as middlemen in a business-to-business capacity, would be required to register their organization and adhere to HHS guidelines. In light of cases like *United States v. Rathburn*, where a leaking, unsealed cooler filled with human remains was shipped via interstate commerce, exposing dozens of people to disease and raising numerous public safety and health concerns while en route, it would become the budding responsibility of the HHS to set forth requirements for packaging, labeling, tracking, disclosure, inspection, and disposal. Akin to H.R. 1835 and Arizona’s H.B. 2307, this amendment proposes that in addition to a licensing requirement, all entities also be subject to inspection at regular intervals and that the entity be required to keep clear records of transactions. The HHS will be vested with the power to deny or suspend licensing to any entity that does not adhere to their policies and inspections.

Finally, in drawing additional inspiration from Arizona’s H.B. 2307, language will be added to the federal UAGA that requires each non-transplant tissue bank to hire a full-time medical doctor to oversee private facility processes and certify that their means of doing business are up to the newly-defined legal par, or else risk their medical license.

One counterargument anticipated from critics is that the cost of administering and policing the whole-body donation industry will prove too costly for the federal government to bear. Alas, the same was likely said about organ donation regulation, which admittedly does cost a great deal of money to administrate each year. So, why, as a country, do we do it? The policy considerations for regulating the flow of viable organs, the importance of saving human life through transplant, and the protection of vulnerable—whether it be the sick or poor—

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329. See supra Part II.C (aiming to allow the government to take inventory of the market and to tighten restrictions via registration requirements).
330. See supra notes 166-67 and accompanying text.
331. See Consensual Donation and Research Integrity Act of 2019, H.R. 1835, 116th Cong. § 2(a) (2019) (expanding on the bill’s requirements and proposing a specific government agency to administer the body broker business).
333. See supra text accompanying note 325.
334. See Ariz. H.R. 2307.
336. Id. For fiscal year 2020, the HHS requested $28,000,000 from the federal government to cover the cost of administering organ transplantation, an increase of $2,000,000 from fiscal year 2019. Id. In comparison, for fiscal year 2018, HRSA had an overall budget of $11,500,000,000. About HRSA, supra note 326.
337. See supra text accompanying notes 49-51.
members of our society, outweigh the costs accrued.\textsuperscript{338} Notably, some of those same arguments cannot be made for the donated, non-transplant dead, because they are just that: dead.\textsuperscript{339}

But note—a costly reform of the body trade is not all but (also) dead.\textsuperscript{340} The policy rationales behind uniform regulation of the body trade share some overlap with the policy rationales that underscore the federal regulation of organ donations.\textsuperscript{341} The body trade exposes society to similar health and safety harms\textsuperscript{342} and thus is a rational expenditure for a government, whose foremost obligation is to protect its citizens.\textsuperscript{343} To aid the government in minimizing the costs of hiring a clerical staff to actively administrate and inspectors to enforce the regulations set forth by the department, the government may charge an annual licensing fee to certify each license.\textsuperscript{344} Based on the untold profitability of body brokers,\textsuperscript{345} and the large costs expected as a result of undertaking whole-body regulation, the government must have substantial leeway in deciding what is a \textit{reasonable} licensing fee.\textsuperscript{346} Acting as a barrier to entry,\textsuperscript{347} a mandatory licensing process with periodic review of each entities’ internal procedures and a meaningful annual licensing fee, will encourage those who are entering the industry with the intent to act unethically to think twice.\textsuperscript{348}

2. Amendment Two: Increased Transparency

In addressing the concern that the poor and uneducated have become the target of broker tactics, greater transparency is called for.\textsuperscript{349} A requirement will be added to Part B of the revised federal UAGA Section 11 that requires that the receiver advise the donor as to all possible intended uses of the donation.\textsuperscript{350} For body brokers, this is

\begin{itemize}
  \item \textsuperscript{338}See supra text accompanying notes 49-51.
  \item \textsuperscript{339}See supra text accompanying notes 49-51.
  \item \textsuperscript{340}See infra text accompanying notes 344-46.
  \item \textsuperscript{341}See supra text accompanying notes 19, 236. Organ and body donations have in common the ability to save lives—organs, immediately versus body donations after a period of study. See supra text accompanying notes 37, 130. They also share some of the same risks—abuse and inequitable pressure on society’s most vulnerable. See supra text accompanying notes 19, 236.
  \item \textsuperscript{342}See supra note 341.
  \item \textsuperscript{344}See Will Kenton, \textit{Licensing Fee}, INVESTOPEDIA, https://www.investopedia.com/terms/l/licensing-fee.asp (last updated Mar. 3, 2020). “A licensing fee can be an amount of money paid by an individual or business to a government agency for the privilege of performing a certain service or engaging in a specific line of business.” \textit{Id}.
  \item \textsuperscript{345}See supra notes 87, 154 and accompanying text.
  \item \textsuperscript{346}See Kenton, supra note 344.
  \item \textsuperscript{347}\textit{Id.}; see supra text accompanying note 81.
  \item \textsuperscript{348}See supra text accompanying note 81.
  \item \textsuperscript{349}See supra text accompanying note 77.
  \item \textsuperscript{350}See supra notes 98-100, 176-80 and accompanying text (highlighting instances where the
difficult to do because they often cannot foresee how a body will be used when they take in the donation, as it will depend on future market demand.\textsuperscript{351} However, for all those contemplating making a whole-body donation, a broader understanding of how the body may be used will increase understanding, and in turn, allow donors to make more informed decisions.\textsuperscript{352} Through this amendment, the burden of advising the donor would now fall on the receiver of the donation, who is best equipped to advise on the risks and potential uses of the donation.\textsuperscript{353} Accordingly, the industry as a whole will no longer be able to rely on the notion that the donor \textit{should} or \textit{could} have inquired.\textsuperscript{354} In advance of accepting the donation, the receiver will be required to advise the donor that there is a risk that the body may be sold and in what ways the broker could possibly use the remains.\textsuperscript{355} The donor must be given the opportunity to object.\textsuperscript{356}

Historically, whole-body donors and their next of kin have contended that the language used by receivers in agreements was technical and cumbersome to comprehend.\textsuperscript{357} As such, future agreements between donors and receivers must be in writing and must use plain language to avoid any and all deceptive tactics.\textsuperscript{358} Finally, a copy of the donor agreement must be filed with the HHS within thirty days of receiving the donation.\textsuperscript{359}

The current language of Section 11(a) states that "[a]n anatomical gift may be made to the following persons named in the document of the gift: (1) a hospital; accredited medical school, dental school, college, or university; organ procurement organization; or other appropriate person, for research or education."\textsuperscript{360} In closing a loophole that has provided a great deal of ambiguity, the language "\textit{or other appropriate person}" shall be removed from Section 11(a)(1).\textsuperscript{361} In accordance with federal Section 28 of the UAGA,\textsuperscript{362} the requirement of licensing by the HHS of donor was either not advised of how the donation could be used or the receiver misrepresented how the donation was actually used).

\textsuperscript{351} \textit{In the U.S. Market for Human Bodies}, supra note 3.
\textsuperscript{352} See supra text accompanying notes 98-100, 176-80 (highlighting instances where next of kin consent was not informed).
\textsuperscript{353} See infra text accompanying note 365.
\textsuperscript{354} See infra text accompanying note 365.
\textsuperscript{355} See infra text accompanying note 365.
\textsuperscript{356} See infra text accompanying note 365.
\textsuperscript{357} See supra text accompanying note 365.
\textsuperscript{358} See infra text accompanying note 80.
\textsuperscript{359} See infra text accompanying note 365.
\textsuperscript{360} \textsc{revised uniform anatomical gift act} § 11(a)(1) (amended 2009) (\textsc{nat’l conf. of comm’rs on unif. state laws} 2006).
\textsuperscript{361} Id. (emphasis added); see infra text accompanying note 365.
\textsuperscript{362} See supra text accompanyng note 328.
any receiving party shall be added. Accordingly, Section 11 of the revised federal version of the UAGA shall be amended to include all of the above modifications. The whole-body donation portion of Section 11 shall read, in part, as follows:

SECTION 11. PERSONS THAT MAY RECEIVE NON-TRANSPLANT ANATOMICAL GIFT.
(a) An anatomical gift may be made directly to the following federally licensed entities named in the document of gift:
(1) a hospital; accredited medical school, dental school, college, or university; or organ procurement organization, or certified private organization, for research or education;
(b) Prior to taking possession of the anatomical gift, the receiving body, in the form of a written agreement, is responsible for making the donor aware of, and provide for an opportunity to object, in advance to: (i) all intended and possible uses of the donation; and (ii) the risk that the body may be sold.
(c) Federally licensed persons are defined as organizations that are registered with the United States Department of HHS as defined in Section 28.
(d) A copy of all written donor agreements must be filed with the United States Department of HHS office within thirty (30) days of receiving the anatomical donation.

3. Amendment Three: Punishment

In accordance with the aforementioned amendments, and in order to close a loophole that has allowed private individuals to “charge a reasonable amount for the removal, processing, preservation, quality control, storage, transportation, implantation, or disposal of a part,” federal UAGA Section 16(b) will instead require “an entity licensed by the United States Department of HHS,” instead of a “person.” Additionally, the language of the law will require that if fees are being charged, the sale must only be for purposes of science or medicine, as determined by the HHS.

Current UAGA Section 16 speaks only to punishment for individuals who “knowingly purchase[] or sell[] a part for transplantation or therapy.” This Note seeks to add a monetary and criminal punishment provision for individuals who misuse, or fail to adhere to, the requirements set forth by the HHS as it relates to any use

363. See infra text accompanying note 365.
364. See REVISED UNIFORM ANATOMICAL GIFT ACT § 11.
365. Id. (modifying § 11 of the UAGA to include the proposed recommendations).
366. Id. at § 16(b); see infra text accompanying note 373.
367. See infra text accompanying note 373.
368. REVISED UNIFORM ANATOMICAL GIFT ACT § 16(a) (emphasis added).
of the donation, including but not limited to, for medicine, science, transplantation, and therapy.\textsuperscript{369} Now with federal laws on the books, which was not previously the case and which resulted in a limited number of infractions,\textsuperscript{370} the threat of increased punishment is expected to serve as a deterrent.\textsuperscript{371} Accordingly, Section 16 of the revised federal version of the UAGA\textsuperscript{372} shall be amended to read, in relevant part:

SECTION 16. SALE OR PURCHASE OF PARTS PROHIBITED.
(a) For medical or scientific use, an entity licensed by the United States Department of HHS may charge a reasonable amount for the removal, processing, preservation, quality control, storage, transportation, implantation, or disposal of a part. Medical or scientific use is to the discretion of the HHS.
(b) Except as otherwise provided in this subsection, a person that for valuable consideration, takes possession of non-transplant anatomical tissue for any reason and without federal licensing by the United States Department of HHS in the prior sections, commits a felony and upon conviction is subject to a fine not exceeding \([\$50,000]\) or imprisonment not exceeding [five] years, or both [class E felony].\textsuperscript{373}

V. CONCLUSION

In the United States, body brokering is big business that carries with it both moral and societal consequences.\textsuperscript{374} Historically, the problem was perpetuated by the lack of legal consequences resulting from the state-by-state legislative approach.\textsuperscript{375} In its wake—a glaring legislative hole.\textsuperscript{376} The enactment of uniform, federal legislation governing practices across the whole-body donation industry is legitimately warranted given the high volume of bodies traveling in interstate commerce, which has resulted in donor deception, as well as health and safety concerns.\textsuperscript{377} In serving both the interests of the living and of the dead, this federal regulation will bring with it the opportunity to inject uniformity and transparency into one of the most important decisions a person may make on behalf of themselves or their loved one.\textsuperscript{378}

\textsuperscript{369} See infra text accompanying note 373.
\textsuperscript{370} See supra text accompanying notes 170-71.
\textsuperscript{371} See supra text accompanying notes 170-71.
\textsuperscript{372} See REVISED UNIFORM ANATOMICAL GIFT ACT § 16.
\textsuperscript{373} Id. (modifying § 16 of the UAGA to include the proposed recommendations).
\textsuperscript{374} See supra Part II.A.1.
\textsuperscript{375} See supra Part II.F and text accompanying notes 170-72.
\textsuperscript{376} See supra Part II.F and text accompanying notes 170-72.
\textsuperscript{377} See supra Part IV.
\textsuperscript{378} See supra Part IV.C.1–2.
Federal regulation serves to ensure that two important ends meet. First, standardized regulation for health and safety by ensuring that bodies are not, for instance, being shipped haphazardly in interstate commerce, nor dissected in ways that are disrespectful to the deceased or that endanger the health of the public. Federal regulation will ensure that only licensed professionals are handling the whole-body donations. Additionally, federal regulation will ensure that upon donation, the donor or their family agreed only after gaining an informed understanding—informed consent. Second, in working to remedy the cadaver shortages experienced in the medical and scientific community, the hope is that uniform federal legislation, with emphasis on the added transparency measures put forth in amendment two, will make donors who have previously been exposed to the negative publicity, feel more confident in their decision to donate their body to science. In turn, this will benefit the supply of donated dead and is anticipated to have a positive, trickledown effect on all of society through enhanced medical and scientific innovations by way of the increase in research opportunities. In summation, a call for regulation has been made and it is up to Congress to answer that call.

Alexandra C. Piscitello*  

379. See infra text accompanying notes 380-84.  
380. See supra Part IV.C.1–2. In shedding light on one last public health concern to call attention to the need for federal regulation, a body broker mentioned in Part II.A.1, SNDS, was reported to the police in 2015 after neighboring tenants of their suburban warehouse alleged that they noticed a “mysterious stench and bloody boxes in [the] dumpster.” In the U.S. Market for Human Bodies, supra note 3. Upon investigating, health inspectors came across:  
[A] man in medical scrubs holding a garden hose. He was thawing a frozen human torso in the midday sun. As the man sprayed the remains, “bits of tissue and blood were washed into the gutters” . . . The stream weaved past storefronts and pooled across the street near a technical school. Id.  
381. See supra Part IV.C.1–2.  
382. See supra Part IV.C.2.  
383. See supra Part II.D (discussing shortages of bodies donated for medicine and science).  
384. See supra Part II.D.  
385. See supra Part IV.  

* J.D. Candidate, 2021, Maurice A. Deane School of Law at Hofstra University; B.S., 2014, Frank G. Zarb School of Business at Hofstra University. This Note is dedicated to my parents, Helen and John Piscitello, my brother, John Piscitello, and my better half, James McCormack. Thank you for your endless love and support throughout law school and my entire life. I would also like to thank my team, Kelly McKinney, Mary Jane Gurrell, and Danielle Izzo, for their encouragement since the very first day of law school and throughout the drafting of this Note. Thank you to the Maurice A. Deane School of Law, and its faculty and staff, with special acknowledgement of my faculty advisor and de-facto mentor, Professor James J. Sample. A heartfelt thank you to my Notes Editor, Aaron Shubert, who encouraged and molded my ideas from day one and who has become a dear friend. Last but certainly not least, I would like to thank the Volume 48 Managing Editors, Amy Elsayed, Madelyn Nicolini, and Sabrina Salama, the Volume 49 Managing Editors, Leanne Bernhard, Robert Levinson, and Delores Chichi, and my friends and fellow Board members, Ashley Ehman, Kelly McKinney, and Stephanie Smith, as well as the entire staff, for their dedication to both my Note and the Review. Thank you, Team!