

THE LAW OF DEAD BODIES: IMPEDING MEDICAL PROGRESS

One of the police officers "took hold of the crank of the windlass and after some winding brought to the surface a nude body, the head of which was covered with a cloth . . . the officers' curiosity had been aroused and, against the protests of the young men, they removed the cloth. Thereupon, John Harrison and George Eaton became speechless with horror because, in spite of the absence of his long white beard which had been ruthlessly cut off, they recognized the body hanging before them to be none other than John Scott Harrison." The Medical College of Ohio was the scene. 1878 was the year. The son of one President of the United States and the father of another was the body. A few days later a local newspaper forcefully stated, "The responsibility for this outrage rests ultimately with the Legislature."¹ Charles Dickens could inject a note of humor into *The Tale of Two Cities* with his resurrectionist, Jerry Cruncher, but the general public found little to laugh about as grave-robbing swept England and the United States. Grave-robbing had become a necessity for the medical student who could obtain dissection material from no other source. Massachusetts in 1831 and England in 1832 passed "unclaimed bodies" or "anatomy" laws with the very effective result that resurrectionists went out of business, but a half-century elapsed and the Harrison case occurred before the Ohio Legislature in 1881 enacted its counterpart of those laws.²

Although there is little likelihood that "resurrectionist" will be added to the *Dictionary of Occupational Titles* in the mid-twentieth century, both lawyers and legislatures are likely again to be charged with the "responsibility" for an "outrage." In recent years popular periodicals and medical publications have contained innumerable articles dealing with the need and utilization of post mortem human materials. The legal publications have revealed a dearth of articles on the legal

¹ Edwards, *The Famous Harrison Case and its Repercussions*, 31 BULL. OF THE HISTORY OF MEDICINE 162 (March-April 1957). Dr. Linden F. Edwards, Chairman of the Anatomy Department, Ohio State University College of Medicine, has also written the following interesting articles: *The History of Human Dissection*, 40 OHIO ST. MED. J., No. 4 (April 1944); *The Ohio Anatomy Law of 1881*, 46 OHIO ST. MED. J. (1950); *Body Snatching in Ohio During the Nineteenth Century*, 59 OHIO ST. ARCHAEOLOGICAL & HISTORICAL QUARTERLY (Oct. 1950); *Cincinnati's "Old Cunny", A Notorious Purveyor of Human Flesh*, 50 OHIO ST. MED. J., No. 5 (May 1954); *Dr. Frederick C. Waite's correspondence with Reference to Grave Robbery*, 54 OHIO ST. MED. J. 480 (April 1958).

² MASS. ANN. LAWS c. 113, §1 (1957); OHIO REV. CODE §1713.34 (1954); ANATOMY ACT, 1832, (Eng.) 243 WILL. 4, c. 95. For an analysis of the laws and recent developments in the British Commonwealth see also Bentham, *Donatio Mortis Corporis*, 116 J.P. 312 (1952); *Bequeathing Bodies for Dissection*, 98 SOL. J. 19 (1954); *Dead Bodies*, 2 SYD. L. REV. 109 (1956).

problems in this area.³ Such problems may well exist and are likely to become more intricate and uselessly complex due to the lack of knowledge in legal circles concerning the law of dead bodies. This comment is an attempt to explore these problems and to suggest legislation.

THE LAW OF DEAD BODIES

With very few exceptions since the beginnings of society man has buried his dead in the earth. In England the ecclesiastical courts controlled the questions of burial until they were supplanted by the common law courts. Primarily because of the Judaeo-Christian concepts of "dust to dust" and a future "resurrection," the church considered covering with earth the only proper disposal of a dead human body.⁴ Ultimately burial at sea and cremation followed by burial of the ashes were accepted as decent modes of burial. The common law courts took over these concepts with the result that in England and the United States there is a legally recognized right to a decent burial. This is a right of a living person to be accorded to him after death.⁵

It is natural that what constitutes "decent" burial should depend

³ *Life from Death*, 67 TIME 81 (May 21, 1956); *Spare Parts for People*, 211 HARPERS 74 (July 1956); *What I am Going to do After Death*, 83 AMERICAN MERCURY 29 (Sept. 1956); Bruner, *Service After Death*, TOLEDO BLADE, June 3, 1957. Brown, Fryer, Randall, & Lu, *Postmortem Homografts*, 138 ANNALS OF SURG. 618 (1953); Woodburne & Gardner, *Anatomical Materials and Anatomical Laws*, 8 BULL. FOR MED. RESEARCH 10 (1954); Hemphill & Brown, *Skin Storage in Tissue Banking*, 14 PLASTIC & RECONSTRUCTIVE SURG. 118 (1954); Cullipher, *The Organization and Operation of a Bone Bank*, 20 AM. J. OF MED. TECHNOLOGY 354 (1954); Brown & Fryer, *Bringing Skin to Life*, 70 LIFE AND HEALTH 14 (1955); Brown, Fryer, & Zaydon, *Skin Bank for Postmortem Homografts*, 101 SURG. GYN. & OBSTETRICS 401 (1955); *The Cadaver Business*, 159 J.A.M.A. 21 (1955); Brown, Fryer, & Zaydon, *Establishing a Skin Bank*, 16 PLASTIC & RECONSTRUCTIVE SURG. 337 (1955); *Special Report on the Supply of Anatomical Material*, 10 BULL. FOR MED. RESEARCH 10 (1955); *Report of the Committee on Blood Vessel Banks*, 13 CIRCULATION 270 (1956); Brown, Fryer, Zaydon & King, *Skin Viability Following Preservation*, 6 SURG. FORUM 577 (1956); *Willed Bodies Key to the Future*, 11 BULL. FOR MED. RESEARCH 8 (1957). The "Skin" articles by Brown and Fryer show the fascinating development of skin homotransplantations. Apparently, there is only one lead article in American legal publications: Vestal, Taber, & Shoemaker, *Medico-Legal Aspects of Tissue Homotransplantation*, 18 DET. L.J. 271 (1954) (Hereinafter cited as *Homotransplantation*).

⁴ *Matter of Johnson*, 169 Misc. 215 (1938); JACKSON, THE LAW OF CADAVERS 6, 24 (2d ed. 1950); LINTON, THE TREE OF CULTURE (1955); *Homotransplantation*, *supra* note 3; cf. *In re Widening of Beekman Street*, 4 Brad. 503 (N.Y. 1857), where Ruggles maintains that the common law right to burial derives from the pre-Christian era.

⁵ *Persinger v. Persinger*, 39 Ohio Op. 315, 54 Ohio L.Abs. 295, 86 N.E.2d 335 (1949); *Kanavan's Case*, 1 Me. 726 (1821); *Finley v. Atlantic Transport Co.*, 220 N.Y. 249, 115 N.E. 715 (1917); *Patterson v. Patterson*, 59 N.Y. 574 (1875); *Kitchen v. Wilkinson*, 26 Pa. Super. 75 (1904); *Pierce v. Swan Point Cemetery*, 10 R.I. 227 (1872); *Chapple v. Cooper*, 13 M.&W. 252, 153 Eng. Rep. 105 (Ex. 1844).

upon the wishes of the deceased, the desires of his relatives, and the mores of his culture. The most that can be said definitely is that this is a right to be buried or cremated as soon as possible after death (the body's condition remaining the same as at the time of death) and to remain interred.⁶

The litigated questions concerning the right to decent burial are comparatively few and revolve around the manner and place of burial. Their resolution always depends upon a balancing of the interests of the deceased, his relatives, and the community.⁷ However, whether explicit or implicit, it is the opinion and needs of the community which are overriding. Although burial in a cheap wood box in a woodlot, lack of religious services, absence of relatives and friends do not deprive a burial of its decency,⁸ acts such as casting into a stream or stuffing into a furnace⁹ which are extremely repugnant to the community's sentiments or which may affect the health and welfare of the community do violate the right. Altering the condition of the body at death by autopsy does not violate the right of decent burial if it is necessary for the detection of crime or determination of civil liability, both of which are considered by courts to be necessary for the welfare of the community in according justice to the living.¹⁰ In the exercise of its function to settle controversies among relatives as to place or manner of burial, the equity court gives great weight to the desires of the deceased,¹¹ but often accedes to the wishes of the relatives if this action seems the more socially acceptable solution. In a typical case of this kind the court overruled the clear desires of the deceased and his blood relatives to order his burial in the city where his widow and three-year-old daughter resided so that the child would be able to visit the grave of her father.¹²

As a correlative to the right of decent burial the law generally has imposed the duty of according that right upon the surviving spouse, then

⁶ *Pettigrew v. Pettigrew*, 207 Pa. 313, 56 Atl. 878 (1904); see cases collected in Annot., 21 A.L.R.2d 472 (1952).

⁷ *Seaton v. Commonwealth*, 149 Ky. 498, 149 S.W. 871 (1912); *Fox v. Gordon*, 16 Phila. 185 (Pa. 1883); *Jackson, op. cit. supra* note 4, at 29.

⁸ *Seaton v. Commonwealth, supra* note 7.

⁹ *Kanavan's Case, supra* note 5; *State v. Bradbury*, 136 Me. 347, 9 A.2d 657 (1939).

¹⁰ *Standard Accident Ins. Co. v. Rossi*, 35 F.2d 667 (8th Cir. 1929); *Mutual Life Ins. Co. v. McCulloch*, 31 F.Supp. 800 (D.C.W.Va. 1940), *reversed for lack of sufficient grounds*, 109 F.2d 866 (4th Cir. 1940); *Wehle v. United States Mut. Acc. Ass'n.*, 153 N.Y. 116, 47 N.E. 35 (1897).

¹¹ *Thompson v. Deeds*, 93 Iowa 228, 61 N.W. 842 (1895); *Larson v. Chase*, 47 Minn. 307, 50 N.W. 238 (1891); *Fidelity Union Trust v. Heller*, 16 N.J. Super. 285, 84 A.2d 485 (1951); *Goskowski v. Roman Catholic Church*, 262 N.Y. 320, 186 N.E. 798 (1933); *Smiley v. Bartlett*, 3 Ohio C.C.D. 432 (1892); *Goldman v. Mollen*, 168 Va. 345, 191 S.E. 627 (1937).

¹² *Herold v. Herold*, 16 Ohio Dec. 303, 3 Ohio N.P. (n.s.) 405 (1905).

the next of kin, and finally, in the absence of kin, upon the public.¹³ Since the concept of decent burial depends upon the interests of the deceased, his relatives, and the community, the satisfaction of the duty must meet all these interests as far as possible. A number of courts have said the duty is a "sacred trust" upon the one primarily responsible with his responsibility running to all these interests.¹⁴

The law has recognized in the kin having the duty of burial a right to possession of the body so that the duty can be carried out. This is a right to receive possession of the body immediately and in the same condition it was in at the time of death. There is also a correlative duty imposed upon anyone who may have the possession not to mutilate the body and to deliver possession. The right to possession of the body exists only in order to aid the accomplishment of the duty of burial and, therefore, should only be co-extensive with that duty.¹⁵ However, confusion exists in most of the cases where a remedy is sought for interference with this right. The confusion was brought about because the common law has tiresomely repeated since the time of Lord Coke that there is no property in a dead body.¹⁶ The courts, precluded from labeling this a property right, found it difficult to give a remedy. In the effort to place it into an existing legal cubby-hole, the concept of a "quasi-property" interest in the body was born.¹⁷ Probably the majority of courts today state that "although there is no property in a dead body in the commercial sense, there is a quasi-property right." A few courts ignore or distinguish Lord Coke's analysis and conclude that there is a property right.¹⁸ A very few wisely recognize that a right to possession exists and that a remedy can be given without twisting the right into some other legal classification.¹⁹ The court in the *Pettigrew* case points

¹³ *Pierce v. Swan Point Cemetery*, *supra* note 5; *Fox v. Gordon*, *supra* note 7; *McClellan v. Filson*, 44 Ohio St. 184, 5 N.E. 861 (1886); *Love v. Aetna Casualty Co.*, 132 Tex. 280, 99 S.W.2d 646 (1936), *aff'd*, 135 Tex. 53, 121 S.W.2d 986 (1938). This duty was originally stated as that of the householder where death occurred, *JACKSON, op. cit. supra* note 4, at 37.

¹⁴ *Pierce v. Swan Point Cemetery*, *supra* note 5; *Fox v. Gordon*, *supra* note 7; *Larson v. Chase*, *supra* note 11; *Southern Life & Health Ins. Co. v. Morgan*, 21 Ala. App. 5, 105 So. 161 (1925); *Boyle v. Chandler*, 33 Del. 323, 138 Atl. 273 (1927).

¹⁵ *Finley v. Atlantic Transport*, *supra* note 5; *Pettigrew v. Pettigrew*, *supra* note 6; *Doxtator v. Chicago & W.M. Ry.*, 121 Mich. 90, 79 N.W. 922 (1899); *Hassard v. Lehane*, 143 App. Div. 424, 128 N.Y.S. 161 (1911); *Koerber v. Patek*, 123 Wisc. 435, 102 N.W. 40 (1905); See also *JACKSON, op. cit. supra* note 4, at 124; cases collected in Annot. 88 A.L.R. 984 (1934).

¹⁶ Nearly every legal source cited in this article will refer to this concept.

¹⁷ *Pierce v. Swan Point Cemetery*, *supra* note 5; *Pettigrew v. Pettigrew*, *supra* note 6.

¹⁸ *Bogert v. Indianapolis*, 13 Ind. 134 (1859).

¹⁹ *Larson v. Chase*, *supra* note 11; *Southern Life & Health Ins. Co. v. Morgan*, *supra* note 14; *Hassard v. Lehane*, *supra* note 15; *Love v. Aetna Casualty* *supra* note 13; *Farley v. Carson*, 8 Ohio Dec. Repr. 119 (1880).

out that whichever of these views is followed, the results should be identical in protecting a right which is only co-extensive with the duty of burial. However, a further confusing factor has appeared in more recent times. Most of the "dead-body" litigation is concerned with alleged violations or determination of this right to possession. The piling up of years of precedent on this point has caused a tendency to overlook the fact that this right is derivative from the more basic right of decent burial. Especially in those courts which have labeled this a property or "quasi-property" right, the tendency is to over-emphasize the kin's right to the point of absoluteness and to the exclusion of the rights of others.²⁰ This is particularly unfortunate since there exists another right—vague though it may be.

This is a right in the surviving relatives and presumably the public, whether or not given the duty of disposing of the body. It would seem that it should be a right to insure that the deceased will be accorded his right to a decent burial. Some courts have included this within the original right, so that they consider the right of burial as belonging not only to the deceased but also to the survivors.²¹ Since the right of decent burial depends partially upon the feelings of the surviving relatives and of the community, and the duty is a "sacred trust" running to them, this is undoubtedly the correct conclusion. The few courts which have overemphasized the right in the one who has the duty of burial to the exclusion of others' interests refuse remedies to these others.²²

The anatomy laws of the nineteenth century changed the common law right to immediate burial intact and relieved the public of the duty of according such a burial in certain cases. These laws in 44 jurisdictions provide that unclaimed indigents otherwise required to be buried at public expense may be delivered to the state anatomical board or to medical schools or physicians for distribution and anatomical study.²³ Although these laws represent the first major change in the community attitude toward "decent" burial by legalizing dissection, the component parts of the laws reveal that an anathema to dissection existed. Many of according such a burial in certain cases. These laws in 44 jurisdictions, fraternal orders, and religious organizations can claim the bodies. A number of them exempt bodies of honorably discharged veterans and travelers who died suddenly "unless the stranger or traveler belongs to that class commonly known as tramps." Dissection apparently was looked upon as a disgrace fit for tramps but not for one who had

²⁰ *Gostkowski v. Roman Catholic Church*, *supra* note 11; *Bogert v. Indianapolis*, *supra* note 18; *Trammel v. City of New York*, 193 Misc. 356, 82 N.Y.S.2d 762 (1948), *aff'd*, 276 App. Div. 781, 93 N.Y.S.2d 299 (1949). The court in *Southern Life & Health Ins. Co. v. Morgan*, *supra* note 14, recognizes this error.

²¹ This is a plausible explanation for the "sacred trust" language in *Boyle v. Chandler*, *supra* note 14, and the other cases cited *supra* note 14.

²² *Trammel v. City of New York*, *supra* note 20.

²³ See Appendix I for citations of these statutes.

gloriously served his country. The careful restrictions as to use for anatomical study only and for use only within the state, the time periods for which the body must be held, the possibility of claiming the body at any time, all indicate that the laws were drafted to stop grave-robbing and not primarily to aid medical science. Nevertheless the legal change caused a halt to grave-robbing by supplying an adequate number of cadavers to meet the demands of the times. The flamboyant newspaper articles stopped, and the public's imprecation of anatomical study could begin to wane.

The deceased's right to a decent burial with its correlative duty in relatives or the public, the relative's right to possession of the body with its resulting duty on anyone else having the possession, and the provisions of the anatomy laws constitute the bases for the practical and legal difficulties involved in the need for and use of post mortem human materials by medical science.

THE NEED FOR CADAVER MATERIAL

Unfortunately the anatomy laws which were a boon to medical science in the last century are rapidly becoming totally inadequate. The two particularly pressing needs are a supply of cadavers for anatomical study by the increasing number of medical, dental, embalming, nursing, chiropractic, and osteopathic students, and a supply of human parts for therapeutic purposes.

A ratio of two anatomy students to one body is ideal. In 1955 there were at least eight medical schools where the current ratio of four to one could not be sustained and one school where it was not possible to maintain a ratio of eight to one. A survey questionnaire as to whether or not the supply of cadavers was ample received twenty-seven answers of "no," while fifteen others indicated "adequate, but not ample." The School of Medicine at Western Reserve University reports that its supply is now entirely inadequate. Other surveys indicate that approximately fifty per cent of the medical schools are burdened by this problem and that the shortage is becoming more acute.²⁴ Since the anatomy acts generally give medical schools preference, it is probably correct to assume that schools of embalming, chiropractic and osteopathic medicine, nursing, and others tangentially connected with medicine have few or no cadavers for use in anatomical study.

A second demand for dead human bodies has developed only in very recent years. This is for homotransplantation, rehabilitation, or therapeutics. The existence of corneal transplants and eye banks are fairly well known. However, there are a number of other types of

²⁴ Woodburne & Gardner, *Anatomical Materials and Anatomical Laws*, 8 BULL. FOR MED. RESEARCH 10 (1954); *The Cadaver Business*, 159 J.A.M.A. 21 (1955); *The Supply of Cadavers*, 10 BULL. FOR MED. RESEARCH 11 (1955); *Willed Bodies—Key to the Future*, 11 BULL. FOR MED. RESEARCH 8 (1957). Interview with Dr. Linden F. Edwards, April 18, 1958.

banks for human parts. Although homografts of human skin will not "take" permanently, they have been found to be much more effective for temporary covering than artificial dressings. They are so effective in preventing leakage of body fluids that lives which otherwise would have been lost are saved by homografts. With existing methods of preservation, skin can be banked up to sixty days and research is now developing methods of indefinite preservation. Experts working in this field feel that national defense and disaster plans could be instituted through which skin would be available for saving the lives of persons extensively burned by military or civilian disasters.²⁵ Another life-saving technique utilizes the transplantation of arteries, which can be banked in much the same manner as skin. The procurement, preservation; and implantation of these grafts has become an important factor in the surgical correction of cardiovascular lesions.²⁶ A third rehabilitation use is that of bone which is also banked. Although it has not yet been extensively acquired from post mortem sources, the indications point to success in this use.²⁷ This writer has not exhausted the medical journals but feels that other transplantations either are or soon will be utilized; for example, within the last few months there was an attempt to transplant an organ, the kidney, between two people who were not identical twins.²⁸ The possibilities of transferring organs from recently deceased bodies are not too remote for speculation.²⁹ Even without future speculation, it is obvious that at present the need for these human parts exceeds the supply. The Boston Eye Bank reports that they receive about fourteen eyes (not pairs) a month and could easily utilize twice that number.³⁰

When one considers the great population increase of recent years and that only about one-third of one per cent (5,000) of the bodies

²⁵ See series of articles by Brown and Fryer, *supra* note 3; *Homotransplantation*, *supra* note 3. Personal communications have given me much of the information in this section.

²⁶ See *Report of Committee on Blood Vessel Banks and Homotransplantation*, *supra* note 3. Dr. Rudolf J. Noer of the University of Louisville School of Medicine in a personal communication, May 7, 1958, stated that the artery grafts: "(1) replace segments of injured vessels, (2) replace a vessel which has developed an aneurysm, (3) replace a vessel occluded by an arteriosclerotic plaque, (4) replace a vessel that must be removed because of involvement by neoplasm."

²⁷ See Cullipher, *supra* note 3.

²⁸ *Medicine*, 71 *TIME* 77 (April 28, 1958).

²⁹ *Science*, 71 *TIME* 47 (June 2, 1958); *Science Nears a Goal: Bank of Vital Organs*, 45 *LIFE* 104 (July 14, 1958).

³⁰ Letter from Nancy Hunt, Executive Secretary, April 30, 1958; Dr. Noer *supra* note 26, also wrote: "The quantity of material that we obtain both for the Artery Bank and for the Skin Bank is not sufficient to meet our needs. Frequently arteries are replaced by various artificial grafts employing nylon, dacron or a combination of such material due to the shortages of homograft arteries. Similarly, the Skin Bank does not contain skin at all times, when it is urgently needed for coverage of a person who has suffered severe third degree burns."

which die each year in the United States would adequately fill the need for cadavers for anatomical study, it seems inconceivable that such a shortage does exist. A number of factors have combined to create this shortage. The first of these factors is the increasing number of autopsies performed to learn the cause of death or to obtain material for basic research.³¹ These purposes may even be considered two other uses of the dead human body. A radical autopsy disturbs or removes most of the viscera so that the body is no longer suitable for anatomical study.

The impact of social welfare legislation on the anatomy laws has been devastating. As indicated earlier, the anatomy laws only provide that unclaimed dead be used for anatomical study. The primary reason for not claiming the indigent dead is lack of funds with which to bury them. Today this situation seldom exists, not only because of increased standards of living but because so many laws provide the means for burial. Most states have veterans' relief legislation comparable to that in Ohio where a fair and reasonable price may be incurred by a county commission for the burial of any soldier, sailor, marine, army nurse, or mother, wife, or widow of any of these.³² The Federal Social Security Act provides that up to \$225 is available to be paid not only to the widow or widower but also to "anyone equitably entitled thereto" for expenses he has incurred in the burial of an insured deceased.³³ In Ohio the Workmen's Compensation Act provides up to \$400 for funeral and burial expenses, while the Aid for the Aged legislation allows up to \$180.³⁴ This social legislation not only gives the means to relatives and close friends to claim and bury the deceased, but it has also increased the operations of "curbstone undertakers," those unsavory characters who claim the bodies and bury them cheaply in order to collect a small profit from whatever government agency provides the funds.³⁵ Furthermore, some medical authorities state that the welfare officials interpret this legislation as taking precedence over the anatomy laws so that they refuse to turn over the unclaimed bodies for anatomical study if there are public funds available with which to bury them.³⁶ The State of Florida has no such social legislation, but requires undertakers to provide burial as a public service; consequently, the supply of cadavers for

³¹ Woodburne & Gardner, *supra* note 24; THE BOSTON EYE BANK TEN YEAR REPORT (1956); THE EYE-BANK FOR SIGHT RESTORATION INC., NEW YORK, ANNUAL REPORT (1957). Interview with Dr. Edwards, *supra* note 24.

³² OHIO REV. CODE §5901.25 (1953).

³³ 60 STAT. 986 (1946), 42 U.S.C. §402 (1952).

³⁴ OHIO REV. CODE §§4123.66, 5105.15 (1953).

³⁵ *Some Shortages and Some Causes*, 10 BULL. FOR MED. RESEARCH 12 (1955); *Willed Bodies*, *supra* note 24.

³⁶ *Ibid.* Even after delivery to the Ohio State University Medical School, six to ten bodies a year are claimed by state welfare agencies which assert their right to bury them, Interview with Dr. Linden F. Edwards, June 11, 1958.

anatomical study there is more than ample.³⁷

Certain provisions in the anatomical laws or the enforcement of the laws also contribute to the shortage. Some of the statutes provide that the state shall bury the bodies if relatives or friends merely so request; some agencies follow this practice even though the statute does not permit it.³⁸ Some of the statutes do not require the agencies to notify the anatomical board or medical schools of the availability of a body; in some instances where it is required such notification is not made.³⁹ Many of the statutes permit charitable organizations to claim the bodies. There are a great many more such organizations today than existed at the time these laws were passed. Also, fraternal and religious organizations, probably having more money than ever before, are permitted to claim and bury their members' bodies. Even the provisions allowing friends to claim are sometimes abused, since very few of the laws provide for determining whether it is actually a personal friend who claims the body. For example, the medical schools at the University of Michigan and The Ohio State University report that they no longer receive bodies from the state penitentiaries because the inmates have provided the means to claim all bodies through the establishment of burial funds.⁴⁰

There are also sections in some of the anatomy laws which are outmoded, creating a hindrance to the use of the bodies received for anatomical study. Some of the state laws require that the dissected bodies be interred or buried. Since the passage of the anatomy acts, cremation has become more widely accepted as a form of decent disposal, and it is, of course, much more convenient and inexpensive for the medical schools to cremate than to bury. It is the practice of at least one school in Ohio to do so even though the Ohio statute specifies "the remains thereof shall be interred in some suitable place."⁴¹ When the New York statute contained a similar clause in the penal section, a civil action for \$25,000 against New York University for wrongful dissection and cremation was sustained on demurrer on the ground, *inter alia*, that cremating was a wrongful act for which a civil action would lie. Shortly afterwards the statute was amended to allow cremation.⁴² A second hindrance in the statutes is the requirement that the bodies or parts thereof must be kept within the state. These sections were included to

³⁷ Florida—*Where There Isn't Any Trouble*, 10 BULL. FOR MED. RESEARCH 23 (1955).

³⁸ *Supra* note 35. See Appendix I for citations of these statutes.

³⁹ *The Weight of the Law—its Effect in Securing Cadavers*, 10 BULL. FOR MED. RESEARCH 17 (1955); *Willed Bodies*, *supra* note 24. Although the Ohio statute requires notification there is no penalty for failure to do so, and many notifications are not made. (Source of information withheld.)

⁴⁰ Interview with Dr. Edwards, *supra* note 24.

⁴¹ OHIO REV. CODE §1713.36 (1953).

⁴² *Burke v. New York University*, 196 App. Div. 491, 188 N.Y.S. 123 (1921); N.Y. PEN. §2215.

halt "bootlegging" over state lines by resurrectionists. When medical or scientific meetings are held which members of the profession attend from various states, an individual may be asked to give a demonstration for which he is expected to bring his own material from out of state. He does bring the material even though he knows that it violates the letter of the law. Another problem is that of unlimited time to claim the body. If the medical schools attempted to adhere to the strict statute which permits claimants to take the body at any time, the schools would have to identify, segregate, and label every infinitesimal part of the body as it is dissected—a burdensome task. Also, a particular student keeps his body throughout the length of the particular anatomy course, and his study is interrupted and less efficient when the body is claimed and he must start on a new one. Some statutes also allow the claimant to take the body from the medical school at no cost whatsoever. These bodies are already embalmed so that the claimant is spared that expense while the school receives no benefit from having incurred it.

For the therapeutic use of post mortem human materials the anatomy laws are of no benefit. Nearly all of these laws specify that the unclaimed bodies are to be used for anatomical study only. Furthermore, most of them require a waiting period before the bodies may be used. One of the practical problems of homotransplantation is that of the race against time. It is the fortunate time differential between cessation of breathing and circulation and the final death of the various parts of the human body that permits any post mortem use of the body at all. However, self-destruction of the body cells begins quickly, creating an urgency to remove the part to be used as soon as possible after death: for the eyes within two hours, for skin within 24 hours if the body is refrigerated, for blood vessels within six or eight hours.⁴³ If therapeutic use is to be made there must be some legal method by which to obtain the material from a recently deceased person immediately after his death.

THE EXISTING LEGAL PROBLEMS

As they did in the days of the resurrectionists, the people of the medical profession seem to be surging beyond the law in their quest to solve the practical problems of supply and use of post mortem materials.⁴⁴ It is largely due to the uncertainties in this area of the law

⁴³ Letter from Dr. Noer, *supra* note 26; see articles cited *supra* note 3. Also, the increasing magnitude of the problem is evident when one considers these figures from the REPORT OF THE NEW YORK EYE BANK FOR SIGHT RESTORATION, *supra* note 31: Eye Donor Pledges signed—1955-56, 2,200; 1956-57, 28,900.

⁴⁴ A decided difference of opinion has been expressed. The conclusion of the authors of the article in the University of Detroit Law Journal, *Homotransplantation*, *supra* note 3, is that probably no legal difficulties exist. It has not been my intention to refute or to answer that article, but rather, to balance it. That article contains statements which indicate that the authors were a bit dubious

that the man engaging in the activities analyzed in the ensuing discussion is subjecting himself to a risk of severe civil or criminal liability, the repercussions of which could be damaging to the medical profession as a whole. The obvious violation of laws by cremating when statutes require burial and by transporting bodies or their parts over state lines has already been mentioned. The following problems involve the varying degrees of consent given for utilization of a dead body.

Consent Not Given

An autopsy is an examination of the body by dissection to determine the cause of death. Without authorization such an examination is illegal. Even when an autopsy is authorized, parts, larger than necessary for microscopic examination, are sometimes removed during the examination and not thereafter returned, without the prior permission of the deceased or his relatives. It has been suggested that this is the greatest readily available source of material for transplantations.⁴⁵ Unless there is some legal justification for this practice, the right of decent burial¹ intact and the right of the next of kin to receive possession of the whole body have been violated.

The possible justification put forward is that this is the customary practice and therefore consent or authorization for the autopsy includes consent or authorization to remove parts permanently.⁴⁶ This argument is untenable. In order for custom to form the basis of an implied consent it must be: (1) so generally known, at least among the parties involved, that knowledge can be attributed to them, (2) certain and uniform, (3) followed for a considerable period of time, and (4) not contrary to established legal principles or public policy.⁴⁷ Outside of medical and legal circles the practice of removing parts is little known. Transplantation is such a recent development that removal for that purpose could not be generally known. The average person giving autopsy consent cannot be charged with notice of such a little known fact. Also, it is highly questionable whether there is a uniform practice of removing parts. Some writers have relied on the fact that unusual specimens have been retained for exhibition or scientific demonstrations, but this hardly constitutes a custom of wholesale removal and retention. In *In re Disinterment of Body of Jarvis*⁴⁸ the court quoted and relied upon

of their conclusion. The point I make is that their dubiousness is well founded; clarifying legislation is warranted because of the prevailing uncertainties and risks.

⁴⁵ *Homotransplantation, supra* note 3.

⁴⁶ *Ibid.* Price, *Legal Rights and Duties in Regard to Dead Bodies, Post-Mortems, Dissections*, 68 So. AFR. L. J. 403 (1951).

⁴⁷ See discussion and cases cited in: 55 AM. JUR., *Usages & Customs* 263 25 C.J.S., *Customs & Usages* 76. Cf. Note, *Customs and Trade Usage*, 55 COL. L. REV. 1192 (1955).

⁴⁸ 244 Iowa 1025, 58 N.W.2d 24 (1953).

the testimony of two physicians who defined autopsy as the "removal *and replacement*" of parts. (Emphasis supplied.) Even though parts may be retained when an extended laboratory analysis is required to determine the cause of death, this is removal within the very narrow purpose for which the autopsy was permitted, and the court in the *Jarvis* case went to great lengths to assure that no portion greater than necessary would be so retained. Moreover, removal for transplantation is certainly not a uniform practice and has been occurring for an extremely short period of time.

Such a "custom" seems to be in direct contravention of law and public policy.⁴⁹ It must be remembered that the *policy* is for burial intact. The *exceptions* to this policy were made by the common law and statutes to aid in the determination of legal liability, and they are limited strictly to acts necessary in order to ascertain the cause of death.⁵⁰ Transplantation is an entirely new concept. It serves to rehabilitate a person not connected in any way with the rights and liabilities of those who dealt with the deceased person from whom the tissues were taken. There is no legal principle or policy which would accord with the practice of removal of parts for therapeutic use, but such removal does infringe rights recognized for hundreds of years.⁵¹ Especially since courts are more likely to develop rules for the preservation of justice than of medicine, it is hardly conceivable that a court would deny recovery to a distraught widow whose husband's body has been partially dismantled and attached to various living persons in flagrant violation of her right to bury her husband whole.

If there is no authority to remove parts for transplantation, such action could also result in criminal guilt under a statute such as Ohio Revised Code section 2923.08:

No person, not lawfully authorized so to do, shall mutilate or destroy any portion of a dead human body. Whoever violates this section shall be fined not more than ten thousand dollars or imprisoned not less than one or more than ten years.

Consent of Deceased

One of the most effective ways for medical science to obtain bodies for anatomical study and therapeutics is by the permission of the deceased himself.⁵² At least fifteen states have specific statutes or other statutory

⁴⁹ Cf., *United States Fidelity & Guaranty Co. v. Hood*, 124 Miss. 548, 87 So. 115 (1921), where the court went so far as to hold void because *contra* to public policy an insurance contract permitting exhumation and autopsy to ascertain the cause of death.

⁵⁰ *Finley v. Atlantic Transport Co.*, *supra* note 5; *In re Jarvis*, *supra* note 48; *In re Disinterment of Tow*, 243 Iowa 695, 53 N.W.2d 233 (1952); *Winkler v. Hawkes & Ackley*, 126 Iowa 474, 102 N.W. 418 (1905).

⁵¹ *Koerber v. Patek*, *supra* note 15 *Hassard v. Lehane*, *supra* note 15. Even the unusual decision in *Farley v. Carson*, *supra* note 19, which denied recovery for an unauthorized autopsy carefully noted that nothing was removed from the body.

⁵² See articles cited *supra* note 3.

language which apparently permit such donation by the deceased.⁵³ These statutes will be discussed in the last section of this article. Without such a statute efforts to make such donations can be thwarted.

It is not practicable for the deceased to attempt to bequeath his body in his will because ordinarily it has been buried before the will is read or probated. If this means is chosen nevertheless, it will be ineffectual in those jurisdictions which hold that a body is not property and therefore cannot be the subject of a bequest. If the will contains no other bequests, it may be denied probate.⁵⁴ It is believed that finding the authority for the right to dispose of a body by will in the many cases containing statements that the wishes of certain relatives will be followed "in the absence of testamentary disposition" is unfounded. First, the phrase is usually dicta since these cases involve no testamentary disposition or, at most, only directions as to place of burial.⁵⁵ Second, most of the cases cited for support are from New York which has contained in its statutes since 1881 the following language: "A person has the right to direct the manner in which his body shall be disposed of after death."⁵⁶ Third, these courts recognize that the deceased's attempted testamentary disposition is not controlling.⁵⁷

Donation of his body by the deceased made before his death is at the present time a widespread practice, both for supplying the anatomists and the various tissue banks. Many of the forms for this purpose have no provision for obtaining the consent of the next of kin.⁵⁸ Although the chances

⁵³ See Appendix II for citations of these statutes.

⁵⁴ *Fidelity Union Trust v. Heller*, *supra* note 11; *Herold v. Herold*, *supra* note 12; *Enos v. Snyder*, 131 Cal. 68, 63 Pac. 170 (1900); *Haghurst v. Haghurst*, 4 Ohio L. Abs. 375 (1926); THOMPSON, WILLS §561 (3d ed. 1947).

⁵⁵ *Pierce v. Swan Point Cemetery*, *supra* note 5; *Pettigrew v. Pettigrew*, *supra* note 6; *Fox v. Gordon*, *supra* note 7; *O'Donnell v. Slack*, 123 Cal. 288, 55 Pac. 906 (1899). The court in *Enos v. Snyder*, *supra* note 54, made clear that in the *O'Donnell* case "the point was not involved"; *Painter v. United States Fidelity & Guaranty Co.*, 123 Md. 301, 91 Atl. 158 (1914); *Hardin v. Ehring*, 22 Ohio App. 437, 155 N.E. 153 (1926).

⁵⁶ *Homotransplantation*, *supra* note 3, nn. 63, 64, & 66; N.Y. PUB. HEALTH §4201; N.Y. PEN. §2210.

⁵⁷ Apparently the only case involving a will which contained nothing other than a bequest of the body for scientific purposes is *Matter of Johnson*, *supra* note 4, where the will was admitted to probate as a testamentary instrument. However, a year later in New York another surrogate's court stated that there are only personal rights in one's body and these are not subject to testamentary disposition, therefore, such a disposition is not testamentary in character and can be disregarded or altered if evidence of a later desire is shown, *Matter of Scheck*, 172 Misc. 236, 123 N.Y.2d 784 (1939). See also, *Fidelity Union Trust v. Heller*, *supra* note 11.

⁵⁸ One form received by the author reads as follows:

I herewith state that it is my desire to donate my body immediately after my death to the School of Medicine, ----- University, for teaching purposes, scientific research, or for such purposes as the authorized representatives of said University shall in their sole discretion deem advisable. Whenever possi-

are that close relatives will know of the deceased's wishes and cooperate to carry them out, many reported cases concern relatives attempting to exert their own preferences, either in complete disregard of what the deceased wanted or because there is doubt as to what his wishes were at the time of death. Assuming that it is clear that at the time of death the deceased wanted his body donated to science, the great weight given to his desires is not controlling because the right to a decent burial depends also upon the desires of the relatives and the community. Therefore, the deceased alone could not waive the right. The equity court looks to these interests and constitutes itself an umpire to settle the question. If the donation were of a part of the body for transplantation, the race against time in removing the part precludes the use of it if any objection is made by any relative.⁵⁹ There simply is not time to wrangle over the problem or to have a court umpire the conflicting interests. Even when the donation is for anatomical study only, the medical profession would not become embroiled in a legal difficulty with the claiming relatives if it could be avoided. The unfortunate risk that is entailed when only the deceased's permission is received, whether it be for autopsy, study, or transplantation, is that after the scientific use has been made the relatives may institute a damage suit which the medical people could not avoid and very likely would lose. In a jurisdiction where it is held that the deceased has no property in his body but that the next of kin charged with the duty of burial does have, it takes little imagination to envisage the dire results to anyone who has tampered with the body.

Consent of Relatives

Another method of obtaining the bodies is to receive the consent of the relatives, either before or after the death, but not that of the deceased. This is essentially the same problem as that discussed above: two interests in determining what constitutes decent burial are ignored; this time it is the deceased and the community. Recent cases have loosely referred to the right of the kin to "dispose of the body"; the authors of the *Homotransplantation* article perceptibly change from writing of "burial" to writing of "disposition." There is no case authority in point and no apparent legal

ble I desire that my eyes shall be donated to the eye bank for sight restoration.

A copy of this statement is on file with the Professor of Anatomy -----
----- University. Immediately after my decease he should be notified, -----, in order that he may take the necessary action to implement this request.

Date ----- Name -----

Address -----

⁵⁹ "The time lag between death and obtaining consent for removal of tissue does seriously hamper us, if the nearest relative cannot be reached, or if the patient's family has difficulty in deciding whether or not to give consent for obtaining material, the time elapsed might be of sufficient length to make the material which could be obtained, worthless." Communication from Dr. Noer, *supra* note 26.

principle with which to buttress the conclusion that disposition by donating to science is the equivalent of according the common law right of decent burial. The closest thing to it would be those cases which have erroneously overlooked the fact that the rights in the kin are only co-extensive with what is necessary in order to accomplish the duty of decent burial, and have concluded that the kin have a near absolute right to dispose of the body as they wish. However, these cases have dealt primarily with the place of burial or the right to get possession of the body. Since the courts generally feel that every human wants to be laid to rest in the earth without mutilation of his body,⁶⁰ it is likely that scientific use of the body without the permission of the deceased would be held to violate his right of decent burial.

Consent of Deceased and Relatives

The obvious conclusion to be reached from this discussion is that the best manner of obtaining post mortem materials for scientific purposes is to have the permission of both deceased and relatives before death. For therapeutic uses it would be essential to have the relatives' permission before death so that no time would be wasted in contacting them. For anatomical study it is probably of no consequence when the permission is obtained; however, it may be easier emotionally for the relatives to give it in advance of death. Since the cases are fairly uniform in giving weight to the wishes of both the deceased and his relatives, there are only two sources of legal difficulty in this method. The first involves determining which relatives' consent must be obtained. This will be discussed later. The other source is the community attitude. Assuming for the moment that someone does have standing to sue, the court's determination of whether a cause of action exists, where both the deceased and close kin have consented to scientific use of the body, will be entirely dependent upon whether the policy or mores of the society regards such use as within the concept of decent burial.

Early in this article mention was made of the community's changing concepts which have approved cremation rather than burial intact and autopsies when necessary to aid justice. The anatomy acts themselves constituted a legislative declaration of a public policy which under limited circumstances approved of dissection. These acts gave an aura of respectability to dissection which over the years has decreased the public anathema to the practice. It was also indicated that community attitude appears to be influential only when the public health is adversely affected or the acts done are extremely repugnant to the community sentiments. Since no public health objection would be involved, the question before a court would be whether the particular scientific use contemplated was repugnant to the community. There may well be a difference in result depending upon whether the use is for transplantation or for anatomical study.

⁶⁰ Thompson v. Deeds *supra* note 11; American Citizen Labor & Protective Inst. v. Wesley, 9 S.W.2d 498 (Tex. 1928).

The publicity concerning transplantations has been frequent and favorable. More and more donations of parts to banks are being made without contest. There is a definite and direct benefit to mankind which the public readily sees and grasps when a corneal transplant gives miraculous sight to the blind. There are few, if any, specific laws which indicate a negative policy toward transplantation itself. In Italy, even though he openly violated the law, the priest who gave his eyes to restore sight to a child not only received wide acclaim but also brought about a change in the Italian law.⁶¹ The public's enthusiasm for the concept of giving life from death by transplantation is such that one doubts that a court, faced with permission of deceased and relatives, would declare that transplantation is repugnant to the community sentiments. Although it is hoped and expected that the enthusiasm for transplantation is the backdoor to complete approval of dissection for anatomical study, it is not so clear that that door is now opened wide. Members of the medical profession are hesitant on the subject and doubt the public's support.⁶² The benefit to the public flows through such a remote and devious channel from the young student before his dissecting table to the experienced surgeon at the operating table that the public does not so readily grasp the importance to them of anatomical study. Compared to transplantations there is little favorable publicity. Perhaps most important is the fact that there exists a long and negative legal history concerning the problem. The criminal cases for illegal dissection and grave-robbing set the policy of the common law which the anatomy acts only narrowly changed. The acts included or were accompanied by language forbidding the "possession of a corpse for the purpose of medical, surgical, and anatomical study *except in conformity to the provisions of the law.*" (Emphasis added.) Since these statutes are in derogation of the common law, they will be construed strictly to permit only what their language precisely permits. Furthermore, the social legislation of the past twenty-five years providing burial funds for so many groups indicates, if anything, a policy for immediate burial whenever possible. To predict a court's decision as to the community policy or sentiment toward dissection for anatomical study would be hazardous. The hopes that such a decision would be favorable cannot remove the lingering risk arising from the uncertainty.

Some would say that the preceding discussion is moot and that the risk can be disregarded, for if the consent of the relatives alone or relatives and deceased is received, there is no one around to bring a suit.⁶³ This raises the double-barreled question: from which relatives must consent be obtained, and who has standing to sue? The type of suit brought is most likely to be a civil one for compensatory damages for mental anguish

⁶¹ *Law was Blind*, 67 TIME 92 (March 19, 1956).

⁶² *The Cadaver Business*, *supra* note 24; *Willed Bodies*, *supra* note 24; *Your Body and Mine*, *supra* note 57.

⁶³ *Homotransplantation*, *supra* note 3.

caused by mutilation of the body, and could be brought against the individual who dissected the body, the hospital or school which permitted the dissection, or the relative who gave the permission. Also, all these parties could be joined as joint tortfeasors. A disgruntled relative, or perhaps even a stranger, could have criminal proceedings instituted under one of the criminal statutes relating to unlawful dissection or mutilation.

The relative who is most likely to bring a civil action is the one charged with the duty of burial. There is no question of his standing to sue for violation of his right to possession of the body for purposes of burial. This danger can be guarded against by obtaining his previous permission whether it be for dissection for study, autopsy, autopsy with removal of parts, or dissection solely for removal. If the permission is obtained before death, not only the consent of the spouse but also that of all adult children, including those from other marriages should be received. If the spouse should expire before the one who is to be dissected, upon the latter's death it will be the children who have the duty to bury and the cause of action. If there is neither spouse nor children, the permission of both parents and all brothers and sisters should be acquired. At the least, this permission may estop the person who has given it from proceeding with the suit.

Since so many of the reported cases deal with controversies among relatives as to disposition of a body, it is likely that relatives other than the one who has the duty of burial and right to possession will be interested in collecting a substantial verdict to heal their mental suffering over the mutilation of the deceased. In those jurisdictions in which the courts hold that only the kin having the duty of burial have protectable rights, these other relatives will be denied a cause of action.⁶⁴ However, where it is recognized that the right of burial depends partially upon the wishes of surviving relatives or where the duty of burial is a "sacred trust" running to other relatives, it seems that these relatives have clear standing to sue.⁶⁵ Complete protection against this hazard is a practical impossibility. The language of the courts is quite loose so that one could argue that almost anyone who ever knew the deceased is entitled to a cause of action.⁶⁶ This is rather preposterous. It is felt that a fair degree of protection will be achieved by having the consent of spouse, children, parents, brothers, and sisters.

POSSIBLE LEGISLATIVE SOLUTIONS

The advances of medical science will continue to be hampered by the absence of a sound legal status for the utilization of post mortem human materials unless clarifying legislation is enacted. Such legislation could take one or all of the forms discussed in the ensuing sections.

⁶⁴ *Trammel v. City of New York*, *supra* note 20; *Gostkowski v. Roman Catholic Church*, *supra* note 20.

⁶⁵ *Boyle v. Chandler*, *supra* note 14.

⁶⁶ The court in *Larson v. Chase*, *supra* note 11, states, "all are interested who were allied to the deceased by the ties of family or friendship."

Revamping the Anatomy Acts

The provisions of the anatomy acts could use overhauling.⁶⁷ Perhaps it is time for the legislatures to assure that only personal friends of the deceased may claim his body. Perhaps those who claim the body after it has been embalmed should be required to pay for the embalming. Certainly, either a time limit for claiming or a protection to the agency which has dissected should be made so that there is no liability incurred for failure to deliver the entire body when a request is made for it months or years after death. There should be provision for and enforcement of notification to the schools when a body is available. The requirement of interment after dissection should be changed to allow for cremation. The prohibition against removing bodies from the state should definitely be accompanied by an exception which allows "transporting human specimens outside of the state for the temporary use at scientific meetings or exhibits."⁶⁸

Clarifying Conflicting Social Legislation

The members of the medical profession have criticized the social legislation providing funds for burial so heavily that one could draw the conclusion that they would like to see this legislation changed. This writer has no opinion as to whether or not such changes should be made, but urges legislators to clarify apparent conflicts between social legislation and the anatomy acts so that local officials will know whether the body must be buried or whether it must be delivered to a medical school.

Instituting a Basis for Donation

This writer is convinced that legislation forming the basis for donation of bodies for anatomical study or therapeutics is the most desirable and practical solution to the problems of cadaver supply. The results in those states with such legislation have been very favorable.⁶⁹ Within a two year period the University of California at Los Angeles received 300 donations; in about the same length of time the Anatomical Board of Florida had received 138 bodies and had on file 75 other wills or statements of persons wishing to donate their bodies to science.⁷⁰ Even though there is no legal basis for it, one of the Ohio medical schools reports that its three year program to encourage donations is successful.⁷¹ It is believed that through donations, encouraged largely by the success of therapeutic transplantations, the various medical schools and banks could acquire a more than ample supply of cadaver material. As compared to the anatomy laws, where the body of an unclaimed indigent is simple "taken," a donation system is much more acceptable to the public for the reason that the deceased himself has made the choice. It is also the only way by which the consent of the relatives could be obtained. By cooperation between the anatomy de-

⁶⁷ See discussion of inadequacies, *supra* page 463.

⁶⁸ See Appendix I for citations to similar exceptions.

⁶⁹ See Appendix II for citations of these statutes.

⁷⁰ *Willed Bodies*, *supra* note 24; *Florida—Where There Isn't Any Trouble*, *supra* note 37; *Your Body and Mine*, *supra* note 57.

⁷¹ Source of information withheld.

partments and banks the same body could be used to a limited extent by both. It would even be feasible for the eyes to be removed immediately after death, for embalming to be done under instructions from the anatomy department, a normal funeral held, anatomical study made, and the remains delivered to relatives for burial in the family cemetery plot.⁷² This entails good public relations and efficient administration which is difficult to accomplish when the legal status of all actions is doubtful.⁷³

The number of conflicting interests in need of protection renders it difficult to draft good legislation on this subject. The very fact that legislation is enacted will mean that the public policy or community sentiment favors post mortem use of the human body by science. However, there must be some assurance that the deceased really wanted this use made of his body—just as the law does its best to assure that his disposition of property is really his wish. Second, the emotional entanglements surrounding death are such that some consideration should be given to protecting the desires of close surviving relatives. Third, the people of the medical profession who will be using these bodies should be protected against liability for reasonable and innocent mistakes. According protection to all these interests when the body is to be used for scientific purposes is complicated by the fact that the body must be secured by the medical people quickly after death.

In the fifteen states which have statutory language apparently allowing donation of one's body to science the balance of protection among these interests is not necessarily the best that could be achieved.⁷⁴ The statutory provisions in six of these states are not clearly designed to implement donation of bodies to science. In New York and North Dakota the provision is that a person has the right to direct the manner in which his body shall be disposed. The New York courts have held that this disposition is subject to the desires of relatives in some cases.⁷⁵ The Oregon statute gives certain kin the right to control "disposition" of the body "unless other directions have been given by" the deceased. Washington, North Dakota, Nevada, and Montana limit autopsies or dissection with the permission of relatives to ascertainment of the cause of the death, but with permission of the deceased there is no such limitation. Most of these statutes should be amended to make clear that they do facilitate donation of one's body to science.

⁷² *Your Body and Mine*, *supra* note 57.

⁷³ For example, the author of the following excerpt cannot openly develop his program for donations. "I have enclosed two letters and a form which I send to people who would like to donate their bodies to me. I would appreciate any comments from you on the legality of this form for I have not actually had it tested. As you very well know, the thing is complicated and I fully expect to find myself in trouble as a result of this particular endeavor. However, there are many people who inquire concerning methods of doing this, and I think it is something that we must follow along . . . medicine would be sent back into the dark ages without bodies for dissecting purposes." (Source of information withheld.)

⁷⁴ See Appendix II for citations of all the statutes discussed herein.

⁷⁵ *Matter of Schenk*, *supra* note 57.

The legislation in the other nine states has been enacted since 1947 and is specifically tailored to allow donations. All of them attempt to protect the wishes of the deceased. In six of the states the donor must be otherwise capable of making a will or be over twenty-one years of age and of sound mind. Limitations as to the nature of the donative instrument vary from the requirement that it must be executed as a deed and recorded, to the allowance of any written instrument. It seems that a written instrument witnessed by two people not connected with the donee agency would assure that the donation was the deceased's wish and at the same time not require a cumbersome process.

The Maine statute is the only one which provides that there must be no objection from relatives.⁷⁶ Such protection should not be so great as to hamper unduly the use of the body for transplantation or anatomical study; therefore it is suggested that only those relatives who are very close to the deceased, such as spouse and children, should be protected. It would be most convenient for both transplantation and anatomical study if legislation would require consent before, rather than after, death, perhaps near the time the donative instrument is executed.

The attempts to protect the medical profession have been particularly unsatisfactory. Three states provide that if a donee is not named "any available physician or surgeon" shall be considered the donee. Possible confusion would be avoided by a more specific designation such as the state anatomy board, chairman of the department of anatomy at the nearest school, or a particular hospital official. The statutory solutions employed at present to solve the time problem have the virtue of being certain but appear too stringent. Making interference with the donation a criminal offense accords no protection whatsoever to the relatives or deceased. Under these statutes it would be courting crime to raise the objection that the donative instrument was a complete forgery. On the other hand, the Arizona exemption from liability is limited to acts performed "in carrying out instructions of the donor or testator. . . ." This gives no protection to the person who reasonably believes that he is carrying out the instructions of the deceased but, in fact, has made an innocent mistake. Although it is an overused suggestion, it appears that the great savior of all difficult legal problems would be apropos, "reasonableness." The deceased and relatives need to be protected against fraudulent or arbitrary practices, but the scientist should also have some protection against an innocent error. A statutory exception from liability in cases of reasonable mistakes or in the absence of fraudulent acts is appropriate.⁷⁷

⁷⁶ It is interesting to note that even among the medical profession there is a decided interest in protecting the wishes of surviving relatives. *Florida—Where There Isn't Any Trouble*, *supra* note 37; *Your Body and Mine*, *supra* note 57; personal communications, (sources of information withheld.)

⁷⁷ For other suggested changes see Woodburne & Gardner, *supra* note 24.

The adoption of legislation following one or more of the forms discussed here would certainly prevent a recurrence of the nineteenth century newspaper's statement: "The responsibility for this outrage rests ultimately with the Legislature."

B. Joan Krauskopf

APPENDIX I—ANATOMY LAWS

Statute	Relatives May Claim	Friends May Claim	Organizations May Claim	Use in State Only	Exception for Scientific	Bury Only
ALA. CODE tit. 22, §174 (1940)-----	x	x		x		
ARIZ. REV. STAT. ANN. §36-801 (1956)-----	x	x				
ARK. STAT. §82-404 (1947)-----	x	x				x
CAL. HEALTH & SAFETY CODE §7200-----	x			x		
CONN. GEN. STAT. §4214 (1949)-----	x	x		x		
COLO. REV. STAT. ANN. §91-3-1 (1953)-----	x	x	x			
DELAWARE—None-----						
D.C. CODE ANN. §2-201 (1951)-----	x	x		x		
FLA. STAT. ANN. §245.01 (Supp. 1957)-----	x	x	x	x	x	
GA. CODE ANN. §88-701 (1933)-----	x	x		x		x
IDAHO—None-----						
ILL. ANN. STAT. c. 91, §19 (Smith-Hurd 1956)	x			x		
IND. ANN. STAT. §63-601 (1951)-----	x			x		
IOWA CODE ANN. §142.1 (Supp. 1957)-----	x	x		x		
KAN. GEN. STAT. ANN. §65-901 (1949)-----	x	x		x		x
KY. REV. STAT. ANN. §311.300 (1955)-----	x	x		x		x
LA. REV. STAT. ANN. §17:2271 (1951)-----	x	x		x		
ME. REV. STAT. ANN. c. 66, §11 (1954)-----	x			x		x
MD. ANN. CODE art. 43, §158 (1951)-----	x	x		x	x	
MASS. ANN. LAWS c. 113, §1 (1957)-----	x	x		x		x
MICH. STAT. ANN. §14.511 (1956)-----	x	x		x		x
MINN. STAT. ANN. §145.14 (1946)-----	x					x
MISS. CODE ANN. §6709 (1952)-----	x	x				
MO. ANN. STAT. §194.120 (1952)-----	x	x		x	x	
MONT. REV. CODES ANN. §69-2301 (1953)-----				x		
NEB. REV. STAT. §71.1001 (1950)-----	x		x			
NEVADA—None-----						
N.H. REV. STAT. ANN. §291:1 (1955)-----				x		x
N.J. STAT. ANN. §45:9-43 (1940)-----	x			x		
N.M. STAT. ANN. §12-7-1 (1953)-----				x		
N.Y. PUB. HEALTH §4200-----	x	x				
N.C. GEN. STAT. §90.211 (1950)-----	x			x		
N.D. REV. CODE §23-0603-----	x			x		
OHIO REV. CODE ANN. §1713.34 (Page 1954)-----	x	x		x		x
OKLA. STAT. ANN. tit. 63, §91 (1949)-----	x	x	x			
ORE. REV. STAT. §97.130 (1957)-----	x	x		x		
PA. STAT. ANN. tit. 35, §1091 (1949)-----	x	x	x	x	x	
RHODE ISLAND—None-----						
S.C. CODE §9-501 (1952)-----	x			x		
SOUTH DAKOTA—None-----						
TENN. CODE ANN. §53-504 (1955)-----				x		
TEX. REV. CIV. STAT. ANN. art. 4583 (1951)-----	x	x	x	x		
UTAH CODE ANN. §53-31-30 (1953)-----	x	x				
VT. STAT. §6742 (1947)-----	x	x	x			
VA. CODE ANN. §32-354 (1950)-----	x			x		x
WASH. REV. CODE §68.08.060 (1951)-----	x	x		x		
W. VA. CODE ANN. §1884 (1955)-----	x			x		
WIS. STAT. §155.02 (1955)-----	x	x				
WYO. COMP. STAT. ANN. §63-801 (1945)-----	x	x		x		

APPENDIX II—DONATION STATUTES

Statute	Date Enacted	Manner of Disposition			Donee not Named	Interference Forbidden
		Deed or Recorded	Will or Witnessed	Written Instrument		
ALA. CODE tit. 22, §184(1) (1940)-----	1949	x				x
ARIZ. REV. STAT. ANN. §36-841 (1956)-----	1954		x		x	
CAL. HEALTH & SAFETY CODE §7100-----	1947		x	x		x
FLA. STAT. ANN. §245.11 (Supp. 1957)-----	1953		x			
IOWA CODE ANN. §142.12 (Supp. 1957)-----	1955	x	x			
LA. REV. STAT. ANN. §17:2351 (1951)-----	1950	x	x			
ME. REV. STAT. ANN. c. 66, §10 (1954)-----	1951					x
MONT. REV. CODES ANN. §69.2308 (1953)-----	1943		x	x		
NEV. REV. STAT. §451.010 (1957)-----	1911					
N.Y. PUB. HEALTH §4201-----	1881					
N.C. GEN. STAT. §90.216.1 (1950)-----	1951		x	x	x	
OKLA. STAT. ANN. tit. 63, §105 (Supp. 1957)	1957		x		x	x
ORE. REV. STAT. §97.130 (1957)-----	1947					
WASH. REV. CODE §68.08.100 (1951)-----	1909					