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Wanted! Dead and/or Alive: Choosing Among the Not-So-Uniform Statutory Definitions of Death

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NOTES

Wanted! Dead and/or Alive: Choosing Among the Not-So-Uniform Statutory Definitions of Death

JASON L. GOLDSMITH*

| | |
|---|-----|
| I. A PRELUDE TO LIFE AND/OR DEATH | 871 |
| II. THE DEATH OF COMMON LAW DEATH | 879 |
| III. THE BIRTH OF STATUTORY DEATH | 882 |
| A. <i>The Kansas Statute and Its Progeny</i> | 882 |
| B. <i>The Uniform Determination of Death Act</i> | 884 |
| IV. LIFE AND/OR DEATH UNDER THE UDDA | 889 |
| A. <i>The Taxonomy of Contemporary Death Laws</i> | 889 |
| B. <i>The Anatomy of Contemporary Death Laws: Definitional Components</i> . . . | 891 |
| 1. DEFINITIONAL APPLICABILITY | 891 |
| 2. DEFINITIONAL FOCUS | 895 |
| a. Subject Matter | 895 |
| b. Grammatical Modality | 899 |
| 3. DEFINITIONAL INDICIA | 902 |
| a. Cardiopulmonary Indicia | 903 |
| b. Neurological Indicia | 906 |
| C. <i>The Anatomy of Contemporary Death Laws: Determinative Components</i> . . | 909 |
| 1. DETERMINATIVE PREREQUISITES | 909 |
| 2. DETERMINATIVE INVOLVEMENT | 912 |
| 3. DETERMINATIVE CRITERIA | 914 |
| V. BEYOND THE VEIL OF THE UDDA | 917 |
| FIGURE 1. THE ANATOMY OF CONTEMPORARY DEATH LAWS | 921 |
| FIGURE 2. THE PROLIFERATION OF CONTEMPORARY DEATH LAWS | 922 |
| APPENDIX 1. AN INTERSTATE COMPARISON OF DEFINITIONAL COMPONENTS | 923 |
| APPENDIX 2. AN INTERSTATE COMPARISON OF DETERMINATIVE COMPONENTS | 927 |

“[O]ur dying is more a concern to those who survive us than to ourselves”¹

I. A PRELUDE TO LIFE AND/OR DEATH

A hearse may not come equipped with a luggage rack, but it cer-

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1. THOMAS MANN, *THE MAGIC MOUNTAIN* 522 (John E. Woods trans., Alfred A. Knopf, Inc. 1995) (1924). Because death “does not apply to us at all, but at best [applies] to nature and the world at large,” this Note endeavors – and I urge the reader – to “contemplate it with composure [and] indifference.” *Id.*

tainly has room for much legal baggage. Death disbands the marital union,² dissociates business partners,³ and dissolves certain commercial entities.⁴ It abridges the agent's scope of authority,⁵ abbreviates the annuitant's stream of income,⁶ and discharges the secondary obligor's guaranty.⁷ Death tolls a statute of limitation,⁸ terminates a tortfeasor's

2. See, e.g., UNIF. MARRIAGE & DIVORCE ACT § 201 (1973) (identifying "death" as one of the means by which "[a] marriage may be . . . dissolved . . . as provided by law"). Tangentially, "the obligation to pay future maintenance [to a former spouse] is terminated upon the death of either party," *id.* § 316(b), whereas "provisions for the support of a child are [not] terminated by . . . the death of a parent obligated to support the child." *Id.* § 316(c).

3. See, e.g., UNIF. LTD. P'SHIP ACT § 601(b)(6), 6A U.L.A. 52 (2001) ("A person is dissociated from a limited partnership as a limited partner upon . . . the person's death . . ."); *id.* § 603(7)(a) ("A person is dissociated from a limited partnership as a general partner upon . . . the person's death . . ."); UNIF. P'SHIP ACT § 601(7)(i), 6 U.L.A. 94 (1997) ("A partner is dissociated from a [general] partnership upon the occurrence of . . . the partner's death . . ."); *cf.*, e.g., UNIF. LTD. LIAB. CO. ACT § 601(8)(i), 6A U.L.A. 472 (1996) ("A member is dissociated from a limited liability company upon the occurrence of . . . the member's death . . .").

4. See, e.g., UNIF. P'SHIP ACT § 801(2)(i), 6 U.L.A. 189 (1997) ("A partnership [for a definite term or particular undertaking] is dissolved, and its business must be wound up . . . within 90 days after a partner's dissociation by death . . ."); UNIF. P'SHIP ACT § 31(4), 6 U.L.A. 370 (1914) ("Dissolution is caused . . . [b]y the death of any partner . . .").

5. See, e.g., RESTATEMENT (THIRD) AGENCY § 3.07(1) (2006) ("The death of an individual agent terminates the agent's actual authority."); *id.* § 3.07(2) ("The death of an individual principal terminates the agent's actual authority."); *id.* § 3.11 cmt. b ("A principal's death . . . does not by itself or automatically end the agent's apparent authority."); RESTATEMENT (SECOND) AGENCY § 123 (1958) (the death "of one of two or more joint principals terminates the authority of an agent to act on their joint account," just as the death "of one of two or more agents authorized to act only jointly terminates the authority of the survivor"). *But cf.* RESTATEMENT (THIRD) AGENCY § 3.13(2) (2006) ("[N]either a power given as security nor a proxy . . . is terminated by . . . (d) death of the holder of the power or proxy, unless the holder's death terminates the interest secured or supported by the power or proxy; or (e) death of the creator of the power or proxy, if the power or proxy is given as security for the performance of a duty that does not terminate with the death of its creator.").

6. *Cf.*, e.g., 5 U.S.C. § 8345(c) (1996) ("[T]he annuity of a retired [federal] employee . . . terminates on the day of death. . . . The annuity of a survivor terminates on the last day of the month before death . . ."); UNIF. PERIODIC PAYMENT OF JUDGMENTS ACT § 13(a), 14 U.L.A. 95 (1990) ("[L]iability to a claimant for periodic [judgment] payments not yet due for medical expenses terminates upon the claimant's death."); *id.* § 13(c) ("[I]f a judgment for periodic payments provides payment to more than one claimant entitled to receive benefits for future damages and one or more but fewer than all of them die, the surviving claimants are entitled to shares proportionate to their shares in the periodic payments not yet due . . ."). Generally, an annuity that specifies an expiration date does not terminate when the annuitant dies prior thereto. 4 AM. JUR. 2D *Annuities* § 7 (2006). If the instrument "shows an intention that payments shall be personal to the beneficiary," however, the right to future income "will not pass to the annuitant's estate upon . . . her death before the expiration of such period." *Id.*

7. See, e.g., RESTATEMENT (THIRD) SUR. & GUAR. § 16 (1996) (where a continuing guarantor "agrees to be a secondary obligor for all future obligations of the principal obligor to the obligee . . . the continuing guaranty is terminated by the death of the continuing guarantor").

8. See, e.g., UNIF. PROBATE CODE § 3-109 (amended 1998), 8 U.L.A. 44 (1969) ("No statute of limitation running on a cause of action belonging to a decedent . . . shall apply to bar a cause of action surviving the decedent's death sooner than four months after death."); *id.* § 3-802(b) ("The running of a statute of limitations measured from an event other than death or the giving of notice to creditors is suspended for four months after the decedent's death, but resumes thereafter . . .").

civil liability,⁹ and abates an appellant's criminal conviction.¹⁰ It divests freehold,¹¹ leasehold,¹² and equitable interests in property;¹³ and occasions the delimitation,¹⁴ valuation,¹⁵ and taxation of the decedent's

9. *See, e.g.*, RESTATEMENT (SECOND) TORTS § 900(1)(a) (1979) ("A cause of action for a tort may be discharged by . . . the death of either party, in the absence of a statute providing for survival of the cause of action . . ."); *id.* § 926 ("Under statutes providing for the survival or revival of tort actions . . . (a) the death of the injured person limits recovery for damages . . . to harms suffered before the death, and (b) the death of the tortfeasor terminates liability for punitive damages."); *see also* FED. R. CIV. P. 25(a)(1) ("If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. . . . Unless [a] motion for substitution is made not later than 90 days after the death . . . , the action shall be dismissed as to the deceased party.").

10. *See* *Durham v. United States*, 401 U.S. 481, 483 (1971) (*per curiam*), *overruled on other grounds*, *Dove v. United States*, 423 U.S. 325 (1976), *cited with approval in* *United States v. Estate of Parsons*, 367 F.3d 409, 413-16 (5th Cir. 2004) ("[D]eath pending direct review of a criminal conviction abates not only the appeal but also all proceedings had in the prosecution from its inception.").

11. *See, e.g.*, RESTATEMENT (FIRST) PROP. § 18 (1936) ("An estate for life is an estate which is not an estate of inheritance . . ."); 7 POWELL ON REAL PROPERTY § 52.05[2] (Michael A. Wolf ed., 2005) ("[T]he death of a spouse holding as tenant by the entirety terminates the tenancy and leaves the survivor vested solely with the fee simple interest . . . she previously held concurrently."); *id.* § 51.03[3] ("[T]he estates of deceased joint tenants have no interest.").

12. *See generally* Russell G. Donaldson, Annotation, *Death of Lessee as Terminating Lease*, 42 A.L.R. 4TH 963 (1985). Although the lessee's death during a term-of-years tenancy does not generally terminate the lessee's obligations, the lessee's death during a tenancy at will is considered an exercise of her option to unilaterally terminate the leasehold. *See id.*

13. *See, e.g.*, RESTATEMENT (THIRD) TRUSTS § 55(1) (2003) ("If the interest of a deceased beneficiary of a trust does not terminate or fail by reason of the beneficiary's death, the interest devolves by will or intestate succession in the same manner as a corresponding legal interest."); *id.* § 69 cmt. a (if by testamentary bequest or intestate succession "the entire beneficial interest in trust property passes to the trustee, the trust terminates and the trustee holds the property free of trust"); *id.* § 69 cmt. b (if by testamentary bequest or intestate succession "the legal title to the trust property passes to the beneficiary who has the entire beneficial interest, merger occurs, the trust terminates, and the beneficiary holds the property free of trust"); RESTATEMENT (THIRD) PROP.: SERVITUDES § 4.3(3) (2000) ("A servitude benefit or burden that is personal lasts no longer than the life of the person holding the benefit or burden."); UNIF. CUSTODIAL TRUST ACT § 2(e), 7A U.L.A. 246 (1999) ("[T]he custodial trust terminates on the death of the beneficiary."); RESTATEMENT (FIRST) TRUSTS § 143(2) (1935) ("If two or more beneficiaries of a trust are joint tenants of the beneficial interest and one of them dies, his interest does not devolve upon his heir or next of kin or devisee or legatee, but the survivor or survivors are entitled to the whole beneficial interest, unless it is otherwise provided by statute.").

14. *See, e.g.*, I.R.C. § 2033 (2003) ("[T]he gross estate shall include . . . all property to the extent of the interest therein of the decedent at the time of his death."); RESTATEMENT (THIRD) PROP.: WILLS & DON. TRANS. § 1.1(a) (1999) ("A decedent's 'probate estate' . . . consists of property owned by the decedent at death and property acquired by the decedent's estate at or after the decedent's death."). *But see* H.R. REP. NO. 95-595, at 368 (1977), *reprinted in* U.S.C.C.A.N. 5963, 6324 ("If the debtor dies during the [pendency of a bankruptcy] case, only property exempted from . . . the [bankruptcy] estate or acquired by the debtor after the commencement of the case and not included as property of the [bankruptcy] estate will be available to the representative of the debtor's probate estate.").

15. *See, e.g.*, § 2031(a) ("The value of the gross estate of the decedent shall be determined by including . . . the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated."). *But see* § 2032(1) ("In the case of property . . . disposed of[]

estate.¹⁶ Death transfers title to takers-in-waiting,¹⁷ triggers the disbursement of survivor benefits,¹⁸ and effectuates the harvest of donated organs.¹⁹ It excuses performance of contractual duties,²⁰ extinguishes rights to statutory entitlements,²¹ and deems exercisable powers of

within 6 months after the decedent's death, such property [may, if the executor so elects,] be valued as of the date of . . . disposition.""); § 2032(2) ("In the case of property not . . . disposed of within 6 months after the decedent's death, such property shall be valued as of the date 6 months after the decedent's death."); § 2032(3) ("Any interest or estate which is affected by mere lapse of time shall be included at its value as of the time of death (instead of the later date) with adjustment for any difference in its value as of the later date not due to mere lapse of time.").

16. *See, e.g.*, § 2001(a) ("A tax is . . . imposed on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States."); § 6075(a) ("Returns made under section 6018(a) (relating to estate taxes) shall be filed within 9 months after the date of the decedent's death."); 26 C.F.R. § 1.6012-3(b)(1) (2002) ("The executor or administrator of the [decedent's] estate . . . shall make the return of income required in respect of such decedent. For the decedent's taxable year which ends with the date of his death, the return shall cover the period during which he was alive.").

17. *See, e.g.*, UNIF. PROBATE CODE § 3-101 (amended 1998), 8 U.L.A. 380 (1969) ("Upon the death of a person, his real and personal property devolves to the persons to whom it is devised by his . . . will or to those indicated as substitutes for them in . . . circumstances affecting the devolution of testate estate[s;] or in the absence of testamentary disposition, to his heirs or to those indicated as substitutes for them in . . . circumstances affecting [the] devolution of intestate estates . . ."); UNIF. DISPOSITION OF CMTY. PROP. RIGHTS AT DEATH ACT § 3, 8A U.L.A. 128 (1971) ("Upon death of a married person, one-half of [any community] property . . . is the property of the surviving spouse and is not subject to testamentary disposition by the decedent or distribution under the laws of succession One-half of that property is the property of the decedent and is subject to testamentary disposition or distribution under the laws of succession . . ."); *see also* 7 POWELL ON REAL PROPERTY § 51.03[3] (Michael A. Wolf ed., 2005) ("[T]he decedent's death automatically vests his or her share of [joint-tenancy] property – known as the survivors' accretive interest – in the remaining joint tenants . . ."); *id.* § 52.05[2] ("[T]he death of a spouse holding as tenant by the entirety . . . leaves the surviv[ing spouse] vested solely with the fee simple interest he or she previously held concurrently.").

18. *See, e.g.*, UNIF. PROBATE CODE § 6-101 (amended 1998), 8 U.L.A. 430 (1969) ("[A]n insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature [may include] a written provision that . . . money or other benefits due to, controlled by, or owned by a decedent before death must be paid after the decedent's death to a person whom the decedent designates . . .").

19. *See, e.g.*, UNIF. ANATOMICAL GIFT ACT § 2(e), 8A U.L.A. 24 (1987) ("An anatomical gift by will takes effect upon death of the testator, whether or not the will is probated."); *id.* § 8(c) ("[A] technician may remove any donated [body] parts . . . after determination of death by a physician or surgeon.").

20. *See, e.g.*, RESTATEMENT (SECOND) CONTRACTS § 262 (1981) ("If the existence of a particular person is necessary for the performance of a duty, his death . . . is an event the non-occurrence of which was a basic assumption on which the contract was made."); *id.* § 48 ("An offeree's power of acceptance is terminated when the offeree or offeror dies . . ."); *id.* § 332(2) ("[A] gratuitous assignment is revocable and the right of the assignee is terminated by the assignor's death . . ."); *see also* U.C.C. § 3-504(a)(ii) (2002) ("Presentment for payment or acceptance of [a negotiable] instrument is excused if . . . the maker or acceptor . . . is dead . . .").

21. *See, e.g.*, 42 C.F.R. § 407.27(a) ("An individual's entitlement [to Supplemental Medical Insurance ("S.M.I.")] . . . ends on the last day of the month in which the individual dies."); 20

appointment.²² The validity of testamentary gifts depends upon *who* is alive when the testator dies;²³ resolving conflicts of law depends upon *where* the decedent was domiciled while she was alive;²⁴ culpability for criminal homicide depends upon *when*²⁵ and *how*²⁶ the victim died.

Historically, one's passing from life proved a reliable condition precedent for effecting change in legal rights and relations. It was marked by a precise moment in time – an *articulo mortis* predicated upon the quaint notion that death is both inevitable and incontrovertible.²⁷ Yet determining (or, if you will, deciding) whether and when death has occurred is no longer an easy undertaking.²⁸ Conflicting legis-

C.F.R. § 416.1334 (“Eligibility for [Supplemental Security Income (“S.S.I.”)] benefits ends with the month in which the recipient dies. Payments are terminated effective with the month after the month of death.”).

22. See, e.g., RESTATEMENT (THIRD) PROP.: WILLS & DON. TRANS. § 17.4 (Tentative Draft No. 5, 2006) (“A testamentary power of appointment becomes presently exercisable upon, but not before, the donee’s death.”). But see, e.g., *id.* § 19.11 (“If the donee dies before the effective date of a document purporting to confer on the donee a power of appointment, the power is not created, and any attempted exercise of the power is ineffective.”).

23. See, e.g., RESTATEMENT (THIRD) PROP.: WILLS & DON. TRANS. § 1.2 (1999) (“An individual who fails to survive the decedent cannot take as an heir or a devisee.”); *id.* § 15.3 (“[A] beneficiary of a postponed multiple-generation class gift who fails to survive the distribution date is excluded from the class.”); UNIF. SIMULTANEOUS DEATH ACT § 2, 8B U.L.A. 148 (1993) (“[I]f the title to property, the devolution of property, the right to elect an interest in property, or the right to exempt property, homestead or family allowance depends upon an individual’s survivorship of the death of another individual, an individual who is not established by clear and convincing evidence to have survived the other individual by 120 hours is deemed to have predeceased the other individual.”).

24. See, e.g., RESTATEMENT (SECOND) CONFLICT OF LAWS § 260 (1971) (“The devolution of interests in movables upon intestacy is determined by the law that would be applied by the courts of the state where the decedent was domiciled at the time of his death.”); *id.* § 263(1) (“Whether a will transfers an interest in movables and the nature of the interest transferred are determined by the law that would be applied by the courts of the state where the testator was domiciled at the time of his death.”); UNIF. PROBATE CODE § 2-401 (amended 1998), 8 U.L.A. 139 (1969) (“Rights to homestead allowance, exempt property, and family allowance . . . are governed by the law of the decedent’s domicile at death.”). But see, e.g., RESTATEMENT (SECOND) CONFLICT OF LAWS § 240(1) (1971) (“A will insofar as it devises an interest in land is construed in accordance with the rules of construction of the state designated for this purpose in the will.”); *id.* § 264(1) (“A will insofar as it bequeaths an interest in movables is construed in accordance with the local law of the state designated for this purpose in the will.”).

25. See, e.g., *Louisville, Evansville & St. Louis R.R. Co. v. Clarke*, 152 U.S. 230, 239 (1894) (“[N]o person should be adjudged, ‘by any act whatever, to kill another, who does not die by it within a year and a day thereafter . . .’”). But see *Rogers v. Tennessee*, 532 U.S. 451, 463 (2001) (“The year and a day rule is widely viewed as an outdated relic of the common law. . . . For this reason, the year and a day rule has been legislatively or judicially abolished in the vast majority of jurisdictions recently to have addressed the issue.”).

26. See, e.g., MODEL PENAL CODE § 210.1 (1962) (“A person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being.”).

27. See generally DOUGLAS N. WALTON, ON DEFINING DEATH: AN ANALYTIC STUDY OF THE CONCEPT OF DEATH IN PHILOSOPHY AND MEDICAL ETHICS (1979) (exploring how the boundary of life expands and contracts with shifting definitions of death).

28. See *Severns v. Wilmington Med. Ctr., Inc.*, 421 A.2d 1334, 1344 (Del. 1980) (“[W]e are

lative responses to the uncertainties posed by biomedical technology contravene the formerly inviolate axiom that a person is legally dead simply because she is perceived to have died.²⁹ Because of the varied degrees by which various jurisdictions define death and direct its diagnosis,³⁰ it is now possible for a person to be *simultaneously dead and alive* pursuant to the laws of State X and State Y respectively.³¹ In other words, it is not impossible to statutorily resurrect a “putative decedent” from State X merely by applying the laws of State Y, or to statutorily make moribund a “potential decedent” from State Y simply by applying the laws of State X.³²

on the threshold of new terrain – the penumbra where death begins but life, in some form, continues.”).

29. See ALA. CODE § 22-31-1 (2000); ALASKA STAT. § 09.68.120 (1995); ARIZ. REV. STAT. ANN. § 14-1107 (1994); ARK. CODE ANN. § 20-17-101 (1991); CAL. HEALTH & SAFETY CODE § 7180 (West 1982); COLO. REV. STAT. ANN. § 12-36-136 (West 1981); CONN. GEN. STAT. ANN. § 19a-504a (West 1984); DEL. CODE ANN. tit. 24, § 1760 (2005); D.C. CODE § 7-601 (1982); § 382.009, FLA. STAT. (1987); GA. CODE ANN. § 31-10-16 (1992); GUAM CODE ANN. tit. 10, § 83B101 (2006); HAW. REV. STAT. § 327C-1 (1998); IDAHO CODE ANN. § 54-1819 (1981); 755 ILL. COMP. STAT. ANN. 40/10 (West 1998); IND. CODE ANN. § 1-1-4-3 (West 1986); KAN. STAT. ANN. § 77-205 (1984); KY. REV. STAT. ANN. § 446.400 (West 1986); LA. REV. STAT. ANN. § 9:111 (2001); ME. REV. STAT. ANN. tit. 22, § 2811 (1983); MD. CODE ANN., HEALTH-GEN. § 5-202 (West 1998); MICH. COMP. LAWS ANN. § 333.1033 (West 1992); MINN. STAT. ANN. § 145.135 (West 1989); MISS. CODE ANN. § 41-36-3 (West 1981); MO. ANN. STAT. § 194.005 (West 1982); MONT. CODE ANN. § 50-22-101 (1983); NEB. REV. STAT. § 71-7202 (1992); NEV. REV. STAT. ANN. § 451.007 (West 1985); N.H. REV. STAT. ANN. § 141-D:2 (1987); N.J. STAT. ANN. § 26:6A-3 (West 1991); N.M. STAT. ANN. § 12-2-4 (West 1993); N.C. GEN. STAT. ANN. § 90-323 (West 1979); N.D. CENT. CODE § 23-06.3-01 (1989); OHIO REV. CODE ANN. § 2108.30 (West 1982); OKLA. STAT. ANN. tit. 63, § 3122 (West 1986); OR. REV. STAT. ANN. § 432.300 (West 1997); 35 PA. STAT. ANN. § 10203 (West 1983); R.I. GEN. LAWS § 23-4-16 (1982); S.C. CODE ANN. § 44-43-460 (2006); S.D. CODIFIED LAWS § 34-25-18.1 (1990); TENN. CODE ANN. § 68-3-501 (1982); TEX. HEALTH & SAFETY CODE ANN. § 671.001 (Vernon 1995); UTAH CODE ANN. § 26-34-2 (2007); VT. STAT. ANN. tit. 18, § 5218 (1981); V.I. CODE ANN. tit. 19, § 869 (1993); VA. CODE ANN. § 54.1-2972 (2004); W. VA. CODE ANN. § 16-10-1 (West 1989); WIS. STAT. ANN. § 146.71 (West 1998); WYO. STAT. ANN. § 35-19-101 (1985).

30. Compare CAL. HEALTH & SAFETY CODE § 7180(a) (West 1982) (“An individual who has sustained . . . irreversible cessation of *circulatory* and *respiratory* functions . . . is dead.” (emphasis supplied)), with VA. CODE ANN. § 54.1-2972(A) (2004) (“A person shall be medically and legally dead if . . . there is the absence of *spontaneous respiratory* and *spontaneous cardiac* functions” (emphasis supplied)); compare OHIO REV. CODE ANN. § 2108.30 (West 1982) (“[D]eath has occurred . . . [if] the irreversible cessation of all functions of the *brain* has occurred.” (emphasis supplied)), with WIS. STAT. ANN. § 146.71 (West 1998) (“An individual who has sustained . . . irreversible cessation of all functions of the *entire brain, including the brain stem*, is dead.” (emphasis supplied)).

31. This Note differentiates between “medical death” and “legal death.” Because most death laws minimally require that a determination thereunder conform to accepted medical standards, any person who may be deemed “legally dead” may also be diagnosed “medically dead.” Many statutes, however, confine death’s legal definition to the physiological indicia enumerated therein. See *infra* Part IV.B.2.b. Consequently, a person who may be diagnosed “medically dead” may not necessarily be considered “legally dead.”

32. At first blush, this unsavory possibility might appear (at least) unlikely or (at most) unrealistic. Yet, congressional investigations into “the ethical and legal implications of . . .

The annals of academia are rich in debate as to which medical definition of death should apply in particular clinical circumstances, yet few have reduced to brass-tacks how death's legal definition impacts the average attorney and her clients. Are death laws symmetrical? In other words, is the conger of end-of-life situations covered by one jurisdiction's codification equivalent with that of another? Or, is there statutory asymmetry, namely, circumstances where identical end-of-life scenarios are dissimilarly addressed by different legislative models? Are death laws harmonious? Put another way, do statutes based upon theoretically analogous grounds generate congruent results? Or, is there medico-legal discord; that is, occasions where individuals with identical physiological conditions are differently deemed dead by divergent legislative enactments? Or even socio-anthropological incompatibility; predicaments where our societal preconceptions of life suggest that a person should (or should not) be alive, but a concomitant determination is foreclosed – or an inapposite determination is mandated – by the controlling statute?³³ These questions are founded upon a general inquiry, which although deserving of comprehensive analysis, has thus far received scant attention: how does the corpus of American death laws operate as a system?³⁴

To be sure, the current state of American death law epitomizes an antinomy of state death laws. This legislative disagreement, however, is not necessarily disagreeable. For the creative practitioner, inconsistent definitions of death offer a “decendent-to-be,” as well as her “soon-to-be survivors,” an array of starting-points from which to launch the legal

defining death, including the advisability of developing a uniform definition” thereof, Pub. L. No. 95-622, § 1802(a)(1)(B), 92 Stat. 3439 (1978), concluded that “*it is possible* to think of medical situations – and, even more freely, of legal cases that would be unlikely but not bizarre – in which the differences in statutory language *could* lead to different outcomes.” PRESIDENT’S COMM’N FOR THE STUDY OF ETHICAL PROBLEMS IN MED. & BIOMED. & BEHAVIORAL RESEARCH, *DEFINING DEATH: A REPORT ON THE MEDICAL, LEGAL AND ETHICAL ISSUES IN THE DETERMINATION OF DEATH* 72 (1981) [hereinafter *DEFINING DEATH*] (emphasis supplied), available at http://www.bioethics.gov/reports/past_commissions/defining_death.pdf.

33. A person steeped in the normative debate over legislating death is apt to wince upon considering the mere plausibility of such medico- and socio-anthropological dilemmas. On the one hand, it is difficult to imagine that our statutory regime for regulating death would (or, even could) militate against our common understanding of life. On the other hand, *every* statute that regulates death *necessarily* vitiates our preconception of life insofar as it is inconsistent with the legislature’s opinion of what it means to be dead. Indeed, “[a] word or phrase defined in a statute . . . has the meaning expressed in its definition and therefore that meaning *prevails* over other meanings.” UNIF. STATUTE & RULE CONSTR. ACT § 2 cmt., 14 U.L.A. 483 (1995 & Supp. 1996) (emphasis supplied).

34. In 1978, the President’s Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research canvassed then-recent legislative and judicial treatments of death. See generally *DEFINING DEATH*, *supra* note 32. Yet, the medico-legal landscape has experienced a sea change over the past quarter century – *all but one* state legislature have amended their definition of death since. See, e.g., N.C. GEN. STAT. ANN. § 90-323 (West 1979).

machinery that a determination of death ignites. And, because each alternative is endowed with unique advantages and disadvantages, a comprehensive estate planning strategy might sensibly integrate calculated end-of-life tactics that ensure the favorable application (or avoid the undesirable applicability) of a particular jurisdiction's definition.³⁵ This Note assesses the legal, ethical, and financial implications of such maneuvers – an evaluation informed by (1) investigating the evolution of modern death jurisprudence, (2) categorizing death statutes based upon their conceptual underpinnings, and (3) examining the impact divergent death laws have upon different legal interests.³⁶

In the final analysis, however, the desirability of statutorily resurrecting a "putative decedent" from State *X* merely by applying the laws of State *Y*, or of statutorily making moribund a "potential decedent" from State *Y* simply by applying the laws of State *X*, depends upon the desirability of her being deemed to have died in the first instance. Thus, the prescient legal advisor must answer a critical question as to each client: whether and when, in the context of *this person's* particular objectives, would deeming her legally dead "seem[] the best thing to

35. Because it is possible for a person to be *simultaneously dead and alive* pursuant to the laws of State *X* and State *Y* respectively, relocating a "soon-to-be-decedent" from one state to another is the most obvious expedient for invoking a particular jurisdiction's death laws. The Uniform Probate Code, however, affords a significantly less disruptive, private-ordering alternative. Section 2-703 empowers a testator to designate that "the law of a particular state" shall govern "[t]he meaning and legal effect" of her will "without regard to the location of property covered thereby." UNIF. PROBATE CODE § 2-703 (amended 1993), 8 U.L.A. 186 (1969); accord RESTATEMENT (SECOND) CONFLICT OF LAWS § 240(1) (1971); *id.* § 264(1). It would thus appear that a domiciliary of State *X* could legitimately incorporate a choice-of-law provision that ensures the term "death" will be interpreted "in accordance with [State *Y*'s] rules of construction" *Id.* § 264 cmt. e (commenting that "[w]hen the testator designates the law of a state as the applicable law in matters of construction, it is to be inferred that he intends the local law of that state to govern" regardless of whether the forum "ha[s] a substantial relationship to the testator or his estate"). Consequently, if a domiciliary of State *X* is not legally dead pursuant to the laws of State *Y*, and also has a will which instructs that its "meaning and effect" shall be governed by the laws of State *Y*, then probating her will or administering her estate would be impermissible – even though she might be legally dead according to the laws of State *X*. Cf. UNIF. PROBATE CODE art. III gen. cmt. (amended 1993), 8 U.L.A. 26 (1969). Indeed, "[p]ost-mortem probate of a will must occur to make [it] effective" and "appointment of a personal representative . . . after the decedent's death is required," *id.*, to issue the letters testamentary that commence administration. See *id.* §§ 3-103 to -104. Conversely, if a domiciliary of State *Y* is legally dead pursuant to the laws of State *X*, and also has a will which instructs that its "meaning and effect" shall be governed by the laws of State *X*, then probating her will and administering her estate would be permissible – even though she might be legally alive according to the laws of State *Y*. See *id.* §§ 3-103 to -104.

36. CAUTION: THE INTENDED FOCUS OF THIS NOTE IS TO FAMILIARIZE ITS READER WITH STATE STATUTES THAT LEGISLATE THE DEFINITION AND DETERMINATION OF DEATH. I NEITHER PURPORT NOR ATTEMPT TO CONSIDER REPORTED CASES THAT HAVE EITHER INTERPRETED SUCH LEGISLATION OR ADDRESSED RELATED QUESTIONS. ACCORDINGLY, THE READER IS ADVISED TO CONSULT RELEVANT CASE LAW WITHIN HER JURISDICTION FOR FURTHER GUIDANCE.

do"?³⁷

II. THE DEATH OF COMMON LAW DEATH

At common law, death was defined by negative implication as "the opposite of life."³⁸ Centuries of scholarship variously summarized this tautology,³⁹ yet the weight of mainstream authority converged upon two easily observable and universally familiar touchstones, namely, a permanent absence of bloodflow and breathing.⁴⁰ Over time, tribunals summoned to adjudicate matters of "alive" versus "dead" regularly relied upon, and regurgitated *in haec verba*, the archetypical formulation adopted by Black's Law Dictionary:⁴¹

Death. The cessation of life; the ceasing to exist; defined by physicians as a total stoppage of the circulation of the blood, and a cessation of the animal and vital functions consequent thereon, such as respiration, pulsation, etc.⁴²

37. Roger B. Dworkin, *Death in Context*, 48 IND. L.J. 623, 636 (1973). "Although death is a single phenomenon, there are multiple ways in which it may be determined." Maria K. Clark, *Solving the Kidney Shortage Crisis Through the Use of Non-Heart-Beating Cadaveric Donors: Legal Endorsement of Perfusion as a Standard Procedure*, 70 IND. L.J. 949 n.6 (1995). Therefore, one cannot thoughtfully investigate the "death definition problem" without first asking, "[w]hat difference does it make whether somebody is dead?" Dworkin, *supra* at 629. This inquiry "places the issue of death into the only posture in which it can be of relevance to the law – the posture of context or consequences." *Id.* For, "[w]hatever may be the needs of the philosopher or the ethicist, the lawyer needs only to know what consequences follow upon a given determination." *Id.*

38. See, e.g., *Evans v. People*, 49 N.Y. 86, 90 (N.Y. 1872).

39. See David J. Powner et al., *Medical Diagnosis of Death in Adults: Historical Contributions to Current Controversies*, 348 LANCET 1219 (1996) (reviewing the varied means by which society has defined, diagnosed, and determined death at various points throughout history).

40. See David W. Meyers, *Time of Death: Medicolegal Considerations*, 16 AM. JUR. PROOF OF FACTS 2D *Proof of Facts* 87, § 2 (2005).

41. A "dictionary-dependent" death jurisprudence emerged in 1898, when the California Supreme Court adverted to Bouvier's definition of "[n]atural death [as] the cessation of life." *Slevin v. Bd. of Police Pension Fund Comm'rs of S.F.*, 55 P. 785, 786 (Cal. 1898); see, e.g., *In re Schmitt's Estate*, 261 Cal. App. 2d 262, 273 (Cal. 1st Dist. Ct. App. 1968) ("[t]his Court considers death as defined in Black's Dictionary" because "[that] is [the definition] used by the California courts"); *Thomas v. Anderson*, 215 P.2d 478, 481-82 (Cal. 4th Dist. Ct. App. 1950) ("As defined in Black's Law Dictionary, 3d Edition, death is the cessation of life; the ceasing to exist . . ."); *Schmidt v. Pierce*, 344 S.W.2d 120, 133 (Mo. 1961) ("Black's Law Dictionary, 4th Ed., defines death as '[t]he cessation of life; the ceasing to exist . . .'"); *Sanger v. Butler*, 101 S.W. 459, 462 (Tex. Civ. App. 1907) ("The Encyclopædic Dictionary, among others, gives the following definitions of [death]: 'The state of being dead; the act or state of dying; the state or condition of the dead.' The Century Dictionary defines death as 'cessation of life; that state of a being, animal or vegetable, in which there is a total and permanent cessation of all the vital functions.'").

42. BLACK'S LAW DICTIONARY 488 (4th ed., rev. 1968). This cardiopulmonary-centric definition, which was adopted by the last "pre-death-legislation era" edition of Black's Law Dictionary, was subsequently revised by the first "post-death-legislation era" edition to encompass a broader conception: "Death. The cessation of life; permanent cessations of all vital functions and signs." BLACK'S LAW DICTIONARY 360 (5th ed. 1979). Consistent with its displacement of

Because a doctrinaire judiciary was reluctant to deviate from this lexical shibboleth, jurisdictions amassed a corpus of case law couched in cardiopulmonary terms.⁴³ The law seldom had occasion to question the propriety of the tried-and-true vital signs, until recently – when modern medicine's increased facility to perpetuate life convoluted the traditional notion of its complement.⁴⁴

During the first half of the twentieth century, the effective use of biomedical technology⁴⁵ to assist patients otherwise incapable of sponta-

the exclusively heart-lung definition, the 1979 edition included an additional entry under the heading "brain death." *Id.* at 170. Nevertheless, both listings – genuflecting to the influx of "statutory definitions . . . which include[d] brain-related criteria" – redirected the reader toward pertinent legislation for further guidance. *Id.* (citing CAL. HEALTH & SAFETY CODE § 7180 (1976) and the statutory definition codified thereby); *see also* BLACK'S LAW DICTIONARY 400 (6th ed. 1990) (citing UNIF. DETERMINATION OF DEATH ACT § 1, 12A U.L.A. 589 (1980) and the model definition articulated therein). In 1999, however, Black's unexpectedly regressed and inexplicably reversed thirty years of medico-legal evolution; both the seventh and eighth editions disposed of any reference to statutory formulations, and each recapitulate a bizarrely truncated "pre-death-legislation era" definition: "Death. The ending of life; the [permanent] cessation of all vital functions and signs." BLACK'S LAW DICTIONARY 406 (7th ed. 1999) (stricken text is supplied to emphasize words previously included but currently omitted); *accord* BLACK'S LAW DICTIONARY 428 (8th ed. 2004) [hereinafter BLACK'S LAW DICTIONARY 2004].

43. *See* *Smith v. Smith*, 317 S.W.2d 275, 279 (Ark. 1958); *In re Schmitt's Estate*, 261 Cal. App. 2d 262, 273 (Cal. 1st Dist. Ct. App. 1968) ("[T]his Court considers death . . . as the total stoppage of the circulation of the blood and cessation of the animal and vital functions of the body such as respiration and pulsation." (internal quotations omitted)); *Thomas v. Anderson*, 215 P.2d 478, 482 (Cal. 4th Dist. Ct. App. 1950) ("[D]eath occurs precisely when life ceases and does not occur until the heart stops beating and respiration ends."); *State v. Johnson*, 395 N.E.2d 368, 372-73 (Ohio 1st Dist. Ct. App. 1977) ("[D]eath means the permanent cessation of all vital functions and the fact and time of its occurrence are questions for a jury."); *In re Myers*, 4 Ohio Law Abs. 111, at *5 (C.P. 1925), *available at* 1925 WL 3007 ("'Death.' Briefly is cessation of life; that state of a being animal or vegetable, in which there is a total and permanent cessation of all vital functions.").

44. *See* *Barber v. Super. Ct.*, 195 Cal. Rptr. 484, 487 (Cal. 2d Dist. Ct. App. 1983) ("[M]odern medical technology . . . has caused our society to rethink its concepts of what constitutes 'life' and 'death.'"); *Swafford v. State*, 421 N.E.2d 596, 598 (Ind. 1981) ("[U]ntil recent medical history, no reason existed for the traditional medical definition of death detailed in Black's Fourth Edition to engender legal controversy."); *In re Quinlan*, 355 A.2d 647, 656 (N.J. 1976) ("Developments in medical technology have obfuscated the use of the traditional definition of death."), *abrogated by* *In re Conroy*, 486 A.2d 1209, 1230 (N.J. 1985); *N.Y.C. Health & Hosp. Corp. v. Sulsona*, 367 N.Y.S.2d 686, 687 (N.Y. Special Term 1975) ("[T]here presently exists a discrepancy between the common law criteria for determining death . . . and the medically recognized concept of 'brain death.'"); *State v. Johnson*, 395 N.E.2d 368, 371 (Ohio 1st Dist. Ct. App. 1977) ("Advances in medicine during the past several decades have rendered suspect the[] traditional criteria of death."); *In re Bowman*, 617 P.2d 731, 734 (Wash. 1980) ("Until recently, the definition of death was both medically and legally a relatively simple matter. . . . With the recent advancement of medical science, the traditional common law 'heart and lungs' definition is no longer adequate.").

45. Examples of biomedical technology that assist patients who are unable to spontaneously sustain circulation or respiration include: mechanical ventilators, cardiac pacemakers, and heart-lung machines. *See* Meyers, *supra* note 40, § 1. A "mechanical ventilator" is used to mimic natural breathing by intermittently exerting either the negative or positive pressure necessary to inflate the lungs, which then self-deflate by gravitational pull. *See generally* ENCYCLOPEDIA OF

neously sustaining circulation and respiration challenged the medico-legal practicality of defining death solely on the basis of cardiopulmonary functions.⁴⁶ This impracticality was especially evident where such natural mechanisms could be, or were in fact being, mechanically substituted within a clinical setting.⁴⁷ Indeed, physicians were uncertain how to even classify an artificially-supported patient who appeared to be alive (because she continued breathing, had a heartbeat, and was “warm to the touch”) inasmuch as she appeared to be dead (because she lacked consciousness and failed to respond either cognitively or reflexively to external stimuli).⁴⁸

By the 1960s, developments in organ transplantation exacerbated the fissure between lagging legal principles and evolving medical procedures.⁴⁹ On the one hand, surgical best practices called for a donor’s vital functions to be artificially maintained until the moment organs were extracted; at which point life support systems were disconnected, circulation and respiration ceased, death was declared, and the harvest proceeded.⁵⁰ On the other hand, the common law diagnosed this “heart-beating organ donor” as legally alive – and, thus, deemed her murdered – when cardiopulmonary support was intentionally disconnected.⁵¹

MEDICAL DEVICES AND INSTRUMENTATION 2848 (John Webster ed., 1988). A “pacemaker” is used to supply – by either external (i.e., transcutaneous) or internal (i.e., implantable) placement – the periodic electrical impulses necessary to stimulate a heart in which the natural pacing mechanism has failed. *See generally id.* at 2175. A “heart-lung machine” is used as either a short-term (i.e., surgical) or long-term (i.e., sustainable) substitute for both cardiac and respiratory functions. *See generally id.* at 1440.

46. *See* Meyers, *supra* note 40, § 1.

47. When it became evident that “biological” and “mechanical” death did not necessarily occur simultaneously, medical commentators proposed that the alternative concepts be distinguished and discretely defined. *See id.* § 6 n.36.

48. *See* Alexandra K. Glazier, “*The Brain Dead Patient Was Kept Alive*” and *Other Disturbing Misconceptions; A Call for Amendments to the Uniform Anatomical Gift Act*, 9 KAN. J.L. & PUB. POL’Y 640, 642 (2000).

49. *See* Thomas R. Trenkner, Annotation, *Tests of Death for Organ Transplant Purposes*, 76 A.L.R. 3d 913 (2005) (“[A] growing number of medical and legal commentators [have] argu[ed] that the reliability of [the traditional cardiopulmonary] criteria has been rendered suspect by . . . the demonstrated ability of transplant recipients to go on living after their vital organs have been removed and replaced by those of another, and . . . that the traditional definition . . . minimizes the possibilit[y] of successful organ transplantation by discouraging physicians, due to their fear of possible civil or criminal liability, from removing donors’ organs until after respiration and heartbeat have ceased and the organs have begun to deteriorate . . .”).

50. *See* INST. OF MED., NON-HEART-BEATING ORGAN TRANSPLANTATION: MEDICAL & ETHICAL ISSUES IN PROCUREMENT 26 (1997) (describing “intense pressure” for maintaining a “short interval” between declaring a donor’s death and procuring her “vital organs”); James M. DuBois, *Non-Heart-Beating Organ Donation: A Defense of the Required Determination of Death*, 27 J.L. MED. & ETHICS 126, 127 (1999).

51. *See What and When Is Death*, 204 JAMA 219 (1968). The Journal of the American Medical Association (“JAMA”) aptly framed the “heart-beating organ donor” dilemma in a 1968 editorial: “If . . . [vital] organs are taken long after death, their chance of survival in another

Over the following decade, the medico-legal complications that accompanied this parade of horrors incited cross-disciplinary intervention.⁵² The medical community responded in 1968 by reifying physiological benchmarks for ascertaining brain death⁵³ – additional neurological criteria that adapted the customary heart-lung definition “to account for the ‘changed conditions’ that a dead body may be attached to a machine so as to exhibit demonstrably false indicia of [somatic] life.”⁵⁴ A corresponding reformation of the anachronistic legal dogma, however, would not gain traction until 1970, when Kansas pioneered the first statutory reformulation of death.⁵⁵

III. THE BIRTH OF STATUTORY DEATH

A. *The Kansas Statute and Its Progeny*

Kansas’ “Act Relating to and Defining Death” foreshadowed many of the hallmarks of its current-day counterparts: two alternative definitions that are applicable “for all purposes . . . any laws to the contrary notwithstanding.”⁵⁶ The first definition codified the traditional cardiopulmonary standard, to wit, an “absence of spontaneous respiratory and cardiac function[s].”⁵⁷ Unlike the common law, however, the Kansas

person is minimized. On the other hand, if they are removed before death can be said to have occurred by the strictest criteria that one can employ, murder has been done.” *Id.* This latter point resonated with criminal defendants, many of whom decried that intervening clinical procedures constituted supervening causes of a homicide victim’s death. *See generally* David B. Sweet, Annotation, *Homicide by Causing Victim’s Brain-Dead Condition*, 42 A.L.R. 4TH 742 (2006).

52. *See* DEFINING DEATH, *supra* note 32, at 6 (“If death were entirely a medical matter, the process of ‘redefinition’ might have been left in the hands of the health professions But, . . . the standards by which death is determined have significance and consequences that are not limited to medical ones.”).

53. *See* Ad Hoc Comm. of the Harvard Med. Sch. to Examine the Definition of Brain Death, *A Definition of Irreversible Coma*, 205 JAMA 337 (1968). A 1968 report by the Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death formulated a triad of physiological criteria for establishing the permanent loss of brain functions, a condition the Committee referred to as “irreversible coma”: (1) non-receptiveness to external stimuli; (2) lack of musculature; and (3) nonexistent reflexive response. *Id.*

54. *People v. Eulo*, 472 N.E.2d 286, 295 (N.Y. 1984).

55. *See* KAN. STAT. ANN. § 77-202 (repealed 1984), *amended by* KAN. STAT. ANN. § 77-205 (1984).

56. *Compare* KAN. STAT. ANN. § 77-202 (repealed 1984) (“A person will be considered medically and legally dead if . . . based on ordinary standards of medical practice, [(1)] there is the absence of spontaneous respiratory and cardiac function . . . [; or] . . . [(2)] there is the absence of spontaneous brain function”), *amended by* KAN. STAT. ANN. § 77-205 (1984), *with* VA. CODE ANN. § 54.1-2972 (2004) (“A person shall be medically and legally dead if . . . based on the ordinary standards of medical practice, [(1)] there is the absence of spontaneous respiratory and spontaneous cardiac functions . . . ; or . . . [(2)] there is the absence of brain stem reflexes, spontaneous brain functions and spontaneous respiratory functions”).

57. KAN. STAT. ANN. § 77-202 (repealed 1984), *amended by* KAN. STAT. ANN. § 77-205 (1984).

statute identified "the time these functions ceased" as the culmination of death,⁵⁸ required that a determination thereof be "based on ordinary standards of medical practice," and restricted such diagnoses to circumstances where "attempts at resuscitation [were] considered hopeless."⁵⁹ The alternative formulation embraced the then-nascent neurological criteria, defined death as "the absence of spontaneous brain function," and deemed it to occur "at the time when such conditions first coincide[d]."⁶⁰ Similar to its cardiopulmonary analogue, a neurological diagnosis was confined to situations where "further attempts at resuscitation or supportive maintenance [would] not succeed."⁶¹

Aside from provoking a cacophony of criticism that "public bodies and laymen . . . ha[d] no role to play in this process of change," the Kansas statute spawned a succession of model acts and variations thereof.⁶² Within ten years nearly half of the United States had appropriated one of five legislative prototypes for defining and determining death: (1) the formulation codified by the State of Kansas;⁶³ (2) a refinement thereof proposed by Professors Capron and Kass;⁶⁴ (3) the Model Definition of Death Act prepared by the American Bar Association ("ABA");⁶⁵ (4) the Model Determination of Death methodology advanced by the American Medical Association ("AMA");⁶⁶ and, (5) the Uniform Brain Death Act ("UBDA") recommended by the National Conference of Commissioners on Uniform State Laws ("NCCUSL").⁶⁷ Some were politically debated and formally adopted by legislative enactment.⁶⁸ Others were deliberated *in camera* and merely decreed by

58. *Id.* At common law, time of death was a question of fact to be established by expert medical testimony and to be determined by a jury. *See, e.g.,* *Tucker v. Lower*, 1 Va. Cir. 124 (Va. Cir. Ct. 1972) ("[I]n determining the time of death, [the jury] could consider in addition to the traditional evidence . . . the time of complete and irreversible loss of all function of the brain; and, whether or not the aforesaid functions were spontaneous or were being maintained artificially or mechanically.").

59. KAN. STAT. ANN. § 77-202 (repealed 1984), *amended by* KAN. STAT. ANN. § 77-205 (1984).

60. *Id.*

61. *Id.*

62. Alexander M. Capron & Leon R. Kass, *A Statutory Definition of the Standards for Determining Human Death: An Appraisal and a Proposal*, 121 U. PA. L. REV. 87, 92 (1972).

63. KAN. STAT. ANN. § 77-202 (repealed 1984), *amended by* KAN. STAT. ANN. § 77-205 (1984).

64. Capron & Kass, *supra* note 62, at 109-17. The 1972 Capron-Kass proposal was subsequently, and substantively, revised by Professor Capron in 1978. Alexander M. Capron, *Legal Definition of Death*, 315 ANN. N.Y. ACAD. SCI. 349, 356 (1978).

65. *Section of Insurance, Negligence, and Compensation Law*, 100 A.B.A. ANN. REP. 231-32 (1978).

66. 243 JAMA 420 (1980) (emphasis supplied).

67. UNIF. BRAIN DEATH ACT § 1, 12 U.L.A. 63 (1978 & Supp. 1996).

68. *See* DEFINING DEATH, *supra* note 32, at 65-66. By 1980, seven states had codified indigenous legislation that did not track any particular exemplar, another seven followed the

judicial fiat.⁶⁹ Each, however, made incrementally more likely the unsavory possibility that a person might satisfy one state's broad definition of death, yet simultaneously fail to satisfy a sister-state's narrowly drafted formulation.

Legal commentators immediately recognized a minefield of medical, legal, and ethical pitfalls in this oblique state of affairs. First, unlike most areas of the law – where “provisions that diverge from one state to the next create, at worst, inconvenience” – legal uncertainty concerning death had a viscerally “jarring effect.”⁷⁰ Second, textual inconsistencies hindered “the process of statutory enactment” because lawmakers – confronted with a smorgasbord of alternatives absent “clear explanation of the significance of their differences” – were increasingly “wary of *all* the choices” before them.⁷¹ Attending to these realities, Congress convened an interdisciplinary public body in 1978 (under the auspices of the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research) to investigate the “implications of . . . defining death, including the advisability of developing a uniform definition” thereof.⁷²

B. *The Uniform Determination of Death Act*

Although modern medicine ambioned the law to reexamine its understanding of life,⁷³ efforts to unify the various articulations of its absence were energized by practical necessity and administrative conve-

Capron-Kass proposal, five adhered to the ABA model, four paralleled the Kansas statute, two adopted the UBDA, and none accepted the AMA methodology. *Id.*

69. *See, e.g.,* Lovato v. Dist. Ct. Tenth Jud. Dist., 601 P.2d 1072, 1081 (Colo. 1979) (en banc) (“[I]n the absence of legislative action . . . [and] until otherwise changed legislatively or judicially, we adopt the provisions of the proposed Uniform Act.”); Swafford v. State, 421 N.E.2d 596, 601-02 (Ind. 1981) (with “no statute to guide us . . . we are unable to ignore the advances made in medical science and technology” and “hold that . . . death . . . may be established by proof of the irreversible cessation of . . . total brain functions”); Commonwealth v. Golston, 366 N.E.2d 744, 748 (Mass. 1977) (“[A]lthough Black’s Law Dictionary does not have the force of a statute or even a judicial decision, . . . its assertion that death is ‘defined by physicians’ in a certain way does not freeze the medical definition for all time”); N.Y.C. Health & Hosp. Corp. v. Sulsona, 367 N.Y.S.2d 686, 691 (N.Y. Special Term 1975) (“[T]he context in which the term ‘death’ is used in . . . the Public Health Law implies a definition consistent with the generally accepted medical practice of doctors primarily concerned with effectuating the purposes of this statute.”); *In re Bowman*, 617 P.2d 731, 738 (Wash. 1980) (en banc) (“[N]o statute in this state has been enacted to define what constitutes death. . . . It is both appropriate and proper, therefore, that this court . . . adopt the provisions of the Uniform Determination of Death Act”).

70. DEFINING DEATH, *supra* note 32, at 72.

71. *Id.* at 73 (emphasis in original).

72. Pub. L. No. 95-622, § 1802(a)(1), 92 Stat. 3439 (1978).

73. The NCCUSL identified several reasons for the disconnect “between current and accepted biomedical practice and the common law.” UNIF. DETERMINATION OF DEATH ACT prefatory note, 12A U.L.A. 589 (1980 & Supp. 1996). The Commissioners were most troubled, however, by the inconsistency between the traditional benchmark for determining death (i.e., “an absence of

nience.⁷⁴ Indeed, the President's Commission not only opined that "developments in medical treatment necessitate[d] a restatement of the standards . . . for determining" death, but also posited that "such a restatement ought preferably . . . be a matter of statutory law . . . uniform among the several states."⁷⁵ In 1980, the NCCUSL embodied these conclusions in the Uniform Determination of Death Act ("UDDA")⁷⁶ – a legislative model to replace the countless conflicting formulations and, thereby, "ease the enactment of good law on death throughout the United States."⁷⁷

The NCCUSL was mindful of the confusion engendered by a decade-long proliferation of patchwork state laws.⁷⁸ Nevertheless, the Commissioners perceived that the discordant ensemble of antecedent statutes resounded the "legislative need" to conflate "accepted biomedical practice and the common law."⁷⁹ To this end, the UDDA enumerates two alternate definitions of death that "reflect the continuity of the traditional [heart-lung] standard and the newer brain-based standard".⁸⁰

An individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead. A determination of death must be made in accordance with accepted medical standards.⁸¹

spontaneous respiratory and cardiac functions") and biomedical technology that could artificially maintain heart and lung activity long after brain functions had irreversibly ceased. *Id.*

74. The Law and Medicine Committee of the ABA explained that:

The advantages of [a] simple direct definition are that it: permits judicial determination of the ultimate fact of death; permits medical determination of the evidentiary fact of death; avoids religious determination of any facts; avoids prescribing the medical criteria; enhances changing medical criteria; enhances local medicine practice tests; . . . covers both civil and criminal law; covers current American judicial decisions; [and] avoids nonphysical sciences.

Frank J. Veith, *Brain Death and Organ Transplantation*, 315 ANNALS N.Y. ACAD. SCI. 416, 430 (1978).

75. DEFINING DEATH, *supra* note 32, at 1.

76. See UNIF. DETERMINATION OF DEATH ACT, *supra* note 73, prefatory note.

77. DEFINING DEATH, *supra* note 32, at 73.

78. See UNIF. DETERMINATION OF DEATH ACT, *supra* note 73, prefatory note.

79. *Id.*

80. DEFINING DEATH, *supra* note 32, at 74.

81. UNIF. DETERMINATION OF DEATH ACT, *supra* note 73, § 1. It is helpful to annotate the UDDA's definition as a first-order logic proposition: $(C_a(x) \wedge R_a(x)) \vee (N_a(x) \wedge S_a(x)) \rightarrow D(x)$. *Cf. id.* In this regard, "x" represents an "individual"; "C_a" represents an "irreversible cessation of circulatory functions, as determined in accordance with accepted medical standards"; "R_a" represents an "irreversible cessation of respiratory functions, as determined in accordance with accepted medical standards"; "N_a" represents an "irreversible cessation of neocortical functions, as determined in accordance with accepted medical standards"; "S_a" represents an "irreversible cessation of brain stem functions, as determined in accordance with accepted medical standards"; and "D" represents "death."

A plain reading of this statute reveals the characteristic traits it inherited from its decisional and positive law ancestry.⁸²

Part (1) codifies the classic cardiopulmonary indicia of somatic death – a person is dead if her heart and lung functions have ceased and neither can be restored nor replaced.⁸³ Despite the NCCUSL's prediction that "the overwhelming majority of cases w[ould] continue to be determined" by this time-honored criterion, its continued exclusivity belied the Commissioners' commitment to ensuring the continual legal recognition of medical innovations.⁸⁴ Accordingly, and to expand upon the common law's narrowly circumscribed confines, Part (2) integrates a neurological definition as an alternate basis for defining death – a person is brain dead if both her higher- and lower-brain have permanently ceased to generate purposeful activity.⁸⁵

The UDDA's brain-based alternative is derived from the Act's predecessor, the UBDA.⁸⁶ Under the UBDA, a person was considered to be dead if she "sustained irreversible cessation of all *functioning* of the *brain*, including the brain stem"⁸⁷ Under the UDDA's modified language, however, an individual who "sustain[s] . . . irreversible cessation of all *functions* of the *entire brain*, including the brain stem, is dead."⁸⁸ At first blush, this minor reformulation might appear to be a distinction without a difference. Yet by requiring a permanent loss of

82. Compare UNIF. DETERMINATION OF DEATH ACT, *supra* note 73, § 1, with KAN. STAT. ANN. § 77-202 (repealed 1984), amended by KAN. STAT. ANN. § 77-205 (1984), and *In re Schmitt's Estate*, 261 Cal. App. 2d 262, 272-73 (Cal. 1st Dist. Ct. App. 1968). Although a plain reading of the UDDA is useful for purposes of tracing the Act's genealogy, more is required to construe and apply the UDDA in practice. First, the meaning of a word or phrase "is determined by its context, the rules of grammar, and common usage," unless it "is defined in the statute" or has "acquired a technical or particular meaning in [the] particular context" of the statute being construed. UNIF. STATUTE & RULE CONSTR. ACT § 2, 14 U.L.A. 483 (1995 & Supp. 1996). Moreover, Section 2 of the UDDA mandates that the Act "be applied and construed to effectuate its general purpose to make uniform the law . . . among states enacting it." UNIF. DETERMINATION OF DEATH ACT, *supra* note 73, § 2.

83. See UNIF. DETERMINATION OF DEATH ACT, *supra* note 73, § 1(1).

84. *Id.* prefatory note.

85. See UNIF. DETERMINATION OF DEATH ACT, *supra* note 73, § 1(2). The human brain comprises three anatomic divisions: (1) the cerebrum; (2) the cerebellum; and (3) the brain stem. See generally David R. Smith, *Legal Recognition of Neocortical Death*, 71 CORNELL L. REV. 850 (1986). Because the cerebrum primarily controls consciousness and cognition, it is traditionally referred to as the "higher brain"; whereas the brain stem, which controls spontaneous and vegetative functions, is referred to as the "lower brain." See *id.* Concomitantly, modern medicine distinguishes between (A) "partial-brain death," the impairment of one or two anatomic divisions; and (B) "whole-brain death," the loss of functions in all three divisions. See *id.*

86. See UNIF. DETERMINATION OF DEATH ACT, *supra* note 73, prefatory note (noting that the UDDA is based in part on the UBDA); UNIF. BRAIN DEATH ACT, *supra* note 67, § 1 (defining death in terms of the quantum and quality of neurological activity).

87. UNIF. BRAIN DEATH ACT, *supra* note 67, § 1 (emphasis supplied).

88. UNIF. DETERMINATION OF DEATH ACT, *supra* note 73, § 1(2) (emphasis supplied).

functions throughout the “*entire brain*,” a concept that embodies all three anatomic divisions,⁸⁹ the NCCUSL reaffirmed that neocortical (i.e., partial-brain) indicia should remain “[in]valid medical or legal bases for determining death.”⁹⁰ Moreover, by recasting the phrase “cessation of all *functioning*” as “cessation of all *functions*,” the NCCUSL intimated that only “cellular activity [which] is organized and directed . . . is []relevant in judging whether the [brain], as opposed to its components, is dead.”⁹¹

To normalize the practical task of making this judgment, the Act complements its physiological definitions of death with procedural guidelines for diagnosing its occurrence.⁹² Most of the UDDA’s predecessors likewise demanded compliance with clinical practices “that ha[d] passed the normal test of scrutiny and adoption by the biomedical community.”⁹³ Because each statutory model was benchmarked against a different standard of care,⁹⁴ however, even slight textual differences proved ample fodder for hindsight-biased assessments – despite that a physician might have “act[ed] in good faith and according to the norms of professional practice and belief.”⁹⁵ To minimize this uncertain exposure to liability, the UDDA clarifies that a determination thereunder need only conform with “accepted medical standards.”⁹⁶ And no person

89. See *supra* note 85 and accompanying text.

90. UNIF. DETERMINATION OF DEATH ACT, *supra* note 73, prefatory note. The term “neocortical death,” also known as “partial-brain death,” encompasses “the terms ‘persistent vegetative state,’ ‘necognitive state,’ ‘apallic syndrome,’ [and] ‘cerebral death’” Smith, *supra* note 85, at 850 n.6. This condition is characterized by a loss of central nervous system activity and a failure to maintain homeostasis; that is, a lack of “self-awareness” and an inability “to respond behaviorally in any major or appropriate way to the environment.” *Id.* Under the UDDA-rejected definition of neocortical death, therefore, a person who manifests neither consciousness nor cognition – the *sine quibus non* of higher-brain activity – is dead notwithstanding the continued presence of brain stem functions. *Cf. id.* Because a partially brain-dead person maintains brain stem activity, however, she would not be considered dead under the UDDA’s whole-brain standard. *Cf. id.*

91. DEFINING DEATH, *supra* note 32, at 75.

92. See UNIF. DETERMINATION OF DEATH ACT, *supra* note 73, § 1.

93. DEFINING DEATH, *supra* note 32, at 78.

94. The formulation proposed by Kansas, and the refinement thereof by Professors Capron and Kass, mandated that a determination of death be “based on *ordinary* standards of medical practice.” KAN. STAT. ANN. § 77-202 (repealed 1984) (emphasis supplied), *amended by* KAN. STAT. ANN. § 77-205 (1984); Capron & Kass, *supra* note 62, at 108-11 (1972). The Model Definition of Death Act prepared by the ABA prescribed that death be defined “according to *usual and customary* standards of medical practice.” *Section of Insurance, Negligence, and Compensation Law*, *supra* note 65, at 231-32 (1978) (emphasis supplied). The AMA’s Model Determination of Death methodology required that a diagnosis of death be “made in accordance with *accepted* medical standards.” 243 JAMA 420 (1980) (emphasis supplied). The UBDA, recommended by the NCCUSL, directed that death be determined “in accordance with *reasonable* medical standards.” UNIF. BRAIN DEATH ACT, *supra* note 67, § 1 (emphasis supplied).

95. DEFINING DEATH, *supra* note 32, at 78.

96. UNIF. DETERMINATION OF DEATH ACT, *supra* note 73, § 1. In other words, compliance

who does so, the NCCUSL commented, “should, or will be, liable for damages in any civil action or subject to prosecution in any criminal proceeding for his acts or the acts of others based on that determination.”⁹⁷ As for which diagnostic tests are “accepted” for the purpose of differentiating the living from the dead, however, the UDDA (like the UBDA before it) is silent.⁹⁸

Consistent with the UDDA’s designation of a general legal standard for determining death – rather than a delimitation of the specific medical procedures by which to do so – the Act’s objective is to articulate death in its broadest definitional sense.⁹⁹ The UDDA’s actual utility, however, is surprisingly limited. First, it is simply inoperative where a person maintains *at least* circulatory, *or* respiratory, *or* higher-brain, *or* lower-brain function(s).¹⁰⁰ Second, the official comments expressly disclaim that “[t]ime of death . . . is not specifically addressed” by the Act.¹⁰¹ Third, the UDDA “does not concern itself with living wills, death with dignity, euthanasia, rules on death certificates, maintaining life support beyond brain death in cases of pregnant women or of organ donors, and protection for the dead body.”¹⁰² For most practical purposes, then, the Act speaks to a relatively narrow range of possible situations within the universe of plausible scenarios where the distinction between life and death is blurred. Because the balance of “these subjects are left [for] other law” to decide,¹⁰³ forty-seven jurisdictions have since codified indigenous answers to the universal questions of whether and when a person has died.¹⁰⁴

with the UDDA standard is not confined merely to “universally adopted” practices, but instead, contemplates any methodology that “has been accepted by a substantial and reputable body” of practitioners. *DEFINING DEATH*, *supra* note 32, at 79.

97. UNIF. DETERMINATION OF DEATH ACT, *supra* note 73, prefatory note.

98. *See id.*; UNIF. BRAIN DEATH ACT, *supra* note 67, prefatory note. The NCCUSL sought to ensure the continual legal recognition of, rather than create statutory shackles for, medical innovations. *See* UNIF. DETERMINATION OF DEATH ACT, *supra* note 73, prefatory note. For this reason, the Commissioners opted not to freeze the UDDA at the then-current level of “scientific sophistication or biomedical technology.” *DEFINING DEATH*, *supra* note 32, at 61. Instead, the Act merely designates “the standards by which death is to be determined and leave[s] to experts in biomedicine the continuing development of criteria and specific tests that fulfill them.” *Id.*

99. UNIF. DETERMINATION OF DEATH ACT, *supra* note 73, prefatory note (“This Act provides comprehensive bases for determining death in all situations.”).

100. *Id.* § 1; *see supra* note 81 and accompanying text.

101. UNIF. DETERMINATION OF DEATH ACT, *supra* note 73, prefatory note (“Time of death is a fact to be determined with all others in each individual case, and may be resolved, when in doubt, upon expert testimony before the appropriate court.”).

102. *Id.*

103. *Id.*

104. *See supra* note 29 and accompanying text. The NCCUSL has subsequently referenced and reiterated the UDDA’s statutory text in other Uniform Acts. *See, e.g.*, UNIF. PROBATE CODE § 1-107(1) (amended 1998), 8 U.L.A. 30 (1969) (“Death occurs when an individual [is determined to be dead under the Uniform Determination of Death Act] [has sustained either (i) irreversible

IV. LIFE AND/OR DEATH UNDER THE UDDA

To be sure, all death laws are invariably anchored in the adjective fundamentals of the UDDA; each represents a statutory “guide [for] those who will decide whether (and if so, when) a person has passed from being alive to being dead.”¹⁰⁵ Nevertheless, and notwithstanding our societal judgments of whether a particular person should (or should not) be dead, these legislative responses are far from substantively unified. In other words, and in per capita terms, the law imposes several related meanings of death upon fifty-one percent of Americans and numerous disparate meanings upon the remaining forty-nine percent.¹⁰⁶

A. *The Taxonomy of Contemporary Death Laws*

Similar to other instances where uniform or model act speaks to a particular subject matter, the fifty-one United States jurisdictions may be bifurcated into discrete classes: (1) jurisdictions that have officially adopted the UDDA; and (2) jurisdictions that have not officially adopted the UDDA. As for the former, thirty-two state legislatures and the District of Columbia have officially adopted the UDDA.¹⁰⁷ As for the latter, eighteen have not.¹⁰⁸ It is not unusual, however, for lawmakers to

cessation of circulatory and respiratory functions or (ii) irreversible cessation of all functions of the entire brain, including the brain stem. A determination of death must be made in accordance with accepted medical standards].”) (explaining that the first set of bracketed language is for use by states that have adopted the UDDA, whereas the second set of bracketed language is for use by states that have not adopted the UDDA).

105. DEFINING DEATH, *supra* note 32, at 55; UNIF. DETERMINATION OF DEATH ACT, *supra* note 73, prefatory note.

106. Based upon the U.S. Census Bureau’s July 2005 state population estimates. U.S. CENSUS BUREAU, POPULATION ESTIMATES, available at <http://www.census.gov/popest/estimates.php> (last visited Apr. 1, 2007); see *infra* fig.2.

107. See UNIF. DETERMINATION OF DEATH ACT, *supra* note 73, gen. notes; see also ALA. CODE § 22-31-1 (2000); ARK. CODE ANN. § 20-17-101 (1991); CAL. HEALTH & SAFETY CODE § 7180 (West 1982); COLO. REV. STAT. ANN. § 12-36-136 (West 1981); DEL. CODE ANN. tit. 24, § 1760 (2005); D.C. CODE § 7-601 (1982); GA. CODE ANN. § 31-10-16 (1992); IDAHO CODE ANN. § 54-1819 (1981); IND. CODE ANN. § 1-1-4-3 (West 1986); KAN. STAT. ANN. § 77-205 (1984); ME. REV. STAT. ANN. tit. 22, § 2811 (1983); MD. CODE ANN., HEALTH-GEN. § 5-202 (West 1998); MICH. COMP. LAWS ANN. § 333.1033 (West 1992); MINN. STAT. ANN. § 145.135 (West 1989); MISS. CODE ANN. § 41-36-3 (West 1981); MO. ANN. STAT. § 194.005 (West 1982); MONT. CODE ANN. § 50-22-101 (1983); NEB. REV. STAT. § 71-7202 (1992); NEV. REV. STAT. ANN. § 451.007 (West 1985); N.H. REV. STAT. ANN. § 141-D:2 (1987); N.M. STAT. ANN. § 12-2-4 (West 1993); N.D. CENT. CODE § 23-06.3-01 (1989); OHIO REV. CODE ANN. § 2108.30 (West 1982); OKLA. STAT. ANN. tit. 63, § 3122 (West 1986); OR. REV. STAT. ANN. § 432.300 (West 1997); 35 PA. STAT. ANN. § 10203 (West 1983); R.I. GEN. LAWS § 23-4-16 (1982); S.C. CODE ANN. § 44-43-460 (2006); S.D. CODIFIED LAWS § 34-25-18.1 (1990); UTAH CODE ANN. § 26-34-2 (2007); VT. STAT. ANN. tit. 18, § 5218 (1981); W. VA. CODE ANN. § 16-10-1 (West 1989); WYO. STAT. ANN. § 35-19-101 (1985).

108. See ALASKA STAT. § 09.68.120 (1995); ARIZ. REV. STAT. ANN. § 14-1107 (1994); CONN. GEN. STAT. ANN. § 19a-504a (West 1984); § 382.009, FLA. STAT. (1987); HAW. REV. STAT. § 327C-1 (1998); 5 755 ILL. COMP. STAT. ANN. 40/10 (West 1998); KY. REV. STAT. ANN.

“substantially adopt the major provisions of a Uniform Act and, yet, depart from the official text” by either substituting, omitting, or adding to the model’s original language.¹⁰⁹ Hence, four second-tier categories may further be distinguished: (1)(A) jurisdictions that have officially adopted the UDDA as originally drafted by the NCCUSL; (1)(B) jurisdictions that have officially adopted the UDDA, but with substantive modifications thereto; (2)(A) jurisdictions that have not officially adopted the UDDA, but have codified native death legislation; and (2)(B) jurisdictions that have neither officially adopted the UDDA nor codified native death legislation.¹¹⁰ In this regard, fourteen states and the District of Columbia have adopted the UDDA in its original form,¹¹¹ eighteen have adapted an abbreviated or augmented analog thereof,¹¹² fourteen have codified death laws of indigenous origin,¹¹³ and four have no such legislation whatsoever.¹¹⁴

Although all forty-seven statutory models fit neatly into one of these four taxonomic categories, each codification has a distinctive tex-

§ 446.400 (West 1986); LA. REV. STAT. ANN. § 9:111 (2001); N.J. STAT. ANN. § 26:6A-3 (West 1991); N.C. GEN. STAT. ANN. § 90-323 (West 1979); TENN. CODE ANN. § 68-3-501 (1982); TEX. HEALTH & SAFETY CODE ANN. § 671.001 (Vernon 1995); VA. CODE ANN. § 54.1-2972 (West 2004); WIS. STAT. ANN. § 146.71 (1982). As of March 1, 2006, Iowa, Massachusetts, New York, and Washington have neither legislated criteria for defining death nor codified the standards for determining its occurrence.

109. UNIF. DETERMINATION OF DEATH ACT, *supra* note 73, prefatory note.

110. *See infra* fig.2.

111. *See* ARK. CODE ANN. § 20-17-101 (1991); CAL. HEALTH & SAFETY CODE § 7180 (West 1982); D.C. CODE § 7-601 (1982); KAN. STAT. ANN. § 77-205 (1984); ME. REV. STAT. ANN. tit. 22, § 2811 (1983); MISS. CODE ANN. § 41-36-3 (West 1981); MONT. CODE ANN. § 50-22-101 (1983); N.H. REV. STAT. ANN. § 141-D:2 (1987); N.D. CENT. CODE § 23-06.3-01 (1989); OR. REV. STAT. ANN. § 432.300 (West 1997); S.C. CODE ANN. § 44-43-460 (2006); S.D. CODIFIED LAWS § 34-25-18.1 (1990); UTAH CODE ANN. § 26-34-2 (2007); W. VA. CODE ANN. § 16-10-1 (West 1989); WYO. STAT. ANN. § 35-19-101 (1985).

112. *See* ALA. CODE § 22-31-1 (2000); COLO. REV. STAT. ANN. § 12-36-136 (West 1981); DEL. CODE ANN. tit. 24, § 1760 (2005); GA. CODE ANN. § 31-10-16 (1992); IDAHO CODE ANN. § 54-1819 (1981); IND. CODE ANN. § 1-1-4-3 (West 1986); MD. CODE ANN., HEALTH-GEN. § 5-202 (West 1998); MICH. COMP. LAWS ANN. § 333.1033 (West 1992); MINN. STAT. ANN. § 145.135 (West 1989); MO. ANN. STAT. § 194.005 (West 1982); NEB. REV. STAT. § 71-7202 (1992); NEV. REV. STAT. ANN. § 451.007 (West 1985); N.M. STAT. ANN. § 12-2-4 (West 1993); OHIO REV. CODE ANN. § 2108.30 (West 1982); OKLA. STAT. ANN. tit. 63, § 3122 (West 1986); 35 PA. STAT. ANN. § 10203 (West 1983); R.I. GEN. LAWS § 23-4-16 (1982); VT. STAT. ANN. tit. 18, § 5218 (1981).

113. *See* ALASKA STAT. § 09.68.120 (1995); ARIZ. REV. STAT. ANN. § 14-1107 (1994); CONN. GEN. STAT. ANN. § 19a-504a (West 1984); § 382.009, FLA. STAT. (1987); HAW. REV. STAT. § 327C-1 (1998); 755 ILL. COMP. STAT. ANN. 40/10 (West 1998); KY. REV. STAT. ANN. § 446.400 (West 1986); LA. REV. STAT. ANN. § 9:111 (2001); N.J. STAT. ANN. § 26:6A-3 (West 1991); N.C. GEN. STAT. ANN. § 90-323 (West 1979); TENN. CODE ANN. § 68-3-501 (1982); TEX. HEALTH & SAFETY CODE ANN. § 671.001 (Vernon 1995); VA. CODE ANN. § 54.1-2972 (West 2004); WIS. STAT. ANN. § 146.71 (West 1982).

114. As of March 1, 2006, Iowa, Massachusetts, New York, and Washington have neither legislated criteria for defining death nor codified the standards for determining its occurrence.

ture – a product of the extent to which its provisions attempt to legislate and, thereby, actually regulate death.¹¹⁵ How effectively a particular model does so hinges upon the unique characteristics of two mainstay constituents: (i) definitional components; and (ii) determinative components.¹¹⁶ The first imbue substantive medical meaning to the term “death,” whereas the second impart procedural legal standards for determining its occurrence. Both, however, are integral to regulating “the practical task of determining whether a person has died.”¹¹⁷ Accordingly, a balanced appraisal of any death law is informed by an examination of each component in the context of its composite elements: (i)(a) definitional applicability; (i)(b) definitional focus; (i)(c) definitional indicia; (ii)(a) determinative prerequisites; (ii)(b) determinative involvement; and (ii)(c) determinative criteria.

B. *The Anatomy of Contemporary Death Laws: Definitional Components*

1. DEFINITIONAL APPLICABILITY

Evaluating the scope of a death law’s purview enables the addressee to anticipate what medico-legal events might follow from a person’s satisfying the codified definition.¹¹⁸ This analysis, however, assesses more than just the degree to which a determination of death could affect one’s legal rights and relations; it also furnishes insight into the drafting body’s normative sentiment towards the extent to which death should be legislated. The nine statutes that either explicitly or implicitly address this issue span four increments of definitional applicability, ranging from broad to narrow.

115. See Capron & Kass, *supra* note 62, at 102. Professors Capron and Kass identified four distinct “levels of ‘definitions’” for legislating death: “(1) the basic concept or idea; (2) general physiological standards; (3) operational criteria; and (4) specific tests or procedures.” *Id.* Because of the likelihood that operational criteria and specific tests might change “with advances in biomedical knowledge and refinements in technique,” the President’s Commission favored, and the UDDA reflects, the second definitional level (i.e., general physiological standards). *DEFINING DEATH*, *supra* note 32, at 1; UNIF. DETERMINATION OF DEATH ACT, *supra* note 73, prefatory note (“The medical profession remains free to formulate acceptable medical practices and to utilize new biomedical knowledge, diagnostic tests, and equipment.”).

116. This dichotomy is exemplified by the UDDA. *Cf.* UNIF. DETERMINATION OF DEATH ACT, *supra* note 73, § 1. The Act’s first sentence speaks to *defining* death (i.e., “An individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead.”). *Id.* The Act’s second sentence speaks to *determining* death (i.e., “A determination of death must be made in accordance with accepted medical standards.”). *Id.*

117. See Capron & Kass, *supra* note 62, at 102.

118. Examples of the medico-legal events that might follow from a person’s satisfying a statutory definition of death include: pronouncing and recording death, harvesting and transplanting organs, autopsy and burial, probate and devolution, etc. See *id.* at 104.

The broadest sense of definitional applicability is exemplified by the Maryland statute's proviso that it "shall be used for all purposes."¹¹⁹ Although the phrase "all purposes" is undoubtedly capacious,¹²⁰ it does little to circumscribe the definition's actual reach – unless one construes the phrase "all purposes" in the context of the narrower language other jurisdictions employ to cabin the use of their respective statutes. For example, the New Mexico legislation specifies its tripartite applicability "[f]or all medical, legal and statutory purposes."¹²¹ In contrast, Nevada's definition may be used for both "legal and medical purposes";¹²² Missouri's, solely "for legal purposes."¹²³ Surprisingly, all four of these articulations, each with a descending degree of applicability, embody official adoptions of the UDDA¹²⁴ – whose statutory text does not specify its definitional applicability.¹²⁵ Rather, the NCCUSL prefatorily notes that the Act is intended to "provide[] comprehensive bases for determining death in *all* situations."¹²⁶

On the one hand, it is semantically intuitive to infer that an all-purpose definition may, *a fortiori*, be applied for any legal, medical, or statutory purpose. On the other hand, it is not logically sound to conclude that an all-purpose definition may *only* be used for these three reasons. Presumably the circumstances that implicate death's definition themselves implicate more than just legal, medical, and statutory needs.¹²⁷ What are the other possible purposes, then, for which an all-purpose definition could apply? Alternatively, what are the illegitimate purposes for which a definition so restricted must not be employed? Because these questions are not unique to the "all purposes" context, their answers may be culled by a more focused investigation.

Connecticut's statutory definition, for example, is applicable only "for purposes of making a determination concerning the continuation or

119. MD. CODE ANN., HEALTH-GEN. § 5-201 (West 1982); *accord* HAW. REV. STAT. § 327C-1 (1998); VA. CODE ANN. § 54.1-2972 (West 2004).

120. When used as an adjective to modify a plural subject, the word "all" means "the entire number of . . . individual components of" the plural subject "without exception." 1 OXFORD ENGLISH DICTIONARY 324 (2d ed. 1989).

121. N.M. STAT. ANN. § 12-2-4 (West 1993).

122. NEV. REV. STAT. ANN. § 451.007 (West 1985); *accord* § 382.009, FLA. STAT. (1987).

123. MO. ANN. STAT. § 194.005 (West 1982); *accord* KY. REV. STAT. ANN. § 446.400 (West 1986).

124. UNIF. DETERMINATION OF DEATH ACT, *supra* note 73, gen. notes.

125. *See id.* § 1.

126. *Id.* prefatory note (emphasis supplied).

127. Examples of other needs implicated by circumstances that implicate death's definition include: anthropological, biological, deontological, diabolical, emotional, epistemological, ethical, familial, financial, philosophical, political, practical, psychological, sociological, teleological, theological, etc.

removal of any life support system.”¹²⁸ While there are innumerable reasons for withholding or withdrawing life support,¹²⁹ its active administration and willful termination generally are embraced by definitions that may be applied “for medical purposes.”¹³⁰ The Connecticut articulation, therefore, also admits of an alternative, and dramatically less restrictive, construction. One could frame a colorable argument that a nuanced interpretation of the clause “for purposes of making a determination” contemplates *any purpose* germane to end-of-life decisionmaking – a veritable artist’s palette of purposes limited only by the attorney’s creativity and imagination.¹³¹

More troublesome than these ambiguities concerning the applicability (or inapplicability) of a single definition, is the medico-legal uncertainty engendered by Illinois’ numerous definitions of a single term. Pursuant to Illinois’ Health Care Surrogate Act, “[d]eath” means . . . there is (i) an irreversible cessation of circulatory and respiratory functions *or* (ii) an irreversible cessation of all functions of the entire brain, including the brain stem.”¹³² For purposes of organ and tissue donation, however, the Illinois legislature has determined that “death” *only* “means . . . the irreversible cessation of total brain function.”¹³³ Unquestionably, the law is no stranger to defining a single word in various ways, with differing definitions befitting different applications.¹³⁴ “One wonders, however, whether it does not appear somewhat foolish for the [same state] to offer a number of arbitrary definitions of [this] natural phenomenon”¹³⁵ Case in point, the bizarre interplay between Illinois’ alternatively applicable statutes apparently *requires* that Irma Illinoisan (an organ donor who manifests only a permanent cessation of heart-lung activity) be deemed legally alive,¹³⁶ but arguably *permits* Irving Illinoisan (a non-donor who exhibits identical physiologi-

128. CONN. GEN. STAT. ANN. § 19a-504a (West 1984).

129. See *supra* note 127.

130. See, e.g., § 382.009, FLA. STAT. (1987); NEV. REV. STAT. ANN. § 451.007 (West 1985); N.M. STAT. ANN. § 12-2-4 (West 1993); cf. HAW. REV. STAT. § 327C-1 (1998); MD. CODE ANN., HEALTH-GEN. §§ 5-201 (West 1982); VA. CODE ANN. § 54.1-2972 (West 2004).

131. Cf. CONN. GEN. STAT. ANN. § 19a-504a (West 1984).

132. 755 ILL. COMP. STAT. ANN. § 40/10 (West 1998) (emphasis supplied). Although this definition of death is evocative of the UDDA articulation, Illinois has not officially adopted the UDDA. See UNIF. DETERMINATION OF DEATH ACT, *supra* note 73, gen. notes.

133. 755 ILL. COMP. STAT. ANN. § 50/1-10 (West 2004).

134. For example, the verb “enjoin” means both “[t]o legally prohibit or restrain” as well as “[t]o prescribe, mandate, or strongly encourage.” BLACK’S LAW DICTIONARY 2004, *supra* note 42, at 570. Likewise, the verb “sanction” means both “[t]o approve, authorize, or support” as well as “[t]o penalize.” *Id.* at 1369.

135. Capron & Kass, *supra* note 62, at 106.

136. Cf. 755 ILL. COMP. STAT. ANN. § 50/1-10 (West 2004).

cal indicia) to be diagnosed legally dead.¹³⁷

To be sure, neither jurisdictions with a single definition of restricted applicability nor those with multiple definitions of different applicability impose a consistent standard that may be employed in all end-of-life situations. Rather, both statutory regimes distinguish “different ‘kinds’ of death,”¹³⁸ designate “the same person ‘dead’ for one purpose [yet] ‘alive’ for another,”¹³⁹ and deem “some people . . . ‘more dead’ than others.”¹⁴⁰ In so doing, these states effectively vest surrogates and “soon-to-be survivors” with the authority to legally define a putative decedent’s legal status. So long as a persuasive purpose can be adduced for determining death vis-à-vis a particular definition, and that purpose is at least implicitly encompassed by the controlling law’s definitional applicability, then the decedent is (for such purpose) dead.¹⁴¹

Naturally, the difficulty of concocting a permissible justification for applying a given definition is inversely proportional to the expansiveness of its purview (i.e., the broader a statute’s definitional applicability, the easier it becomes for one to contrive a permissible justification). Consequently, it would seem sensible that a terminally ill annuitant might favor a narrowly applicable death law – under which it should be relatively more difficult to consider her dead (and, thereby, terminate her stream of income) than under a broadly applicable definition.¹⁴² Con-

137. *Cf. id.* § 40/10. Although this unseemly allegory might appear apocryphal, it illustrates the unintended consequences of well-intentioned legislation that overshoots its intended target. On February 11, 1981, extensive neurological examinations confirmed that Melanie Bacchiochi had sustained a complete and irreversible loss of neurological activity. *See* Fred Fabro, *Bacchiochi vs. Johnson Memorial Hospital*, 45 CONN. MED. 267 (1981). Yet, because of uncertainty concerning the applicability of Connecticut’s death legislation – a brain-death statute that, at the time, applied only to organ transplantation – Melanie’s physician refused to terminate life support. *See id.* “It is ironic,” he decried, “that if [Melanie] had been a donor, she could have [already] been pronounced dead . . . and the respirator could have been withdrawn. Dead for transplantation, but not dead otherwise!” *Id.* at 268.

138. *DEFINING DEATH*, *supra* note 32, at 60.

139. *Id.*

140. Capron & Kass, *supra* note 62, at 106.

141. In Illinois, however, the “putative decedent” arguably retains significant autonomy concerning how and when she is deemed dead. By granting *inter vivos* (perhaps, even *causa mortis*) consent to post-mortem organ donation, the Illinoisan could significantly limit the likelihood of opportunistic skullduggery – no longer could her death be determined by applying the traditional heart-lung definition; only a brain-death standard would suffice. *Compare* 755 ILL. COMP. STAT. ANN. § 50/1-10 (West 2004) (defining “death,” for purposes of organ and tissue donation, as “the irreversible cessation of total brain function”), *with* 755 ILL. COMP. STAT. ANN. § 40/10 (West 1998) (defining “death,” for purposes of surrogate decisionmaking, as either “(i) an irreversible cessation of circulatory and respiratory functions or (ii) an irreversible cessation of all functions of the entire brain, including the brain stem”).

142. *Cf., e.g.*, 5 U.S.C. § 8345(c) (1994) (“The annuity of a retired [federal] employee . . . terminates on the day of death The annuity of a survivor terminates on the last day of the month before death”); UNIF. PERIODIC PAYMENT OF JUDGMENTS ACT § 13(a), 14 U.L.A. 95 (1990) (“[L]iability to a claimant for periodic [judgment] payments not yet due for medical

versely, it would seem equally reasonable that an unscrupulous legatee would benefit by a broadly applicable definition – under which it might be comparatively easy to declare a “testator-to-be” dead, minimize the medical expenses associated with maintaining life, and thereby expedite the maximum potential windfall.¹⁴³ Then again, less malevolent kindred may also favor the broadly applicable definition’s flexibility to accelerate a loved one’s painful demise, diminish the financial burden of ongoing medical care, and alleviate the emotional strain on family and friends.

2. DEFINITIONAL FOCUS

a. Subject Matter

Despite their linguistic differences, the definitional components of each death law imbue the word-symbol “death” with substantive meaning. Yet, the method by which a statute can derive that meaning varies between one of two semantic alternatives. Four jurisdictions deductively define a biological occurrence;¹⁴⁴ forty-three inductively define a biological condition.¹⁴⁵ Pragmatically, both approaches appropriately

expenses terminates upon the claimant’s death.”). Generally, an annuity that specifies an expiration date does not terminate when the annuitant dies prior thereto. 4 AM. JUR. 2D *Annuities* § 7 (2006). If the instrument “shows an intention that payments shall be personal to the beneficiary,” however, the right to future income “will not pass to the annuitant’s estate upon . . . her death before the expiration of such period.” *Id.*

143. *Cf., e.g.*, UNIF. PROBATE CODE § 3-101 (amended 1998), 8 U.L.A. 380 (1969) (“Upon the death of a person, his real and personal property devolves to the persons to whom it is devised by his . . . will or to those indicated as substitutes for them in . . . circumstances affecting the devolution of testate estate[;] or in the absence of testamentary disposition, to his heirs or to those indicated as substitutes for them in . . . circumstances affecting devolution of intestate estates . . .”); UNIF. DISPOSITION OF CMTY. PROP. RIGHTS AT DEATH ACT § 3, 8A U.L.A. 128 (1971) (“Upon death of a married person, one-half of [any community] property . . . is the property of the surviving spouse and is not subject to testamentary disposition by the decedent or distribution under the laws of succession One-half of that property is the property of the decedent and is subject to testamentary disposition or distribution under the laws of succession”).

144. *See* 755 ILL. COMP. STAT. ANN. 40/10 (West 1998); KY. REV. STAT. ANN. § 446.400 (1986); MO. ANN. STAT. § 194.005 (West 1982); N.M. STAT. ANN. § 12-2-4 (West 1993).

145. *See* ALA. CODE § 22-31-1 (2000); ALASKA STAT. § 09.68.120 (1995); ARIZ. REV. STAT. ANN. § 14-1107 (1994); ARK. CODE ANN. § 20-17-101 (1991); CAL. HEALTH & SAFETY CODE § 7180 (West 1982); COLO. REV. STAT. ANN. § 12-36-136 (West 1981); CONN. GEN. STAT. ANN. § 19a-504a (West 1984); DEL. CODE ANN. tit. 24, § 1760 (2005); D.C. CODE § 7-601 (1982); § 382.009, FLA. STAT. (1987); GA. CODE ANN. § 31-10-16 (1992); HAW. REV. STAT. § 327C-1 (1998); IDAHO CODE ANN. § 54-1819 (1981); IND. CODE ANN. § 1-1-4-3 (West 1986); KAN. STAT. ANN. § 77-205 (1984); LA. REV. STAT. ANN. § 9:111 (2001); ME. REV. STAT. ANN. tit. 22, § 2811 (1983); MD. CODE ANN., HEALTH-GEN. § 5-202 (West 1998); MICH. COMP. LAWS ANN. § 333.1033 (West 1992); MINN. STAT. ANN. § 145.135 (West 1989); MISS. CODE ANN. § 41-36-3 (West 1981); MONT. CODE ANN. § 50-22-101 (1983); NEB. REV. STAT. § 71-7202 (1992); NEV. REV. STAT. ANN. § 451.007 (West 1985); N.H. REV. STAT. ANN. § 141-D:2 (1987); N.J. STAT. ANN. § 26:6A-3 (West 1991); N.C. GEN. STAT. ANN. § 90-323 (West 1979); N.D. CENT. CODE § 23-06.3-01 (1989); OHIO REV. CODE ANN. § 2108.30 (West 1982); OKLA. STAT. ANN. tit. 63,

distinguish the antecedent question of “when does death occur” from the consequent inquiry of “has death occurred.” Physiologically, however, only the former actually defines “death,” whereas the latter only accurately defines “dead.”¹⁴⁶

The UDDA inductively concludes that “an individual who has sustained either (1) . . . or (2) . . . *is dead*.”¹⁴⁷ This statutory vantage is retrospective in nature; it looks backward in time from the moment where a determination is being made and enables the addressee to infer that death has already occurred because the decedent currently manifests certain physiological indicia.¹⁴⁸ In other words, the *ex post* perspective adopted by UDDA-style legislation “assumes that each dead person [already] became dead at some moment prior to the time of diagnosis.”¹⁴⁹ In contrast, New Mexico’s statutory definition empowers its addressee to deduce that a living person will later become dead at the instant when certain conditions precedent are satisfied: “[D]eath occurs when an individual has sustained either (1) . . . or (2)”¹⁵⁰ This *ex ante* viewpoint looks forward in time, toward a death event that may or may not have already occurred.¹⁵¹

The distinction between statutes couched in terms of “dead” versus “death” cannot be underestimated. Unlike the New Mexico legislation, which fixes a precise *articulo mortis*, the UDDA does not characterize this issue as one to be resolved statutorily.¹⁵² Rather, the Act merely

§ 3122 (West 1986); OR. REV. STAT. ANN. § 432.300 (West 1997); 35 PA. STAT. ANN. § 10203 (West 1983); R.I. GEN. LAWS § 23-4-16 (1982); S.C. CODE ANN. § 44-43-460 (2006); S.D. CODIFIED LAWS § 34-25-18.1 (1990); TENN. CODE ANN. § 68-3-501 (1982); TEX. HEALTH & SAFETY CODE ANN. § 671.001 (Vernon 1995); UTAH CODE ANN. § 26-34-2 (2007); VT. STAT. ANN. tit. 18, § 5218 (1981); VA. CODE ANN. § 54.1-2972 (West 2004); W. VA. CODE ANN. § 16-10-1 (West 1989); WIS. STAT. ANN. § 146.71 (West 1982); WYO. STAT. ANN. § 35-19-101 (1985); accord UNIF. DETERMINATION OF DEATH ACT, *supra* note 73, § 1.

146. Many scholars assert that death is a biological process – evidenced by the fact that certain organs may endure warm ischemia and, thereby, survive the death of the host body. DuBois, *supra* note 50, at 128-29. Others contend, and the President’s Commission concurred, that “death should be viewed not as a process but as the event that separates the process of dying from the process of disintegration.” See DEFINING DEATH, *supra* note 32, at 77 (quoting James L. Bernat, Charles M. Culver & Bernard Gert, *On the Definition and Criterion of Death*, 94 ANNALS INTERNAL MED. 389 (1981)).

147. UNIF. DETERMINATION OF DEATH ACT, *supra* note 73, § 1 (emphasis supplied). Although “[h]eadings and titles may not [generally] be used in construing a statute or rule,” UNIF. STATUTE & RULE CONSTR. ACT § 13, 14 U.L.A. 493 (1995 & Supp. 1996), one wonders if the name “Uniform Determination of Death Act” is not, in fact, a misnomer – a more accurate title being the “Uniform Determination of Dead Act.”

148. See DEFINING DEATH, *supra* note 32, at 77.

149. *Id.*

150. N.M. STAT. ANN. § 12-2-4 (West 1993) (emphasis supplied).

151. Cf. DEFINING DEATH, *supra* note 32, at 76-77.

152. UNIF. DETERMINATION OF DEATH ACT, *supra* note 73, prefatory note. It could be argued, however, that the NCCUSL implicitly recanted this position by recapitulating a rephrased version

inquires “whether death has or has not occurred,” and implies that the moment of its occurrence is a “matter of estimation”¹⁵³ – a question of fact “to be determined with all others in each individual case” based upon “expert testimony before the appropriate court.”¹⁵⁴ Ascertaining one’s time of death, however, not just its onset, is frequently the dispositive factor in establishing legal rights and relations. Consequently, a lack of statutory consensus regarding when a person has died assures discomfiting uncertainty regarding what it means to have done so.

The viability of one’s claim to devolved property, right to exempt property, or membership status as to a class gift frequently hinges upon whether the purported taker survived the decedent by a prescribed statutory interval (typically, 120 hours).¹⁵⁵ An insurance beneficiary may not be entitled to double indemnity unless the insured dies within a designated time frame following an accident; in fact, a beneficiary may not be entitled to any proceeds at all if the insured dies before the policy’s exclusionary period has lapsed.¹⁵⁶ Surviving relatives are obligated to return most statutory benefits they receive subsequent to the recipient’s demise.¹⁵⁷ Hence, it would seem strategically advantageous for litigants engaged in such disputes to leverage the UDDA’s malleable time-of-death analysis in order to finesse the moment when the decedent is deemed to have died.

of the UDDA in the Uniform Probate Code: “Death occurs *when* an individual . . . has sustained either (i) . . . or (ii)” UNIF. PROBATE CODE § 1-107(1) (amended 1998), 8 U.L.A. 30 (1969) (emphasis supplied).

153. A.L. Moses, *Uniform Determination of Death Act Adds Certainty to the Definition of Death*, 16 EST. PLAN. 276, 277 (1989) (quoting John M. McCabe, Legislative Director of the NCCUSL).

154. UNIF. DETERMINATION OF DEATH ACT, *supra* note 73, prefatory note.

155. See UNIF. SIMULTANEOUS DEATH ACT § 2, 8B U.L.A. 148 (1993) (“[I]f the title to property, the devolution of property, the right to elect an interest in property, or the right to exempt property, homestead or family allowance depends upon an individual’s survivorship of the death of another individual, an individual who is not established by clear and convincing evidence to have survived the other individual by 120 hours is deemed to have predeceased the other individual.”); UNIF. PROBATE CODE § 1-107(6) (amended 1998), 8 U.L.A. 30 (1969) (“In the absence of evidence disputing the time of death stated on a [certified or authenticated copy of a death certificate], a [certified or authenticated copy of a death certificate] that states a time of death 120 hours or more after the time of death of another individual, however the time of death of the other individual is determined, establishes by clear and convincing evidence that the individual survived the other individual by 120 hours.”).

156. See Meyers, *supra* note 40, § 11.

157. See, e.g., 42 C.F.R. § 407.27(a) (“Entitlement [to Supplemental Medical Insurance (“S.M.I.”)] ends on the last day of the month in which the individual dies.”); 20 C.F.R. § 416.1334 (“Eligibility for [Supplemental Security Income (“S.S.I.”)] benefits ends with the month in which the recipient dies. Payments are terminated effective with the month after the month of death.”); SOC. SEC. ADMIN., SSA PUB. NO. 05-10008, HOW SOCIAL SECURITY CAN HELP YOU WHEN A FAMILY MEMBER DIES (2004), available at <http://www.ssa.gov/pubs/10008.html> (“If the deceased was receiving Social Security benefits, you must return the benefit received for the month of death or any later months.”).

From a tax perspective, the extent of a decedent's estate is generally a function of ownership interests held "at the time of his death,"¹⁵⁸ and the assessment of an estate's component assets is based on their date-of-death value.¹⁵⁹ Accordingly, a prescient executor might arguably find safe harbor for decreasing (or, the Internal Revenue Service, its own loophole for increasing) an estate's taxable base within a fluid time-of-death determination.¹⁶⁰ Alternatively, a "soon-to-be decedent" whose time of death can be machinated to occur after 12:01 AM on January 1 of the following calendar year might profit from a reduction of his taxable estate by – and donees would enjoy the largesse of – an additional spate of gratuitous *inter vivos* transfers excluded from federal gift taxation.¹⁶¹ Better yet, a "tax-averse-testator" could avoid the federal estate tax altogether by finagling her time of death to occur after 12:01 AM on January 1, 2010 (when the tax is scheduled for repeal) but before 11:59 PM on December 31, 2010 (when the tax is scheduled for reinstatement).¹⁶²

158. I.R.C. § 2033 (2003) ("[T]he gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death.").

159. § 2031(a) ("The value of the gross estate of the decedent shall be determined by including . . . the [fair market] value at the time of his death of all property, real or personal, tangible or intangible, wherever situated."). *But see* § 2032(a) ("[I]f the executor so elects . . . [:] (1) In the case of property . . . disposed of within 6 months after the decedent's death, such property [may] be valued as of the date of . . . disposition[; and] (2) In the case of property not . . . disposed of within 6 months after the decedent's death, such property shall be valued as of the date 6 months after the decedent's death . . .").

160. *See* §§ 2031-2033.

161. *Cf.* § 2503(b)(1). The first cost-of-living adjusted \$10,000 in gifts made to each donee during the calendar year is excluded from "the total amount of [taxable] gifts made during such year." *Id.* Where the donor is married at the time of the gift, however, she may effectively double the annual exclusion (i.e., by making a \$20,000 tax-free split-gift from the donor and her spouse to the donee). *See id.* § 2513(a)(1) ("A gift made by one spouse to any person other than his spouse shall . . . be considered as made one-half by him and one-half by his spouse."). Moreover, where *both* the donor *and* the donee are each married at the time of the gift, they may effectively quadruple the annual exclusion (i.e., by making an initial tax-free split-gift of \$20,000 from the donor and her spouse to the donee, and, by making a second tax-free split-gift of \$20,000 from the donor and her spouse to the initial donee's spouse.). *Cf. id.* Thus, by postponing the donor's death until after January 1 of the following calendar year, the extent to which she may deplete her taxable estate – with no adverse estate tax consequences – grows eight-fold on a per-donee basis. *Cf. id.* It should also be noted that the federal estate tax regime, like the federal income tax scheme, is progressive in nature. *See* § 2502(a) ("The [gift] tax imposed by section 2501 . . . shall be . . . computed under [the rate schedule in] section 2001(c)."). As a result, diminishing the donor's taxable estate via non-taxable *inter vivos* gifts, both reduces (on a graduated basis) the estate's overall tax liability and concomitantly increases the bounty available for testamentary bequests and devises. *See id.*

162. *Cf.* § 2210(a) ("[C]hapter [11 of the Internal Revenue Code] shall not apply to the estates of decedents dying after December 31, 2009."). Of the sweeping changes heralded by the Economic Growth and Tax Relief Reconciliation Act of 2001, the most notable is that "[t]he estate tax has been repealed for 2010." I.R.S. PUB. NO. 950, INTRODUCTION TO ESTATE AND GIFT TAXES (2006), available at <http://www.irs.gov/pub/irs-pdf/p950.pdf>. "The provisions for these changes," however, "are currently set to expire for estates of decedents dying . . . after December 31, 2010. *Id.* In words, because "[t]he estate tax is repealed [only] for decedents dying after 2009

b. Grammatical Modality

Grammarians define “modality” as “[t]he expression of . . . present likelihood or . . . obligation” conveyed by the “mood” of a verb.¹⁶³ The English language, in turn, traditionally recognizes three such moods:¹⁶⁴ (1) the “indicative,” a verbal form that denotes a statement of fact;¹⁶⁵ (2) the “imperative,” a verbal form that expresses a command;¹⁶⁶ and (3) the “subjunctive,” a verbal form that conveys a suggestion or possibility.¹⁶⁷ Thus, by evaluating “the factuality of what is said” by the drafting legislature (i.e., “its certainty, probability, or possibility”) and assessing the extent of the addressee’s “human control over the situation” (i.e., her “ability, permission, . . . [or] obligation”),¹⁶⁸ interpreting a death law’s mood enables the addressee to predict the likelihood that a person who satisfies the codified definition will be deemed legally dead.

Most death laws signal a “deontic” modality; that is, each “involves the giving of directives” and communicates the extent to which its drafters require conformity therewith.¹⁶⁹ Yet, the mood with which each statute conveys its requisite degree compliance varies – and, hence, the requisite degrees of compliance themselves vary – between one of three alternative constructions. Thirty-seven jurisdictions, as well as the

and before 2011,” I.R.S. PUB. NO. 559, SURVIVORS, EXECUTORS, AND ADMINISTRATORS (2006), available at <http://www.irs.gov/pub/irs-pdf/p559.pdf>, “[i]f you don’t die on time, your legatees could lose millions of dollars.” Arden Dale, *Estate Taxes Flummox Planners*, WALL ST. J., Apr. 5, 2007, at D2.

163. SYLVIA CHALKER & EDMUND WEINER, THE OXFORD DICTIONARY OF ENGLISH GRAMMAR 243 (1994).

164. *Id.* at 247.

165. *Id.* at 202.

166. *Id.* at 197.

167. *Id.* at 381.

168. SIDNEY GREENBAUM, THE OXFORD ENGLISH GRAMMAR 80 (1996).

169. TOM MCARTHUR, THE OXFORD COMPANION TO THE ENGLISH LANGUAGE 664 (1992).

UDDA, express the indicative mood;¹⁷⁰ five, the imperative;¹⁷¹ another five, the subjunctive.¹⁷²

The California Determination of Death Act, like the UDDA, typifies the indicative mood in pronouncing that “[a]n individual who has sustained either (1) . . . , or (2) . . . , *is* dead.”¹⁷³ Here, the inflected verb “is” implicitly substitutes for the modal verb “shall” and, thereby, forecloses any possibility of vacillating over whether a person who satisfies a designated criterion is not alive.¹⁷⁴ In other words, because “[a]n individual who has sustained either (1) . . . , or (2) . . . *is* dead,”¹⁷⁵ an individual who has sustained either (1) . . . , or (2) . . . ” *shall* be deemed dead.¹⁷⁶

170. See ALA. CODE § 22-31-1 (2000); ALASKA STAT. § 09.68.120 (1995); ARK. CODE ANN. § 20-17-101 (1991); CAL. HEALTH & SAFETY CODE § 7180 (West 1982); COLO. REV. STAT. ANN. § 12-36-136 (West 1981); CONN. GEN. STAT. ANN. § 19a-504a (West 1984); DEL. CODE ANN. tit. 24, § 1760 (2005); D.C. CODE § 7-601 (1982); HAW. REV. STAT. § 327C-1 (1998); IDAHO CODE ANN. § 54-1819 (1981); 755 ILL. COMP. STAT. ANN. 40/10 (West 1998); KAN. STAT. ANN. § 77-205 (1984); LA. REV. STAT. ANN. § 9:111 (2001); ME. REV. STAT. ANN. tit. 22, § 2811 (1983); MD. CODE ANN., HEALTH-GEN. § 5-202 (1998); MICH. COMP. LAWS ANN. § 333.1033 (West 1992); MINN. STAT. ANN. § 145.135 (West 1989); MISS. CODE ANN. § 41-36-3 (West 1981); MONT. CODE ANN. § 50-22-101 (1983); NEV. REV. STAT. ANN. § 451.007 (West 1985); N.H. REV. STAT. ANN. § 141-D:2 (1987); N.J. STAT. ANN. § 26:6A-3 (West 1991); N.M. STAT. ANN. § 12-2-4 (West 1993); N.D. CENT. CODE § 23-06.3-01 (1989); OHIO REV. CODE ANN. § 2108.30 (West 1982); OKLA. STAT. ANN. tit. 63, § 3122 (West 1986); OR. REV. STAT. ANN. § 432.300 (West 1997); R.I. GEN. LAWS § 23-4-16 (1982); S.C. CODE ANN. § 44-43-460 (2006); S.D. CODIFIED LAWS § 34-25-18.1 (1990); TENN. CODE ANN. § 68-3-501 (1982); TEX. HEALTH & SAFETY CODE ANN. § 671.001 (Vernon 1995); UTAH CODE ANN. § 26-34-2 (2007); VT. STAT. ANN. tit. 18, § 5218 (1981); VA. CODE ANN. § 54.1-2972 (West 2004); W. VA. CODE ANN. § 16-10-1 (West 1989); WIS. STAT. ANN. § 146.71 (West 1982); WYO. STAT. ANN. § 35-19-101 (1985); accord UNIF. DETERMINATION OF DEATH ACT, *supra* note 73, § 1. Because death laws that incorporate an inflected form of the verb “to be” denote a statement of fact, such models are cast in the indicative mood. See CHALKER & WEINER, *supra* note 163, at 202.

171. See IND. CODE ANN. § 1-1-4-3 (West 1986); KY. REV. STAT. ANN. § 446.400 (West 1986); MO. ANN. STAT. § 194.005 (West 1982); NEB. REV. STAT. § 71-7202 (1992); 35 PA. STAT. ANN. § 10203 (West 1983). Because death laws that incorporate the modal auxiliaries “[s]hall” and “must” express a duty, obligation, requirement, or condition precedent,” UNIF. STATUTE & RULE CONSTR. ACT § 4(a), 14 U.L.A. 485 (1995 & Supp. 1996), and statutes that incorporate the modal auxiliaries “‘may not,’ ‘must not,’ and ‘shall not’ prohibit the exercise of a power, authority, privilege, or right,” *id.* § 4(c), such models are cast in the imperative mood. See CHALKER & WEINER, *supra* note 163, at 197.

172. See ARIZ. REV. STAT. ANN. § 14-1107 (1994); § 382.009, FLA. STAT. (1987); GA. CODE ANN. § 31-10-16 (1992); GUAM CODE ANN. tit. 10, § 83B101 (2005); N.C. GEN. STAT. ANN. § 90-323 (West 1979). Because death laws that incorporate the modal auxiliary “[m]ay confer[] a power, authority, privilege, or right,” UNIF. STATUTE & RULE CONSTR. ACT § 4(b), 14 U.L.A. 485 (1995 & Supp. 1996), such models are cast in the subjunctive mood. See CHALKER & WEINER, *supra* note 163, at 381.

173. CAL. HEALTH & SAFETY CODE § 7180 (West 1982) (emphasis supplied); UNIF. DETERMINATION OF DEATH ACT, *supra* note 73, § 1.

174. Cf. UNIF. STATUTE & RULE CONSTR. ACT § 4(a), 14 U.L.A. 485 (1995 & Supp. 1996) (“‘Shall’ and ‘must’ express a duty, obligation, requirement, or condition precedent.”).

175. CAL. HEALTH & SAFETY CODE § 7180 (West 1982) (emphasis supplied).

176. Cf. *id.* (emphasis supplied).

The imperative mood, on the other hand, is illustrated by the Indiana statute's clarification that "[o]nly an individual who has sustained either (1) . . . or (2) . . . is dead."¹⁷⁷ In this context, the restrictive preposition "only" explicitly substitutes for the modal auxiliary "shall not." In so doing, the Indiana phraseology goes beyond merely eliminating any question as to whether a person who satisfies a designated criterion is not alive; rather, the statute also confines its definition's applicability solely to individuals who satisfy at least one of the enumerated criteria.¹⁷⁸ In other words, because "[o]nly an individual who has sustained either (1) . . . , or (2) . . . is dead,"¹⁷⁹ "[a]n individual who has [not] sustained either (1) . . . , or (2) . . ." *shall not* be deemed dead.¹⁸⁰

To be sure, both the California and Indiana articulations communicate that the criteria identified therein are logically sufficient bases upon which to conclude that a person has already died.¹⁸¹ The Indiana legislation, however, further conveys that the specified criteria are logically necessary prerequisites without which one cannot infer that a person is legally dead.¹⁸² Consequently, the California statute arguably suggests that its designations are *illustrative*, whereas the Indiana codification clearly expresses that its enumeration is *exhaustive*. One might ask, then, what are the non-enumerated (yet medically accepted) criteria that an Indiana physician is expressly prohibited from considering? Alternatively, what are the other medically accepted (yet not statutorily designated) criteria that the California act tacitly permits physicians to evaluate? These questions are not distinctive to death laws cast in the indicative and imperative moods.

The subjunctive mood is exemplified by Georgia's ambivalent statutory guidance that "[a] person *may* be pronounced dead . . . if . . . either (1) . . . , or (2)" ¹⁸³ Because the auxiliary verb "'may' . . . merely

177. IND. CODE ANN. § 1-1-4-3 (West 1986) (emphasis supplied).

178. Cf. UNIF. STATUTE & RULE CONSTR. ACT § 4(c), 14 U.L.A. 485 (1995 & Supp. 1996) ("'May not,' 'must not,' and 'shall not' prohibit the exercise of a power, authority, privilege, or right.").

179. IND. CODE ANN. § 1-1-4-3 (West 1986) (emphasis supplied).

180. Cf. *id.* (emphasis supplied).

181. See CAL. HEALTH & SAFETY CODE § 7180 (West 1982); IND. CODE ANN. § 1-1-4-3 (West 1986).

182. See IND. CODE ANN. § 1-1-4-3 (West 1986).

183. GA. CODE ANN. § 31-10-16(a) (1992) (emphasis supplied). In point of fact, subsection (c) elucidates that "[t]he criteria for determining death authorized in subsection (a) . . . shall not prohibit the use of other medically recognized criteria for determining death." *Id.* § 31-10-16(c). Compliance with subsection (a), however, effectively operates as a safe harbor from *ex post* – and potentially hindsight-biased – adjudication of the chosen course-of-action's propriety. *Id.* § 31-10-16(b) ("A person who acts in good faith in accordance with the provisions of subsection (a) . . . shall not be liable for damages in any civil action or subject to prosecution in any criminal proceeding for such act.").

states what is allowed" and does not "ordinarily connote[] language of command,"¹⁸⁴ it implies the acceptability of its complement (i.e., "need not"). As such, Georgia's death law simply imparts a legislative aspiration, but does not impose a legal obligation, that individuals who satisfy an enumerated criterion be deemed dead.¹⁸⁵ In other words, because "[a] person *may* be pronounced dead . . . if . . . either (1) . . . , or (2) . . . ,"¹⁸⁶ "[a] person [*need not*] be pronounced dead" even though she "has sustained either (1) . . . , or (2)"¹⁸⁷

Presumably, it is biophysically impossible for a particular person to be both biologically dead and biologically alive at the same time. Nevertheless, the Georgia legislature seems to countenance the possibility that George Georgian (who satisfies Criterion X) may be diagnosed as alive, whereas Geralyn Georgian (who also satisfies Criterion X) may be declared legally dead – even if Criterion X is on all fours with the statutory text.¹⁸⁸ This uncertainty regarding one's legal status is not a uniquely intrastate phenomenon. Consider the interstate comparison of Carl Californian, Irving Indianan, and George Georgian (each of whom satisfy Criterion X). If Criterion X is enumerated within the controlling death law, then both Carl and Irving will necessarily be legally dead,¹⁸⁹ yet George may be alive.¹⁹⁰ If Criterion X is not statutorily enumerated, then Carl will likely be alive,¹⁹¹ Irving will necessarily be alive,¹⁹² and George may (but need not) be legally dead.¹⁹³

3. DEFINITIONAL INDICIA

A death law's definitional indicia delineate the physical manifestations (i.e., symptoms) of the condition being defined.¹⁹⁴ In this regard,

184. BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 502 (1st ed. 1987).

185. Cf. UNIF. STATUTE & RULE CONSTR. ACT § 4(b), 14 U.L.A. 485 (1995 & Supp. 1996) ("‘May’ confers a power, authority, privilege, or right.”).

186. GA. CODE ANN. § 31-10-16(a) (1992) (emphasis supplied).

187. Cf. *id.* (emphasis supplied).

188. Cf. GA. CODE ANN. § 31-10-16 (1992). Because the Georgia statute neither requires that death be determined where the enumerated criteria are satisfied nor precludes such determination where they are not, the decisions of whether and when a person has died are reposed to the person making the determination – decisions she is lawfully permitted to make on a case-by-case basis. *Id.* Thus, it might be quite sensible for a Georgia domiciliary who desires to lengthen or shorten her own life, or for *anybody* who wishes to lengthen or shorten the life of a Georgia domiciliary, to consider more than just the attending physician's education and experience (e.g., her ethical proclivities, religious beliefs, and sentiments regarding euthanasia).

189. See *supra* notes 173-82 and accompanying text.

190. See *supra* notes 183-88 and accompanying text.

191. See *supra* notes 173-76 and accompanying text.

192. See *supra* notes 177-80 and accompanying text.

193. See *supra* notes 183-88 and accompanying text.

194. This note differentiates between "medical death" and "legal death." Because most death laws minimally require that a determination thereunder conform to accepted medical standards,

every jurisdiction that legislatively defines death, except for Arizona, does so in terms of “certain vital bodily functions, the permanent absence of which indicates that [a person] is no longer a living human being.”¹⁹⁵ Forty-three statutes integrate a cardiopulmonary definition of somatic death as well as an alternate neurological definition of brain death;¹⁹⁶ three incorporate only the latter.¹⁹⁷ Nevertheless, the physiological benchmarks used to define each condition – as well as the circumstances under which either formulation may be applied – vary from jurisdiction to jurisdiction.

a. Cardiopulmonary Indicia

Like Part (1) of the UDDA, and the common law before it, thirty-eight states and the District of Columbia codify the traditional “irreversible cessation of circulatory and respiratory functions” criteria for determining death.¹⁹⁸ The Louisiana statute, however, breaks from tradition

any person who may be deemed “legally dead” may also be diagnosed “medically dead.” Many statutes, however, confine death’s legal definition to the physiological indicia enumerated therein. *See infra* Part IV.B.2.b. Consequently, a person who may be diagnosed “medically dead” may not necessarily be deemed “legally dead.”

195. Capron & Kass, *supra* note 62, at 111. Whereas most statutory models articulate the physiological criteria by which death is defined, the Arizona legislation merely ascribes a singular diagnostic directive: “[A] determination of death must be made in accordance with accepted medical standards.” ARIZ. REV. STAT. ANN. § 14-1107 (1994).

196. *See* ALA. CODE § 22-31-1 (2000); ALASKA STAT. § 09.68.120 (1995); ARK. CODE ANN. § 20-17-101 (1991); CAL. HEALTH & SAFETY CODE § 7180 (West 1982); COLO. REV. STAT. ANN. § 12-36-136 (West 1981); CONN. GEN. STAT. ANN. § 19a-504a (West 1984); DEL. CODE ANN. tit. 24, § 1760 (2005); D.C. CODE § 7-601 (1982); GA. CODE ANN. § 31-10-16 (1992); HAW. REV. STAT. § 327C-1 (1998); IDAHO CODE ANN. § 54-1819 (1981); 755 ILL. COMP. STAT. ANN. 40/10 (West 1998); IND. CODE ANN. § A.I.C. 1-1-4-3 (West 1986); KAN. STAT. ANN. § 77-205 (1984); KY. REV. STAT. ANN. § 446.400 (West 1986); LA. REV. STAT. ANN. § 9:111 (2001); ME. REV. STAT. ANN. tit. 22, § 2811 (1983); MD. CODE ANN., HEALTH-GEN. § 5-202 (West 1998); MICH. COMP. LAWS ANN. § 333.1033 (West 1992); MINN. STAT. ANN. § 145.135 (West 1989); MISS. CODE ANN. § 41-36-3 (West 1981); MO. ANN. STAT. § 194.005 (1982); MONT. CODE ANN. § 50-22-101 (1983); NEB. REV. STAT. § 71-7202 (1992); NEV. REV. STAT. ANN. § 451.007 (West 1985); N.H. REV. STAT. ANN. § 141-D:2 (1987); N.M. STAT. ANN. § 12-2-4 (West 1993); N.D. CENT. CODE § 23-06.3-01 (1989); OHIO REV. CODE ANN. § 2108.30 (West 1982); OKLA. STAT. ANN. tit. 63, § 3122 (West 1986); OR. REV. STAT. ANN. § 432.300 (West 1997); 35 PA. STAT. ANN. § 10203.(West 1983); R.I. GEN. LAWS § 23-4-16 (1982); S.C. CODE ANN. § 44-43-460 (2006); S.D. CODIFIED LAWS § 34-25-18.1 (1990); TENN. CODE ANN. § 68-3-501 (West 1982); TEX. HEALTH & SAFETY CODE ANN. § 671.001 (Vernon 1995); UTAH CODE ANN. § 26-34-2 (2007); VT. STAT. ANN. tit. 18, § 5218 (1981); VA. CODE ANN. § 54.1-2972 (West 2004); W. VA. CODE ANN. § 16-10-1 (West 1989); WIS. STAT. ANN. § 146.71 (West 1982); WYO. STAT. ANN. § 35-19-101 (1985).

197. *See* § 382.009, FLA. STAT. (1987); N.C. GEN. STAT. ANN. § 90-323 (West 1979); N.J. STAT. ANN. § 26:6A-3 (West 1991). Presumably, such *casus omissi* are governed by the common law rule that death occurs only after “the cessation of all vital functions and signs.” BLACK’S LAW DICTIONARY 2004, *supra* note 42, at 428.

198. UNIF. DETERMINATION OF DEATH ACT, *supra* note 73, § 1(1). The UDDA’s definition of somatic death may be annotated as a first-order logic proposition: $(C_a(x) \wedge R_a(x)) \rightarrow D_s(x)$. *Cf. id.*

and, instead, defines somatic death as a person's mere inability to "*spontaneous[ly sustain] respiratory and circulatory functions.*"¹⁹⁹ Surprisingly, the subtlety of this caveat belies the severity of its medico-legal consequences. Whether (and, if so, how) reliance upon artificial life support will affect one's legal status depends upon the controlling death law.

The term "spontaneous" is generally used by clinicians to describe a physiological activity that occurs "without any influence from other sources."²⁰⁰ With this definition in hand,²⁰¹ it becomes evident that the Louisiana statute permits a person to be deemed dead once her heart has stopped beating and she has stopped breathing *even though* both functions could be mechanically substituted.²⁰² Because artificial activity cannot be characterized as "spontaneous," one's inability to self-sustain cardiopulmonary functions is a sufficient basis upon which to determine

In this regard, "x" represents an "individual"; " C_a " represents an "irreversible cessation of circulatory functions, as determined in accordance with accepted medical standards"; " R_a " represents an "irreversible cessation of respiratory functions, as determined in accordance with accepted medical standards"; and " D_s " represents "somatic death." *Accord* ALA. CODE § 22-31-1 (2000); ALASKA STAT. § 09.68.120 (1995); ARK. CODE ANN. § 20-17-101 (1991); CAL. HEALTH & SAFETY CODE § 7180 (West 1982); COLO. REV. STAT. ANN. § 12-36-136 (West 1981); CONN. GEN. STAT. ANN. § 19a-504a (West 1984); DEL. CODE ANN. tit. 24, § 1760 (2005); D.C. CODE § 7-601 (1982); GA. CODE ANN. § 31-10-16 (1992); IDAHO CODE ANN. § 54-1819 (1981); 755 ILL. COMP. STAT. ANN. 40/10 (West 1998); IND. CODE ANN. § A.I.C. 1-1-4-3 (West 1986); KAN. STAT. ANN. § 77-205 (1984); KY. REV. STAT. ANN. § 446.400 (West 1986); ME. REV. STAT. ANN. tit. 22, § 2811 (1983); MD. CODE ANN., HEALTH-GEN. § 5-202 (West 1998); MICH. COMP. LAWS ANN. § 333.1033 (West 1992); MINN. STAT. ANN. § 145.135 (West 1989); MISS. CODE ANN. § 41-36-3 (West 1981); MONT. CODE ANN. § 50-22-101 (1983); NEB. REV. STAT. § 71-7202 (1992); NEV. REV. STAT. ANN. § 451.007 (West 1985); N.H. REV. STAT. ANN. § 141-D:2 (1987); N.M. STAT. ANN. § 12-2-4 (West 1993); N.D. CENT. CODE § 23-06.3-01 (1989); OHIO REV. CODE ANN. § 2108.30 (West 1982); OKLA. STAT. ANN. tit. 63, § 3122 (West 1986); OR. REV. STAT. ANN. § 432.300 (West 1997); 35 PA. STAT. ANN. § 10203 (West 1983); R.I. GEN. LAWS § 23-4-16 (1982); S.C. CODE ANN. § 44-43-460 (2006); S.D. CODIFIED LAWS § 34-25-18.1 (1990); TENN. CODE ANN. § 68-3-501 (1982); TEX. HEALTH & SAFETY CODE ANN. § 671.001 (Vernon 1995); UTAH CODE ANN. § 26-34-2 (2007); VT. STAT. ANN. tit. 18, § 5218 (1981); W. VA. CODE ANN. § 16-10-1 (West 1989); WIS. STAT. ANN. § 146.71 (West 1982); WYO. STAT. ANN. § 35-19-101 (1985).

199. LA. REV. STAT. ANN. § 9:111 (2001) (emphasis supplied); *accord* HAW. REV. STAT. § 327C-1 (1998); MO. ANN. STAT. § 194.005 (West 1982); VA. CODE ANN. § 54.1-2972 (West 2004). The spontaneous impulses to breathe and contract the heart muscle emanate from the brain stem. See Jack L. Feldman, *Neurophysiology of Breathing in Mammals*, in HANDBOOK OF PHYSIOLOGY: A CRITICAL, COMPREHENSIVE PRESENTATION OF PHYSIOLOGICAL KNOWLEDGE AND CONCEPTS, SEC. 1: THE NERVOUS SYSTEM, VOL. IV: INTRINSIC REGULATORY SYSTEMS OF THE BRAIN 473 (Vernon B. Mountcastle et al. eds., 1986); Smith, *supra* note 85, at 850-51. As a result, the loss of spontaneous cardiopulmonary functions "are surrogates for the loss of brain functions." DEFINING DEATH, *supra* note 32, at 37.

200. 5 J.E. SCHMIDT, ATTORNEY'S DICTIONARY OF MEDICINE AND WORD FINDER S-264 (2005).

201. Cf. UNIF. STATUTE & RULE CONSTR. ACT § 2, 14 U.L.A. 483 (1995 & Supp. 1996) ("[a] word or phrase that has acquired a technical or particular meaning in a particular context has that meaning if it is used in that context" by the statute being construed).

202. Cf. LA. REV. STAT. ANN. § 111 (2001).

death under Louisiana's spontaneity-*salient* definition.²⁰³ This formulation, in other words, prevents a determination of somatic death only if one's circulatory and respiratory activity can be promptly *resuscitated*.

In contrast, the District of Columbia's spontaneity-*silent* definition implicitly prevents a person from being deemed dead merely because her heart has stopped beating and she has stopped breathing *so long as* either function could be *artificially* replaced.²⁰⁴ Surely, if life support systems could emulate the cardiopulmonary activity that has ceased, their immediate absence cannot be characterized as "irreversible." Thus, one's inability to self-sustain circulatory and respiratory functions is, by itself, an insufficient basis upon which to determine death under a spontaneity-*silent* definition.²⁰⁵

Because this inability is, however, a sufficient basis upon which to determine death under a spontaneity-*salient* definition,²⁰⁶ it is entirely possible to deem legally dead an artificially-supported patient who appears to be nothing but alive (i.e., because she continues breathing, has a heartbeat, is "warm to the touch," and might even be both conscious and lucid). That being said, three of the four (but, *only* three of the four) spontaneity-*salient* models effectively provide that "death shall not be determined to have occurred . . . [w]hen respiration and circulation are [already being] artificially maintained . . . [unless] there is a total and irreversible cessation of all brain function, including the brain stem."²⁰⁷ Notwithstanding this statutory safeguard, however, a life-or-death discontinuity still remains. A person who "has experienced an irreversible cessation of spontaneous respiratory and circulatory functions," but who has not yet been administered life support will, in the interim, "be considered dead."²⁰⁸ Consequently, one is left to wonder whether "a physician . . . [who] feels the patient has died and no further care is warranted" would even be obligated to administer life support in the first instance – or could be found negligent for not doing so.²⁰⁹

Albeit, a large majority of death laws do not map the contours of

203. *Cf. id.*

204. *Cf.* D.C. CODE § 7-601 (1982).

205. *Cf. id.*

206. *See supra* notes 200-205 and accompanying text.

207. MO. ANN. STAT. § 194.005 (West 1982); *accord* HAW. REV. STAT. § 327C-1 (1998) ("In the event that artificial means of support preclude a determination that respiratory and circulatory functions have ceased, a person shall be considered dead if . . . the person has experienced irreversible cessation of all functions of the entire brain, including the brain stem."); LA. REV. STAT. ANN. § 111 (2001) ("In the event that artificial means of support preclude a determination that [circulatory and respiratory] functions have ceased, a person will be considered dead if . . . the person has experienced an irreversible total cessation of brain function."). *Contra* VA. CODE ANN. § 54.1-2972 (West 2004).

208. MO. ANN. STAT. § 194.005 (West 1982).

209. Meyers, *supra* note 40, § 8.

life to the spontaneity, *vel non*, of one's cardiopulmonary activity; most are only concerned with whether circulatory and respiratory functions are present, rather than with how they are being (or might be) perpetuated.²¹⁰ This is not to say, however, that heart-lung indicia are an appropriate, or even an effective, means by which to define death in all circumstances. In point of fact, where life support systems are already in place, a physician might be medically incapable of distinguishing artificial activity from natural functions in the first instance.

b. Neurological Indicia

To account for the prospect "that a dead body may be attached to a machine so as to exhibit demonstrably false indicia of [somatic] life,"²¹¹ forty-three statutes incorporate neurological criteria for defining death.²¹² Of these, thirty-seven track Part (2) of the UDDA and, thereby, deem "[a]n individual who has sustained . . . irreversible cessation of all functions of the entire brain, *including the brain stem*," to be brain dead.²¹³ Only eleven statutes, however distinguish occasions where this alternate formulation is preferred.²¹⁴ Consequently, the

210. See *supra* note 198 and accompanying text.

211. *People v. Eulo*, 472 N.E.2d 286, 295 (N.Y. 1984).

212. See *infra* notes 213-14.

213. UNIF. DETERMINATION OF DEATH ACT, *supra* note 73, § 1(2). The UDDA's definition of brain death may be annotated as a first-order logic proposition: $(N_a(x) \wedge S_a(x)) \rightarrow D_b(x)$. Cf. *id.* In this regard, "x" represents an "individual"; " N_a " represents an "irreversible cessation of neocortical functions, as determined in accordance with accepted medical standards"; " S_a " represents an "irreversible cessation of brain stem functions, as determined in accordance with accepted medical standards"; and " D_b " represents "brain death." Accord ALA. CODE § 22-31-1 (2000); ALASKA STAT. § 09.68.120 (1995); ARK. CODE ANN. § 20-17-101 (1991); CAL. HEALTH & SAFETY CODE § 7180 (West 1982); COLO. REV. STAT. ANN. § 12-36-136 (West 1981); CONN. GEN. STAT. ANN. § 19a-504a (West 1984); DEL. CODE ANN. tit. 24, § 1760 (2005); D.C. CODE § 7-601 (1982); GA. CODE ANN. § 31-10-16 (1992); HAW. REV. STAT. § 327C-1 (1998); IDAHO CODE ANN. § 54-1819 (1981); 755 ILL. COMP. STAT. ANN. 40/10 (West 1998); IND. CODE ANN. § 1-1-4-3 (West 1986); KAN. STAT. ANN. § 77-205 (1984); ME. REV. STAT. ANN. tit. 22, § 2811 (1983); MD. CODE ANN., HEALTH-GEN. § 5-202 (West 1998); MICH. COMP. LAWS ANN. § 333.1033 (West 1992); MINN. STAT. ANN. § 145.135 (West 1989); MISS. CODE ANN. § 41-36-3 (West 1981); MONT. CODE ANN. § 50-22-101 (1983); NEB. REV. STAT. § 71-7202 (1992); NEV. REV. STAT. ANN. § 451.007 (West 1985); N.H. REV. STAT. ANN. § 141-D:2 (1987); N.M. STAT. ANN. § 12-2-4 (West 1993); N.D. CENT. CODE § 23-06.3-01 (1989); OKLA. STAT. ANN. tit. 63, § 3122 (West 1986); OR. REV. STAT. ANN. § 432.300 (West 1997); 35 PA. STAT. ANN. § 10203 (West 1983); R.I. GEN. LAWS § 23-4-16 (1982); S.C. CODE ANN. § 44-43-460 (2006); S.D. CODIFIED LAWS § 34-25-18.1 (1990); TENN. CODE ANN. § 68-3-501 (West 1982); UTAH CODE ANN. § 26-34-2 (2007); VT. STAT. ANN. tit. 18, § 5218 (1981); W. VA. CODE ANN. § 16-10-1 (West 1989); WIS. STAT. ANN. § 146.71 (West 1982); WYO. STAT. ANN. § 35-19-101 (1985).

214. See CONN. GEN. STAT. ANN. § 19a-504a (1984); § 382.009, FLA. STAT. (1987); HAW. REV. STAT. § 327C-1 (1998); KY. REV. STAT. ANN. § 446.400 (West 1986); LA. REV. STAT. ANN. § 9:111 (2001); MO. ANN. STAT. § 194.005 (West 1982); N.J. STAT. ANN. § 26:6A-3 (West 1991); N.C. GEN. STAT. ANN. § 90-323 (West 1979); OHIO REV. CODE ANN. § 2108.30 (1982); TEX. HEALTH & SAFETY CODE ANN. § 671.001 (Vernon 1995); VA. CODE ANN. § 54.1-2972 (West 2004).

“choice between two apparently equal yet different” definitions is frequently (but not invariably) reposed to “the unguided discretion of physicians.”²¹⁵

For example, both the Wisconsin and Ohio codifications provide that death may be defined in terms of an “irreversible cessation of all functions of the brain, including the brain stem,” under *any* circumstance.²¹⁶ Unlike the Wisconsin legislation, however, the Ohio statute further pronounces that an “irreversible cessation of all functions of the brain[~~including the brain stem~~]”²¹⁷ is the *only* appropriate benchmark where a person’s “respiratory and circulatory functions . . . are being artificially sustained.”²¹⁸ Because this truncated formulation does not expressly include – and, in fact, conspicuously elides – specific reference to the brain stem, a persistently-vegetative patient may arguably be deemed dead in the minority of like-minded jurisdictions.²¹⁹

The medico-legal implications of this lower-brain lacuna are best

215. Capron & Kass, *supra* note 62, at 112. In Virginia, “[a] person shall be medically and legally dead if: [(1)] . . . there is the absence of spontaneous respiratory and spontaneous cardiac functions . . . ; or [(2)] . . . there is the absence of brain stem reflexes, spontaneous brain functions and spontaneous respiratory functions.” VA. CODE ANN. § 54.1-2972 (West 2004) (emphasis supplied). Although it is questionable whether (or even how) one can exhibit spontaneous respiratory activity absent brain stem functionality, the Virginia statute grants clinicians only illusory discretion to entirely forego cardiopulmonary diagnoses of death. *Cf. id.* Because Virginia’s definition of brain death uncharacteristically includes *both* cardiopulmonary and neurological components, the physician is effectively precluded from performing a strictly brain-based diagnosis of death. *Cf. id.*

216. OHIO REV. CODE ANN. § 2108.30 (1982); WIS. STAT. ANN. § 146.71 (West 1982); *accord* UNIF. DETERMINATION OF DEATH ACT, *supra* note 73, § 1.

217. OHIO REV. CODE ANN. § 2108.30 (1982) (stricken text is supplied to emphasize words included in the primary provision of the Ohio statute but omitted in the secondary provision of the same statute).

218. *Compare* OHIO REV. CODE ANN. § 2108.30 (1982) (“If the respiratory and circulatory functions of a person are being artificially sustained, . . . a determination that death has occurred is made by . . . determin[ing] that the irreversible cessation of *all functions of the brain* has occurred.” (emphasis supplied)), *with* WIS. STAT. ANN. § 146.71 (West 1982) (“An individual is dead if he has sustained . . . irreversible cessation of *all functions of the brain, including the brain stem* . . .” (emphasis supplied)).

219. *See* LA. REV. STAT. ANN. § 9:111 (2001); N.C. GEN. STAT. ANN. § 90-323 (West 1979); OHIO REV. CODE ANN. § 2108.30 (1982); TEX. HEALTH & SAFETY CODE ANN. § 671.001 (Vernon 1995). Support for this partial-brain interpretation of the Ohio definition is two-fold. First, one can infer that the legislature intentionally omitted the qualifier “including the brain stem” from the secondary provision because the legislature intentionally included that phrase in the primary provision of the same statute. 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.05 (4th ed. 1984) (“To discover the true construction of any particular clause of a statute, the first thing to be attended to . . . is the actual language . . . ; second, the words or expressions which obviously are by design omitted . . .”). Second, one can infer that the legislature intentionally elected not to modify the noun “brain” by the adjective “entire” in either provision – a distinct departure from most contemporary whole-brain definitions. *Id.* § 52.01 (“Similar statutes of other states comprise a type of extrinsic aid deserving special attention in the process of interpretation.”).

illustrated by comparing Wilma Wisconsin and Oliver Ohioan – neither of whom maintain higher-brain activity, each of whom retains brain stem functionality, yet both of whom rely upon artificial means to sustain adequate circulation and respiration.²²⁰ Because both Wilma and Oliver have lost neocortical activity, neither maintains cognition or consciousness and each lies motionless, save for periodic (albeit respirator-induced) chest movements.²²¹ Because Wilma and Oliver's brain stems are functioning, however, both "can not only breathe, metabolize, maintain temperature and blood pressure, . . . *on their own*," but each can "also sigh, yawn, track light with their eyes, and react to pain or reflex stimulation."²²² Nevertheless, Oliver is dead under the Ohio statute because his "respiratory and circulatory functions . . . are being artificially sustained," and he has experienced an "irreversible cessation of all functions of the brain[~~including the brain stem~~]."²²³ In contrast, Wilma is alive under Wisconsin's definitions of both somatic and brain death – she has neither sustained an "irreversible cessation of circulatory and respiratory functions," nor has she suffered an "irreversible cessation of all functions of the entire brain, including the brain stem."²²⁴

Consequently, it would seem advisable for hopeful parents, who wish to hold on to a persistently-vegetative child as long as possible, to seek hospice care in a jurisdiction with an unequivocally whole-brain definition of death – where it should be relatively more difficult to deem their child dead than in a jurisdiction with an opaque, and possibly, partial-brain definition.²²⁵ It would seem equally reasonable, however, for even the most loving of parents – who might prefer to accelerate their child's impending demise, alleviate the emotional strain on family and friends, and diminish the financial burden of ongoing medical care – to

220. See Smith, *supra* note 85, at 857-58.

221. See DEFINING DEATH, *supra* note 32, at 35.

222. *Id.* (emphasis supplied).

223. OHIO REV. CODE ANN. § 2108.30 (1982) (stricken text is supplied to emphasize words included in the primary provision of the Ohio statute but omitted in the secondary provision of the same statute). In Ohio, the "irreversible cessation of all functions of the brain[~~including the brain stem~~]" is the only appropriate indicia of death where a person's "respiratory and circulatory functions . . . are being artificially sustained." *Id.* Thus, the fact that Oliver has not experienced an "irreversible cessation of circulatory and respiratory functions" is not germane to a determination of whether he is alive or dead. *Cf. id.*

224. WIS. STAT. ANN. § 146.71 (West 1982).

225. Persistently-vegetative patients "can remain biologically alive with intravenous feeding and antibiotics for much longer periods of time than patients who have sustained whole-brain death." Smith, *supra* note 85, at 857-58. Moreover, it is not unheard of for patients with seemingly permanent neocortical or subcortical damage to even "regain spontaneous respiration and circulation." DEFINING DEATH, *supra* note 32, at 40. For example, Karen Quinlan – who was thought to have lost higher-brain activity, but who was known to have retained brain stem functions – survived in a persistent vegetative state, without mechanical assistance, for years after being removed from a ventilator. *Id.*

favor jurisdictions with a partial-brain formulation. Of course, an invidious remainderman or joint tenant may also benefit by a partial-brain definition – under which it might be comparatively easy to declare a persistently-vegetative owner dead and, thereby, expedite the devolution of her property interest.²²⁶

C. *The Anatomy of Contemporary Death Laws: Determinative Components*

The primary purpose of all death laws is to “guide those who will decide whether (and if so, when) a person has passed from being alive to being dead.”²²⁷ Definitions alone, however, “offer little concrete help in the practical task of determining whether a person has died.”²²⁸ For this reason, most statutes also incorporate procedural rules that inform the addressee how to employ the definitional components in a real-world setting.²²⁹

1. DETERMINATIVE PREREQUISITES

Whereas a death law’s definitional applicability enables the addressee to anticipate what legal events might follow from one’s satisfying the codified definition,²³⁰ its determinative prerequisites identify what clinical circumstances must precede a determination of death in the first instance. For example, the UDDA prefatorily notes that it “does not concern itself with” matters pertaining to the “maint[enance of] life support beyond brain death in cases of . . . organ donors.”²³¹ Because this issue is “left for other law” to resolve,²³² fourteen states either expressly permit or explicitly prevent a person from being declared dead unless certain conditions precedent are fulfilled.²³³

226. Cf. RESTATEMENT (FIRST) PROP. § 18 (1936) (“An estate for life is an estate which is not an estate of inheritance.”); 7 POWELL ON REAL PROPERTY § 52.05[2] (Michael A. Wolf ed., 2005) (“[T]he death of a spouse holding as tenant by the entirety terminates the tenancy”); *id.* § 51.03[3] (“[T]he estates of deceased joint tenants have no interest.”).

227. DEFINING DEATH, *supra* note 32, at 55.

228. See Capron & Kass, *supra* note 62, at 102.

229. See, e.g., UNIF. DETERMINATION OF DEATH ACT, *supra* note 73, § 1. This dichotomy is exemplified by the UDDA’s statutory framework. Cf. *id.* The Act’s first sentence articulates *definitional* components (i.e., “An individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead.”). *Id.* The Act’s second sentence ascribes *determinative* components (i.e., “A determination of death must be made in accordance with accepted medical standards.”).

230. See *supra* Part IV.B.1.

231. UNIF. DETERMINATION OF DEATH ACT, *supra* note 73, prefatory note.

232. *Id.*

233. See ALASKA STAT. § 09.68.120 (1995); CONN. GEN. STAT. ANN. § 19a-504a (West 1984); § 382.009, FLA. STAT. (1987); HAW. REV. STAT. § 327C-1 (1998); KY. REV. STAT. ANN. § 446.400 (West 1986); LA. REV. STAT. ANN. § 9:111 (2001); MD. CODE ANN., HEALTH-GEN.

The Hawaii statute, for example, requires that “[d]eath *shall* be pronounced *before* artificial means of support are withdrawn *and before* any vital organ is removed for purposes of transplantation.”²³⁴ Aside from providing physicians with bright-line legal guidance,²³⁵ this provision also advances a broad-based biomedical policy objective. It is well established that replenishing the cache of transplantable organs depends upon public confidence that critically ill or gravely injured donors will not receive less zealous treatment than their non-donor counterparts.²³⁶ Therefore, by prohibiting the peri-mortem removal of life support – and, thereby, forestalling an organ harvest so long as the donor can be kept alive artificially – the Hawaii legislation doubles as a vehicle by which to buttress the perceived integrity of the transplantation process.

Not all statutes, however, safeguard the legally alive patient against the hazards of being opportunistically declared dead as a pretext for salvaging her still-functioning body parts. The Alaska statute, for example, provides that “[d]eath *may* be pronounced . . . *before* artificial means of maintaining respiratory and cardiac function are terminated.”²³⁷ Of course, the auxiliary verb “‘may’ . . . does not . . . ordinarily connote[] language of command,”²³⁸ and, hence, does not mandate that death be pronounced before life support is terminated.²³⁹ Nevertheless, “‘[m]ay’ confers a power, authority, privilege, or right”²⁴⁰ and, thus, allows such apparatus to be withdrawn before a person has died.²⁴¹ In other words, the Alaska legislature seemingly acquiesces in Natalie Non-donor’s being artificially kept alive as long as her insurance provider will front the bill, yet David Donor’s being disconnected as soon as a donee beck-

§ 5-202 (West 1998); MO. ANN. STAT. § 194.005 (West 1982); N.M. STAT. ANN. § 12-2-4 (West 1993); N.C. GEN. STAT. ANN. § 90-323 (West 1979); OHIO REV. CODE ANN. § 2108.30 (1982); OKLA. STAT. ANN. tit. 63, § 3122 (West 1986); TEX. HEALTH & SAFETY CODE ANN. § 671.001 (Vernon 1995); VA. CODE ANN. § 54.1-2972 (West 2004).

234. HAW. REV. STAT. § 327C-1(b) (1998) (emphasis supplied). By requiring that “[d]eath shall be pronounced before . . . any vital organ is removed for purposes of transplantation,” *id.*, the Hawaii legislature effectively codified the so-called “dead-donor rule” (i.e., a basic tenet of medical practice that eschews the removal of a person’s organs before she is declared dead). *See generally* Robert M. Arnold & Stuart J. Youngner, *The Dead Donor Rule: Should We Stretch It, Bend It, Or Abandon It?*, 3 KENNEDY INST. ETHICS J. 263, 263-65 (1993).

235. *See* UNIF. STATUTE & RULE CONSTR. ACT § 4(a), 14 U.L.A. 485 (1995 & Supp. 1996) (“‘Shall’ and ‘must’ express a duty, obligation, requirement, or condition precedent.”).

236. *See* DuBois, *supra* note 50, at 132-33.

237. ALASKA STAT. § 09.68.120 (1995) (emphasis supplied).

238. GARNER, *supra* note 184, at 502.

239. *Cf.* ALASKA STAT. § 09.68.120 (1995). In other words, because “[d]eath *may* be pronounced . . . before artificial means of maintaining respiratory and cardiac function are terminated,” *id.*, “[d]eath [*need not*] be pronounced . . . before artificial means of maintaining respiratory and cardiac function are terminated.” *Cf. id.*

240. UNIF. STATUTE & RULE CONSTR. ACT § 4(b), 14 U.L.A. 485 (1995 & Supp. 1996).

241. *Cf.* ALASKA STAT. § 09.68.120 (1995).

ons.²⁴² Given the potential for such life-or-death disparity, it would seem sensible for a “donor-to-be” to consider – prior to granting donative consent – whether the controlling death law in her jurisdiction relegates a donor’s welfare to that of a subordinate variable in the supply-and-demand computation that facilitates organ transplantation.²⁴³

To be sure, “[t]he real safeguard against doctors killing patients is not to be found in a statute ‘defining’ death.”²⁴⁴ Rather, protection against clinical skullduggery “inheres in physicians’ ethical and religious beliefs, which are also embodied in the fundamental professional ethic of *primum non nocere* and are reinforced by homicide and ‘wrongful death’ laws and the rules governing medical negligence applicable in license revocation proceedings or in private actions for damages.”²⁴⁵ Nevertheless, two jurisdictions’ death laws expressly address such matters.²⁴⁶

The Oklahoma statute, for example, prohibits a determination of death until after “all reasonable attempts to restore [the patient’s] spontaneous circulatory or respiratory functions” have proven futile.²⁴⁷ Implicit in this proviso are two corollary propositions: (1) a physician must affirmatively undertake resuscitative measures; and (2) a patient must be irrevivable before she is deemed to have died. The moribund Oklahoman, therefore, can rest assured that all feasible measures will be taken to keep her alive – regardless of the physician’s *ex ante* estimation regarding the efficacy of such procedures.²⁴⁸ The Virginia statute also obliges a physician to confirm, before determining her patient to be brain dead, that “further attempts at resuscitation or continued supportive maintenance” would be unavailing.²⁴⁹ Here, the legislature’s use of the word “further” achieves the same result (albeit, implicitly) as the parallel Oklahoma provision; a patient must not only be irrevivable before she is declared brain dead, but her physician must also have exhausted all reasonable resuscitative procedures.

242. Cf. *id.*

243. Cf. UNIF. ANATOMICAL GIFT ACT § 2(e), 8A U.L.A. 24 (1987) (“An anatomical gift by will takes effect upon death of the testator, whether or not the will is probated.”); *id.* § 20 (“[A] technician may remove any donated [body] parts . . . after determination of death by a physician or surgeon.”). Tangentially, one could surmise that a statutory provision which acquiesces in donors receiving less zealous treatment than their non-donor counterparts directly reduces the number of willing donors and, thereby, indirectly decreases the supply of available organs. See DuBois, *supra* note 50, at 132-33.

244. Capron & Kass, *supra* note 62, at 116.

245. *Id.*

246. See OKLA. STAT. ANN. tit. 63, § 3122 (West 1986); VA. CODE ANN. § 54.1-2972 (West 2004).

247. OKLA. STAT. ANN. tit. 63, § 3122 (West 1986).

248. Cf. *id.*

249. VA. CODE ANN. § 54.1-2972 (West 2004) (emphasis supplied).

For purposes of determining somatic death, however, the Virginia statute only asks the physician to opine that “attempts at resuscitation *would not* . . . be successful in restoring spontaneous life-sustaining functions.”²⁵⁰ A strict reading of this language suggests that compliance therewith does not require that an attempt be made to revive a patient before concluding that she is dead. On the contrary, it seems that whether a patient will be resuscitated is entirely discretionary – a decision that hinges upon “the clinical skills and judgment of the p[hysician] making the determination,”²⁵¹ as well as her ethical proclivities, religious beliefs, and sentiments towards euthanasia. The Oklahoma physician is thus given the clear statutory directive that determining a patient to be dead is an option of last resort,²⁵² whereas the Virginia physician is left only with the responsibility of applying usual and customary standards of prudent medical practice on a case-by-case basis.²⁵³

2. DETERMINATIVE INVOLVEMENT

Because most deaths in the United States are determined by application of the traditional heart-lung definition,²⁵⁴ and its indicia are easily ascertainable by most laymen, the UDDA does not prescribe who can or cannot determine whether a person is dead.²⁵⁵ Nevertheless, fifteen jurisdictions specifically identify whether (and to what extent) professional oversight is required to legally declare that death has occurred.²⁵⁶ Seven states require that at least one physician be in attendance when

250. *Id.* (emphasis supplied).

251. DEFINING DEATH, *supra* note 32, at 76-77.

252. *Cf.* OKLA. STAT. ANN. tit. 63, § 3122 (1986).

253. *Cf.* VA. CODE ANN. § 54.1-2972 (2004).

254. UNIF. DETERMINATION OF DEATH ACT, *supra* note 73, prefatory note.

255. *Id.* § 1. The UDDA does mandate, however, that “determination[s] of death . . . be made in accordance with accepted medical standards.” *Id.* In this regard, one could argue that only a physician is capable of applying standards of medical practice in the first instance, or that a physician’s involvement is itself an accepted medical standard. The Arkansas Attorney General, for example, opined that a determination of death relates to the practice of medicine and, therefore, can only be only performed by a licensed physician. Ark. Op. Att’y Gen. No. 84-102 (1984), available at 1984 WL 63282. Then again, the New York Attorney General drew a contrary inference, interpreting a lack of statutory guidance to mean that “no one is either authorized by law or regulation to pronounce death or prohibited by law or regulation from pronouncing death.” N.Y. Op. Att’y Gen. (Inf.) 185 (1980), available at 1980 WL 107259.

256. *See* ALASKA STAT. § 09.68.120 (1995); DEL. CODE ANN. tit. 24, § 1760 (2005); § 382.009, FLA. STAT. (1987); GA. CODE ANN. § 31-10-16 (1992); HAW. REV. STAT. § 327C-1 (1998); KY. REV. STAT. ANN. § 446.400 (West 1986); LA. REV. STAT. ANN. § 9:111 (2001); MICH. COMP. LAWS ANN. § 333.1033 (West 1992); MO. ANN. STAT. § 194.005 (West 1982); N.C. GEN. STAT. ANN. § 90-323 (West 1979); OHIO REV. CODE ANN. § 2108.30 (West 1982); 35 PA. STAT. ANN. § 450.507 (West 1983); TENN. CODE ANN. § 68-3-511 (2005); TEX. HEALTH & SAFETY CODE ANN. § 671.001 (Vernon 1995); VA. CODE ANN. § 54.1-2972 (2004). In Maryland, the only statute that mandates professional involvement in determinations of death is a Correctional Services Article – requiring that a lethal injection persist until “a licensed physician

brain death is declared;²⁵⁷ three require the presence of no less than two licensed doctors when doing so.²⁵⁸ A Registered Nurse (“RN”) is authorized to determine death in seven jurisdictions;²⁵⁹ an Emergency Medical Technician (“EMT”), in just one.²⁶⁰

Whereas a physician’s involvement may be more a formality than a necessity in the traditional heart-lung context, determining whether a person is brain dead often “require[s] sophisticated intervention to elicit latent signs of life.”²⁶¹ And yet, just four statutes distinguish between cardiopulmonary and neurological diagnoses for purposes of delimiting who may perform the latter.²⁶² Only one state statutorily compels a “personal examination of the individual believed to be dead,”²⁶³ another calls for the physician merely to “conduct[] a [confirmatory] test” to establish that a patient is no longer alive.²⁶⁴

The Virginia statute, however, exemplifies the legislative distances a jurisdiction will travel to secure the public’s confidence in the conclusion that a person is brain dead.²⁶⁵ On the one hand, every determination of death – be it based upon heart-lung or brain-based criteria – requires the involvement of at least one “physician duly authorized to

pronounces [the prisoner’s] death according to accepted standards of medical practice.” MD. CODE ANN., CORR. SERVS. § 3-905 (West 1999).

257. See DEL. CODE ANN. tit. 24, § 1760 (2005); DEL. CODE ANN. tit. 24, § 1720 (2006); LA. REV. STAT. ANN. § 9:111 (2001); MO. ANN. STAT. § 194.005 (West 1982); N.C. GEN. STAT. ANN. § 90-323 (West 1979); OHIO REV. CODE ANN. § 2108.30 (West 1982); TEX. HEALTH & SAFETY CODE ANN. § 671.001 (Vernon 1995).

258. See § 382.009, FLA. STAT. (1987); HAW. REV. STAT. § 327C-1 (1998); KY. REV. STAT. ANN. § 446.400 (West 1986).

259. See ALASKA STAT. § 09.68.120 (1995); GA. CODE ANN. § 31-10-16 (1992); HAW. REV. STAT. § 327C-1 (1998); MICH. COMP. LAWS ANN. § 333.1033 (West 1992); NEV. REV. STAT. ANN. § 632.474 (2005); 35 PA. STAT. ANN. § 450.507 (West 1983); TENN. CODE ANN. § 68-3-511 (2005).

260. Compare ALASKA STAT. § 09.68.120 (1995) (“An individual is considered dead if, in the opinion of a mobile intensive care paramedic, . . . or emergency medical technician,” the physiological criteria are satisfied), with DEL. CODE ANN. tit. 24, § 1760 (2005) (“A determination of death . . . may be made by a person certified to practice medicine . . . by . . . the use of information provided by an EMT-P (paramedic) using telemetric or transtelephonic means.”). In 1978, the Florida Attorney General opined that EMTs are not vested with authority to determine death absent express statutory authorization to do so. 1978 Fla. Op. Atty. Gen. 104, available at 1978 WL 24675.

261. Capron & Kass, *supra* note 62, at 113.

262. See § 382.009, FLA. STAT. (1987); N.J. STAT. ANN. § 26:6A-3 (West 1991); TEX. HEALTH & SAFETY CODE ANN. § 671.001 (Vernon 1995); VA. CODE ANN. § 54.1-2972 (2004).

263. DEL. CODE ANN. tit. 24, § 1760 (2005). Fortunately, the New Jersey Board of Medical Examiners at least reminds physicians to “proceed without inordinate delay to the location of the presumed decedent and . . . make [a] proper determination and pronouncement of [her] death.” N.J. ADMIN. CODE § 13:35-6.2 (1995).

264. OHIO REV. CODE ANN. § 2108.30 (West 1982).

265. VA. CODE ANN. § 54.1-2972 (2004).

practice medicine in th[e] Commonwealth.”²⁶⁶ For purposes of declaring brain death, on the other hand, the attending physician must not only “be duly licensed” as “a specialist in the field of neurology, neurosurgery, or electroencephalography,” but “another [consulting] physician and [the attending] neurospecialist” must produce *concurring* diagnoses based upon “the absence of brain stem reflexes, spontaneous brain functions and spontaneous respiratory functions[,] *and* the patient’s medical record.”²⁶⁷

In stark contrast to these relatively strict procedural requirements stand the relatively lenient restrictions imposed by the Alaska statute.²⁶⁸ While Alaska’s legislation does mandate professional involvement in determining death, any “physician licensed or exempt from licensing . . . , or a[n authorized] registered nurse . . . , or . . . a[n authorized] mobile intensive care paramedic, physician assistant, or emergency medical technician” may do so.²⁶⁹ Virginia also allows non-physicians to pronounce death – the means by which the statute does so, however, is seemingly spurious and arguably disingenuous.²⁷⁰ An RN or Physician Assistant (“PA”) may pronounce death in Virginia, but *only if*: (1) the RN or PA is employed by a home health organization, hospice, a hospital, or nursing home; *and* (2) the RN or PA is “directly involved in the care of the patient”; *and* (3) “the patient’s death has occurred”;²⁷¹ *and* (4) “the patient is under the care of a physician when his death occurs”; *and* (5) “the patient’s death has been anticipated”; *and* (6) “the physician is unable to be present within a reasonable period of time to determine death”; *and* (7) “there is a valid Do Not Resuscitate Order.”²⁷² In light of the relatively small percentage of plausible scenarios that might simultaneously satisfy all seven conjuncts of the Virginia statute, one must ask whether its drafters garnered a genuine desire for determinations of death to be made by non-physicians on a regular (or even an *ad hoc*) basis.

3. DETERMINATIVE CRITERIA

Consistent with the UDDA’s objective of designating a “general legal standard” for determining death, the Act does not delimit the spe-

266. *Id.*

267. *Id.* (emphasis supplied).

268. Compare VA. CODE ANN. § 54.1-2972 (2004), with Alaska Stat. § 09.68.120 (1995).

269. ALASKA STAT. § 09.68.120 (1995).

270. See VA. CODE ANN. § 54.1-2972 (2004).

271. One cannot help but relish the tautological absurdity of this legislative legerdemain. Permitting an RN or PA to “pronounce death if . . . the patient’s death has occurred” merely begs the question advanced in the first instance by the statute’s title: “[W]hen [is a] person deemed medically and legally dead”? VA. CODE ANN. § 54.1-2972 (2004).

272. VA. CODE ANN. § 54.1-2972 (2004).

cific “diagnostic tests and medical procedures” by which to do so.²⁷³ In point of fact, only the territory of Guam has codified a detailed clinical methodology.²⁷⁴ Most statutes, however, are simply pegged to one of eight professional standards of care. Thirty-three jurisdictions follow the UDDA’s mandate that a determination “be made in accordance with *accepted* medical standards”;²⁷⁵ two call for “current” acceptance;²⁷⁶ one, only “general.”²⁷⁷ Six states oblige that such standards be “ordinary”;²⁷⁸ three urge they be “usual and customary.”²⁷⁹ One requires they be “reasonable”;²⁸⁰ another, simply “recognized”;²⁸¹ and a last only asks that they at least be “acceptable.”²⁸²

At first blush it may appear that each variant contemplates only practices that have “passed the normal test of scrutiny and adoption by

273. UNIF. DETERMINATION OF DEATH ACT, *supra* note 73, prefatory note.

274. See GUAM CODE ANN. tit. 10, § 83C101 (2005) (“Irreversibility of loss of brain function is declared if the following are satisfied: (a) the cause of coma should be established and sufficient to account for the loss of brain function . . . ; (b) reversible conditions . . . and drug intoxication must be excluded; . . . (c) loss of brain function should persist for a period of twenty-four (24) hours; and (d) an EEG confirmation of neocortical death is optional.”).

275. UNIF. DETERMINATION OF DEATH ACT, *supra* note 73, § 1 (emphasis supplied); *accord* ALA. CODE § 22-31-1 (2000); ARIZ. REV. STAT. ANN. § 14-1107 (1994); ARK. CODE ANN. § 20-17-101 (1991); CAL. HEALTH & SAFETY CODE § 7180 (West 1982); COLO. REV. STAT. ANN. § 12-36-136 (West 1981); CONN. GEN. STAT. ANN. § 19a-504a (West 1984); DEL. CODE ANN. tit. 24, § 1760 (2005); D.C. CODE § 7-601 (1982); § 382.009, FLA. STAT. (1987); IDAHO CODE ANN. § 54-1819 (1981); 755 ILL. COMP. STAT. ANN. 40/10 (West 1998); IND. CODE ANN. § 1-1-4-3 (West 1986); KAN. STAT. ANN. § 77-205 (West 1984); ME. REV. STAT. ANN. tit. 22, § 2811 (1983); MICH. COMP. LAWS ANN. § 333.1033 (West 1992); MINN. STAT. ANN. § 145.135 (West 1989); MISS. CODE ANN. § 41-36-3 (1981); MONT. CODE ANN. § 50-22-101 (1983); NEB. REV. STAT. § 71-7202 (1992); NEV. REV. STAT. ANN. § 451.007 (West 1985); N.H. REV. STAT. ANN. § 141-D:2 (1987); N.J. STAT. ANN. § 26:6A-3 (West 1991); N.M. STAT. ANN. § 12-2-4 (West 1993); N.C. GEN. STAT. ANN. § 90-323 (West 1979); N.D. CENT. CODE § 23-06.3-01 (1989); OHIO REV. CODE ANN. § 2108.30 (West 1982); OKLA. STAT. ANN. tit. 63, § 3122 (West 1986); OR. REV. STAT. ANN. § 432.300 (West 1987); 35 PA. STAT. ANN. § 10203 (West 1983); R.I. GEN. LAWS § 23-4-16 (1982); S.C. CODE ANN. § 44-43-460 (2006); S.D. CODIFIED LAWS § 34-25-18.1 (1990); TENN. CODE ANN. § 68-3-501 (1982); UTAH CODE ANN. § 26-34-2 (West 2007); VT. STAT. ANN. tit. 18, § 5218 (1981); W. VA. CODE ANN. § 16-10-1 (West 1989); WIS. STAT. ANN. § 146.71 (West 1998); WYO. STAT. ANN. § 35-19-101 (1985). Not surprisingly, the Model Determination of Death Act advanced by the AMA mandated that a determination of death be “made in accordance with *accepted* medical standards.” 243 JAMA 420 (1980) (emphasis supplied).

276. See § 382.009, FLA. STAT. (1987); N.J. STAT. ANN. § 26:6A-3 (West 1991).

277. See MINN. STAT. ANN. § 145.135 (West 1989).

278. See HAW. REV. STAT. § 327C-1 (1998); LA. REV. STAT. ANN. § 9:111 (2001); MD. CODE ANN., HEALTH-GEN. § 5-202 (West 1998); N.C. GEN. STAT. ANN. § 90-323 (West 1979); TEX. HEALTH & SAFETY CODE ANN. § 671.001 (Vernon 1995); VA. CODE ANN. § 54.1-2972 (2004).

279. See IDAHO CODE ANN. § 54-1819 (1981); KY. REV. STAT. ANN. § 446.400 (West 1986); MO. ANN. STAT. § 194.005 (West 1982).

280. See § 382.009, FLA. STAT. (1987).

281. See GA. CODE ANN. § 31-10-16 (1992).

282. See ALASKA STAT. § 09.68.120 (1995).

the biomedical community.”²⁸³ Surprisingly, however, it is arguable whether some articulations even require that a procedure “has been accepted by a substantial and reputable body” of practitioners.²⁸⁴ For example, the Florida statute qualifies the UDDA formulation and mandates that a “determination of death . . . be made in accordance with *currently accepted [and] reasonable* medical standards.”²⁸⁵ Alaska’s legislation, in contrast, allows diagnoses to be “based on *acceptable* medical standards.”²⁸⁶ Idaho goes so far as to condone mere conformity with “the *usual and customary procedures of the community* in which the determination . . . is made.”²⁸⁷

On the one hand, it is entirely reasonable to infer that every currently “accepted” practice was, at some earlier stage, considered sufficiently “acceptable” to *confront* the test of peer scrutiny. On the other hand, it is wholly unrealistic to conclude that every practice that is tentatively considered “acceptable” will inevitably *survive* peer scrutiny and become “accepted.” Furthermore, a procedure that is “customary” in a particular regional community need not be “ordinary” in the medical community at large. One must wonder, then, what are the “acceptable” (but not yet “accepted”) practices that a physician in Alaska (but not in Florida) may employ? Similarly, what regionally “customary” (but not nationally “ordinary”) procedures may only an Idaho physician follow? Inasmuch as the answers to these questions are uncertain, the result of this statutory interplay is quite clear. The degree to which death can be uniformly determined is a function of the degree to which the diagnostic tests for doing so are universally accepted.

Whether (and, if so, to what extent) disparity among professional practices actually exists is beyond the scope of this Note. Anecdotal evidence suggests, however, that the same person can be determined

283. DEFINING DEATH, *supra* note 32, at 78.

284. *Id.* at 79.

285. § 382.009, FLA. STAT. (1987) (emphasis supplied). Query against whose standard of reasonableness the Florida statute is benchmarked. Cf. DEFINING DEATH, *supra* note 32, at 78. Is a standard “reasonable” so long as the attending physician or “an expert medical witness . . . who is a competent clinician and is experienced [with] . . . determination[s] of death” so testifies? Meyers, *supra* note 40, § 19. Or, is it possible for a hindsight-biased assessment by lay jurors to find that “a medical practice, although generally adopted,” is nevertheless “unreasonable”? DEFINING DEATH, *supra* note 32, at 78. If the latter is possible, one might speculate whether a physician who practices in a jurisdiction that requires objectively reasonable standards for determining death is more exposed to malpractice liability than her counterparts in jurisdictions that permit subjectively recognized standards. Indeed, many statutes *only* provide immunity from “damages in any civil action or . . . [from] prosecution in any criminal proceeding” if the challenged “determination [is made] in accordance with the Act.” See UNIF. DETERMINATION OF DEATH ACT, *supra* note 73, prefatory note.

286. ALASKA STAT. § 09.68.120 (1995) (emphasis supplied).

287. IDAHO CODE ANN. § 54-1819 (1981) (emphasis supplied).

dead according to Accepted Medical Practice X, yet be determined alive pursuant to Accepted Medical Practice Y²⁸⁸ – both findings being equally compliant with a statute that is benchmarked against “accepted medical standards.” Moreover, varied “local, regional, or national standards or guidelines” are promulgated by various “medical societ[ies], hospital association[s], . . . institution[s], or other recognized group[s] . . . dealing with the criteria to be utilized or referred to in ascertaining [the] time and occurrence of death.”²⁸⁹ Consequently, it would seem advisable for a vitally-driven patient who wishes to be kept alive as long as possible to seek treatment in a jurisdiction that will require her death be determined strictly according to “approved” or “currently accepted” medical procedures.²⁹⁰ Contrarily, financially motivated devisees who scheme to hasten a testator’s demise might favor (or even leverage) a death law that leniently condones diagnostic tests which are “ordinary” or merely “acceptable.”²⁹¹

V. BEYOND THE VEIL OF THE UDDA

From ashes to ashes, from dust to dust – our analysis revisits the question from whence it came: how does the corpus of American death laws operate as a system?

It is undeniable that all death laws share a common objective. Each represents a statutory “guide [for] those who will decide whether (and if so, when) a person has passed from being alive to being dead.”²⁹² But are these laws symmetrical? No. Instead, the end-of-life situations encompassed by one jurisdiction’s codification *do not* necessarily coincide with those of another,²⁹³ and similar end-of-life scenarios are often excluded or included by different legislative models.²⁹⁴ Are these laws harmonious? Quite the contrary. Rather, statutes based upon theoretic-

288. See generally INST. OF MED., *supra* note 50.

289. See Meyers, *supra* note 40, § 13. Because procedures for determining death are responsive to “geographic variations in medical practice, local custom, differences in demographic and social characteristics,” INST. OF MED., *supra* note 50, at 47, the uniformity achieved by the UDDA should not be viewed as a unifying distinction between life and death. Rather, the Act arguably ensures only a consistent application of the *particular* diagnostic tests accepted by the *particular* medical community within the *particular* jurisdiction where the *particular* determination of death is made.

290. Cf. § 382.009, FLA. STAT. (1987); MINN. STAT. ANN. § 145.135 (West 1989); N.J. STAT. ANN. § 26:6A-3 (West 1991).

291. Cf. ALASKA STAT. § 09.68.120 (1995); HAW. REV. STAT. § 327C-1 (1998); LA. REV. STAT. ANN. § 9:111 (2001); MD. CODE ANN., HEALTH-GEN. § 5-202 (West 1998); N.C. GEN. STAT. ANN. § 90-323 (West 1979); TEX. HEALTH & SAFETY CODE ANN. § 671.001 (Vernon 1995); VA. CODE ANN. § 54.1-2972 (2004).

292. DEFINING DEATH, *supra* note 32, at 55.

293. See *supra* Part IV.C.1.

294. See *supra* Part IV.B.1.

cally analogous grounds *do not* generate congruent results,²⁹⁵ and individuals with identical physiological conditions are frequently deemed alive or dead by divergent legislative formulations.²⁹⁶ In sum, just because our common understanding of death might suggest that a person should still be alive, a concomitant determination is commonly prohibited – or an inapposite determination is regularly permitted – by the controlling law.²⁹⁷

Of course, death must come to all living beings – sometimes sooner, sometimes later, but always sometime, “any laws to the contrary notwithstanding.”²⁹⁸ Yet, one’s passing not only impacts her personal relationship with those who survive, but also affects the legal relationships among the survivors themselves.²⁹⁹ “[O]ur dying,” in other words, “is [frequently] more a concern to those who survive us than to ourselves.”³⁰⁰ The antinomy of state statutes, however, affords a “decedent-to-be,” as well as her “soon-to-be-survivors,” an array of starting-points – each endowed with unique advantages and disadvantages – from which to launch the legal machinery that a pronouncement of death ignites. But any one alternative is not advantageous in a vacuum; nor is any one alternative disadvantageous because it fails to vindicate applicable norms. Rather, the prescient legal advisor must answer a critical question as to each client: whether and when, in the context of *this person’s* particular objectives, would deeming her to be legally dead “seem[] the best thing to do”?³⁰¹ Only after one knows what would be best (i.e., whether a person is wanted dead and/or alive) can calculated end-of-life maneuvers ensure the favorable application, or avoid the unfavorable applicability, of particular legal standards for defining and determining death. For only then does any one alternative become favorable, and thereby advantageous, or unfavorable, and thereby disadvantageous, in the first instance.

Certainly, relocating a “soon-to-be-decedent” from one state to another is the most obvious expedient for invoking a particular jurisdiction’s death laws. Yet, the Uniform Probate Code affords a significantly less disruptive, private-ordering alternative. Section 2-703 empowers a testator to designate that “the law of a particular state” shall govern “[t]he meaning and legal effect” of her will “without regard to the loca-

295. See *supra* Part IV.C.3.

296. See *supra* Part IV.B.3.

297. See *supra* Part IV.B.2.

298. KAN. STAT. ANN. § 77-202 (repealed 1984), *amended by* KAN. STAT. ANN. § 77-205 (1984).

299. See *supra* notes 2-26 and accompanying text.

300. MANN, *supra* note 1.

301. Dworkin, *supra* note 37, at 629.

tion of property covered thereby.”³⁰² It would thus appear that a domiciliary of State X could legitimately incorporate a choice-of-law provision in her will that ensures the term “death” will be interpreted and construed “in accordance with [State Y’s] rules of construction.”³⁰³ Consequently, if a domiciliary of State X is not legally dead pursuant to the laws of State Y, and also has a will which instructs that its “meaning and effect” shall be governed by the laws of State Y, then probating her will or administering her estate would be *impermissible* – even though she might be legally dead according to the laws of State X.³⁰⁴ Indeed, “[p]ost-mortem probate of a will must occur to make [it] effective” and “appointment of a personal representative . . . after the decedent’s death is required”³⁰⁵ to issue the letters testamentary that commence administration.³⁰⁶ Likewise, if a domiciliary of State Y is legally dead pursuant to the laws of State X and also has a will which instructs that its “meaning and effect” shall be governed by the laws of State X, then probating her will and administering her estate would be *permissible* – even though she might be legally alive according to the laws of State Y.³⁰⁷

It is understandable why some perceive this oblique state of affairs as, at best, unsettling or, at worst, unsavory. It is disconcerting to imagine that our statutory regime would (or even could) militate against our shared understanding of life. Yet, *every* statute that regulates death *inevitably* vitiates its electorate’s preconceptions of what it means to be alive – at least insofar as those precepts are inconsistent with the legislature’s opinion of what it means to be dead.³⁰⁸ And, so long as one state’s lawmakers disagree with their sister-state counterparts, our statutory regime will continue to distinguish “different ‘kinds’ of death,”³⁰⁹ designate “the same person ‘dead’ for one purpose [yet] ‘alive’ for

302. UNIF. PROBATE CODE § 2-703 (amended 1993), 8 U.L.A. 186 (1969); *accord* RESTATEMENT (SECOND) CONFLICT OF LAWS § 240(1) (1971) (“A will insofar as it devises an interest in land is construed in accordance with the rules of construction of the state designated for this purpose in the will.”); *id.* § 264(1) (“A will insofar as it bequeaths an interest in movables is construed in accordance with the local law of the state designated for this purpose in the will.”).

303. RESTATEMENT (SECOND) CONFLICT OF LAWS § 264 cmt. e (1971) (“[w]hen the testator designates the law of a state as the applicable law in matters of construction, it is to be inferred that he intends the local law of that state to govern” regardless of whether the forum “ha[s] a substantial relationship to the testator or his estate”).

304. *Cf.* UNIF. PROBATE CODE art. III gen. cmt. (amended 1993), 8 U.L.A. 26 (1969).

305. *Id.* (emphasis supplied).

306. *See id.* §§ 3-103 to -104.

307. *Cf. id.* art. III gen. cmt.

308. UNIF. STATUTE & RULE CONSTR. § 2 cmt., 14 U.L.A. 483 (1995 & Supp. 1996) (“A word or phrase defined in a statute . . . has the meaning expressed in its definition and therefore that meaning *prevails* over other meanings.” (emphasis supplied)).

309. DEFINING DEATH, *supra* note 32, at 60.

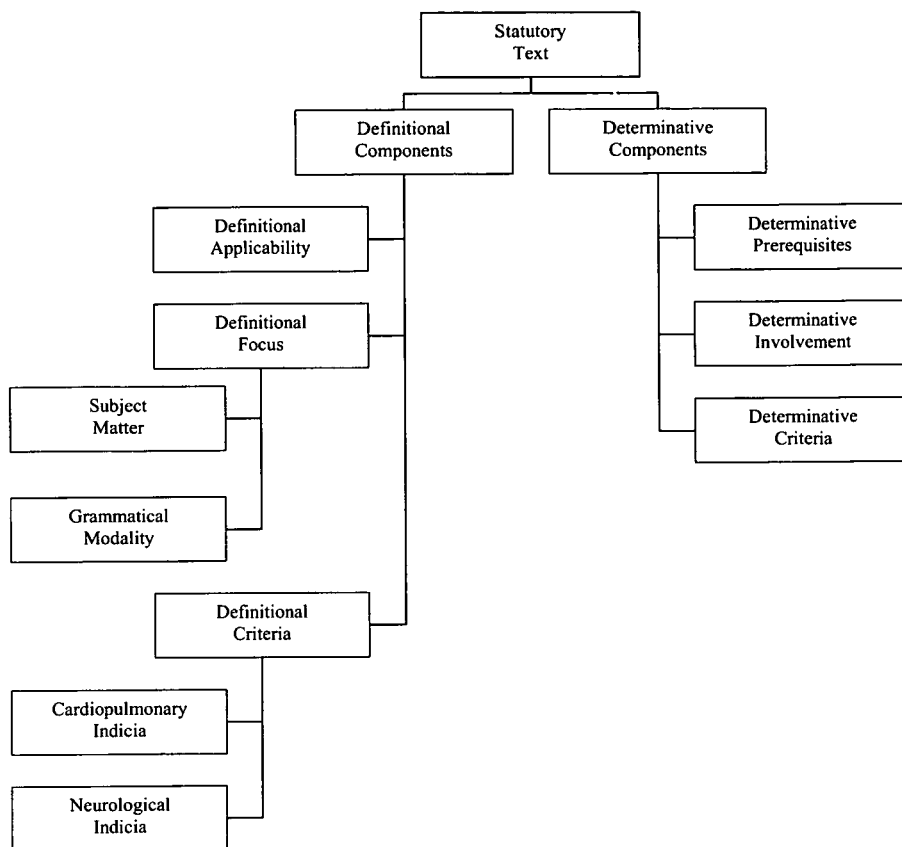
another,”³¹⁰ and deem “some people . . . ‘more dead’ than others.”³¹¹

This legislative disagreement, however, is not necessarily disagreeable. For, whether it is desirable (or undesirable) that a person can be simultaneously dead and alive pursuant to the laws of State *X* and State *Y* respectively cannot be answered by normative referents alone. Rather, the desirability of statutorily resurrecting a “putative decedent” from State *X* merely by applying the laws of State *Y*, or of statutorily making moribund a “potential decedent” from State *Y* simply by applying the laws of State *X*, depends upon the desirability of her being deemed to have died in the first instance. It is this purposive inquiry alone that “places the issue of death into the only posture in which it can be of relevance to the law – the posture of context or consequences.”³¹²

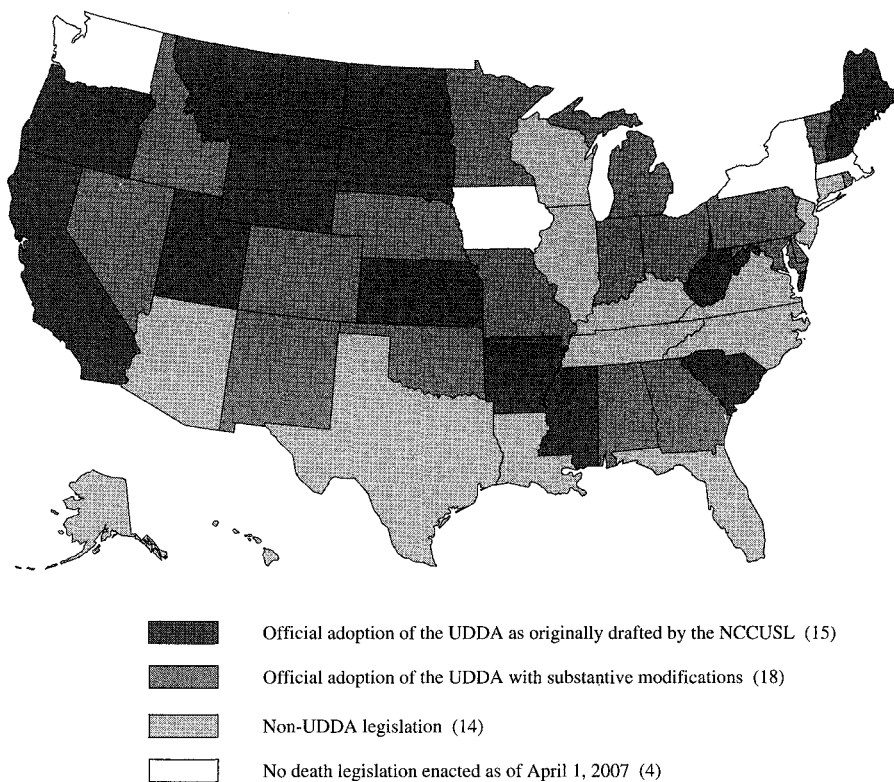
310. *Id.*

311. Capron & Kass, *supra* note 62, at 106.

312. Dworkin, *supra* note 37, at 629.

FIGURE 1. THE ANATOMY OF CONTEMPORARY DEATH LAWS³¹³

313. See *supra* notes 115-17 and accompanying text.

FIGURE 2. THE PROLIFERATION OF CONTEMPORARY DEATH LAWS³¹⁴

314. See *supra* notes 108-14 and accompanying text.

APPENDIX 1. AN INTERSTATE COMPARISON OF DEFINITIONAL COMPONENTS³¹⁵

| Jurisdiction | Statutory Model | Definitional Applicability | | | | Definitional Focus | | | Cardiopulmonary Indicia | | | | Neurological Indicia | | | | | | | | | | | | | |
|--------------|-----------------|----------------------------|---------------------|-------------------------|-----------------------|--------------------|-----------------------|------------------------------------|-------------------------|---|---------------------------|-------------|--|--|---------|-----------|---------------------------|-----|-------------|----------------|------------------------|-------------------------------|--------------------------|-----------------------------------|-----------------------------------|--|
| | | For all purposes. | For legal purposes. | For statutory purposes. | For medical purposes. | death occurs | an individual is dead | an individual may be declared dead | only | if the individual has sustained either: (1) | irreversible cessation of | spontaneous | circulatory and respiratory functions; | unless such are artificially maintained; | or: (2) | total and | irreversible cessation of | all | spontaneous | brain function | functions of the brain | functions of the entire brain | including the brain stem | where respiration and circulation | are being artificially maintained | preclude a cardiopulmonary determination |
| ALA. | a | | | | | | e | | e | e | e | | e | | e | | e | e | | | e | e | | | | |
| ALASKA | n | | | | | | | | | e | e | | e | | e | | e | e | | | e | e | | | | |
| ARIZ. | n | | | | | | | | | | | | | | | | | | | | | | | | | |
| ARK. | u | | | | | | e | | | e | e | | e | | e | | e | e | | | e | e | | | | |
| CAL. | u | | | | | | e | | | e | e | | e | | e | | e | e | | | e | e | | | | |
| COLO. | a | | | | | | e | | | e | e | | e | | e | | e | e | | | e | e | | | | |
| CONN. | n | | | | i | | e | | | e | e | | e | | e | | e | e | | | e | e | | | | |
| DEL. | a | | | | | | e | | | e | e | | e | | e | | e | e | | | e | e | | | | |
| D.C. | u | | | | | | e | | | e | e | | e | | e | | e | e | | | e | e | | | | |
| FLA. | u | | e | | e | | e | | | e | i | | i | | i | | e | e | | | e | e | | e | e | |

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Instructions:

To verbalize the text of a particular statute, concatenate its constituent elements from left to right. For example, the Alabama (ALA) statute would be verbalized as follows:

"an individual is dead" + "if the individual has sustained" + "either"

+ "irreversible cessation of" + "circulatory and respiratory functions" + "or"

+ "irreversible cessation of" + "all" + "functions of the entire brain" + "including the brain stem."

315. See *supra* Part IV.B.

| Jurisdiction | Statutory Model | Definitional Applicability | | | | Definitional Focus | | | | Cardiopulmonary Indicia | | | | Neurological Indicia | | | | | | | | | | | | | |
|--------------|-----------------|----------------------------|---------------------|-------------------------|-----------------------|--------------------|-----------------------|------------------------------------|------|---------------------------------|-------------|---------------------------|-------------|--|--|---------|-----------|---------------------------|-----|-------------|----------------|------------------------|-------------------------------|--------------------------|-----------------------------------|-----------------------------------|--|
| | | For all purposes, | For legal purposes, | For statutory purposes, | For medical purposes, | death occurs | an individual is dead | an individual may be declared dead | only | if the individual has sustained | either: (1) | irreversible cessation of | spontaneous | circulatory and respiratory functions; | unless such are artificially maintained; | or: (2) | total and | irreversible cessation of | all | spontaneous | brain function | functions of the brain | functions of the entire brain | including the brain stem | where respiration and circulation | are being artificially maintained | preclude a cardiopulmonary determination |
| GA. | a | | | | | | | | | | | | | | | | | | | | | | | | | | |
| HAW. | n | e | i | i | i | | e | | | | | | | | | | | | | | | | | | | | |
| IDAHO | a | | | | | | e | | | | | | | | | | | | | | | | | | | | |
| ILL. | n | | | | | e | | | | | | | | | | | | | | | | | | | | | |
| IND. | a | | | | | | e | | e | e | e | | | | | | | | | | | | | | | | |
| KAN. | u | | | | | | e | | e | e | e | | | | | | | | | | | | | | | | |
| KY. | n | | | | | | e | | e | e | e | | | | | | | | | | | | | | | | |
| LA. | n | | e | | | | e | | e | e | e | e | e | e | i | | | | | | | | | | | | |
| ME. | u | | | | | | e | | e | e | e | e | e | e | | | | | | | | | | | | | |
| MD. | a | e | i | i | i | | e | | | e | e | e | e | e | | | | | | | | | | | | | |
| MICH. | a | | | | | | e | | | e | e | e | e | e | | | | | | | | | | | | | |
| MINN. | a | | | | | | e | | | e | e | e | e | e | | | | | | | | | | | | | |

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Instructions:

To verbalize the text of a particular statute, categorize its constituent elements from left to right. For example, the Alabama (ALA) statute would be verbalized as follows:
 "an individual is dead" + "if the individual has sustained" + "either:"
 + "irreversible cessation of" + "circulatory and respiratory functions" + "or"
 + "irreversible cessation of" + "all" + "functions of the entire brain" + "including the brain stem."

| Jurisdiction | Statutory Model | Definitional Applicability | | | | Definitional Focus | | | Cardiopulmonary Indicia | | | | Neurological Indicia | | | | | | | | | | | | | | |
|--------------|-----------------|----------------------------|---------------------|-------------------------|-----------------------|--------------------|-----------------------|------------------------------------|-------------------------|---------------------------------|-------------|---------------------------|----------------------|--|--|---------|-----------|---------------------------|-----|-------------|----------------|------------------------|-------------------------------|--------------------------|-----------------------------------|-----------------------------------|--|
| | | For all purposes, | For legal purposes, | For statutory purposes, | For medical purposes, | death occurs | an individual is dead | an individual may be declared dead | only | if the individual has sustained | either: (1) | irreversible cessation of | spontaneous | circulatory and respiratory functions; | unless such are artificially maintained; | or: (2) | total and | irreversible cessation of | all | spontaneous | brain function | functions of the brain | functions of the entire brain | including the brain stem | where respiration and circulation | are being artificially maintained | preclude a cardiopulmonary determination |
| Miss. | u | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Mo. | a | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Mont. | u | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Neb. | a | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Nev. | a | | | | | | | | | | | | | | | | | | | | | | | | | | |
| N.H. | u | | | | | | | | | | | | | | | | | | | | | | | | | | |
| N.J. | u | | | | | | | | | | | | | | | | | | | | | | | | | | |
| N.M. | a | | | | | | | | | | | | | | | | | | | | | | | | | | |
| N.C. | u | | | | | | | | | | | | | | | | | | | | | | | | | | |
| N.D. | u | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Ohio | a | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Okla. | a | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Or. | u | | | | | | | | | | | | | | | | | | | | | | | | | | |

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Instructions:

To verbalize the text of a particular statute, concatenate its constituent elements from left to right.

For example, the Alabama (ALA.) statute would be verbalized as follows:

"an individual is dead" + "if the individual has sustained" + "either"

+ "irreversible cessation of" + "circulatory and respiratory functions" + "or"

+ "irreversible cessation of" + "all" + "functions of the entire brain" + "including the brain stem."

| Jurisdiction | Statutory Model | Definitional Applicability | | | | Definitional Focus | | | | Cardiopulmonary Indicia | | | | Neurological Indicia | | | | | | | | | | | | | |
|--------------|-----------------|----------------------------|---------------------|-------------------------|-----------------------|--------------------|-----------------------|------------------------------------|------|---------------------------------|-------------|---------------------------|-------------|--|--|---------|-----------|---------------------------|-----|-------------|----------------|------------------------|-------------------------------|--------------------------|-----------------------------------|-----------------------------------|--|
| | | For all purposes, | For legal purposes, | For statutory purposes, | For medical purposes, | death occurs | an individual is dead | an individual may be declared dead | only | if the individual has sustained | either: (1) | irreversible cessation of | spontaneous | circulatory and respiratory functions; | unless such are artificially maintained; | or: (2) | total and | irreversible cessation of | all | spontaneous | brain function | functions of the brain | functions of the entire brain | including the brain stem | where respiration and circulation | are being artificially maintained | preclude a cardiopulmonary determination |
| PA. | a | | | | | | e | | e | e | e | e | | | | e | | e | e | | | e | e | | | | |
| R.I. | a | | | | | | e | | | e | e | e | | | | e | | e | e | | | e | e | | | | |
| S.C. | u | | | | | | e | | | e | e | e | | | | e | | e | e | | | e | e | | | | |
| S.D. | u | | | | | | e | | | e | e | e | | | | e | | e | e | | | e | e | | | | |
| TENN. | n | | | | | | e | | | e | e | e | | | | e | | e | e | | | e | e | | | | |
| TEX. | n | | | | | | e | | | e | e | e | | | | e | | e | e | | | e | e | | | | |
| UDDA | - d | | i | i | i | | e | | | e | e | e | | | | e | | e | e | | | e | e | | | | e |
| UTAH | u | | | | | | e | | | e | e | e | | | | e | | e | e | | | e | e | | | | |
| VT. | a | | | | | | e | | | e | e | e | | | | e | | e | e | | | e | e | | | | |
| VA. | n e | | e | i | e | | e | | | e | e | e | | | | e | | e | e | | | e | e | | | i | |
| W. VA. | u | | | | | | e | | | e | e | e | | | | e | | e | e | | | e | e | | | | |
| Wis. | n | | | | | | e | | | e | e | e | | | | e | | e | e | | | e | e | | | | |
| Wyo. | u | | | | | | e | | | e | e | e | | | | e | | e | e | | | e | e | | | | |

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Instructions:

- To verbalize the text of a particular statute, concatenate its constituent elements from left to right.
- For example, the Alabama (ALA.) statute would be verbalized as follows:
- "an individual is dead" + "if the individual has sustained" + "either"
- + "irreversible cessation of" + "circulatory and respiratory functions" + "or"
- + "irreversible cessation of" + "all" + "functions of the entire brain" + "including the brain stem."

APPENDIX 2. AN INTERSTATE COMPARISON OF DETERMINATIVE COMPONENTS³¹⁶

| Jurisdiction | Statutory Model | Determinative Prerequisites | | | | | | Determinative Criteria | | | | | | | | | | Determinative Involvement | | | | | | | | | | |
|--------------|-----------------|-----------------------------|--------|--------|-------|--|--------------------------|---|---|-----------|-----------|------------|----------|----------|----------|------------|------------|---------------------------|-------------------|------------------|--------|--------|----------|------------|-----------|---------------|-----------------|----------------------|
| | | and | unless | before | after | attempts to restore cardiopulmonary functions. | would not be successful. | artificial means of support are terminated. | any vital organ is removed for transplantation. | currently | generally | acceptable | accepted | approved | ordinary | reasonable | recognized | usual and customary | medical standards | medical practice | by one | by two | licensed | authorized | qualified | physician(s). | neurologist(s). | registered nurse(s). |
| ALA. | a | | | | | | | e | | | | e | | | | | | | e | e | e | | | | e | e | e | e |
| ALASKA | n | | | e | | | | | | | | | | | | | | | e | e | e | | | | e | e | e | e |
| ARIZ. | n | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| ARK. | u | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| CAL. | u | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| COLO. | u | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| CONN. | a | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| DELA. | u | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| D.C. | a | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| FLA. | u | | | | | | | | | | | | | | | | | | | | | | | | | | | |

Legend:

- = Official adoption of the UDPA with substantive modifications.
- "a" = For purposes of determining brain death.
- "b" = Discussed within official comments or notes.
- "c" = Explicitly stated within statutory text.
- "d" = Implicitly stated within statutory text.
- "e" = Implicitly stated within statutory text.
- "f" = Not UDPA language.
- "g" = Official adoption of the UDPA as originally drafted by the NCCUSL.

Instructions:

- To verbalize the text of a particular statute, concatenate its constituent elements from left to right.
- For example, the Alabama (ALA.) statute would be verbalized as follows:
- A determination of death must be made in accordance with
- + "accepted" + "medical standards" + "by one" + "licensed" + "physician."

316. See *supra* Part IV.C.

| Jurisdiction | Statutory Model | Determinative Prerequisites | | | | | | | Determinative Criteria | | | | | | | | | | Determinative Involvement | | | | | | | | | |
|--------------|-----------------|-----------------------------|--------|--------|-------|--|--------------------------|---|---|-----------|-----------|------------|----------|----------|----------|------------|------------|---------------------|---------------------------|------------------|--------|--------|----------|------------|-----------|---------------|-----------------|----------------------|
| | | and | unless | before | after | attempts to restore cardiopulmonary functions. | would not be successful. | artificial means of support are terminated. | any vital organ is removed for transplantation. | currently | generally | acceptable | accepted | approved | ordinary | reasonable | recognized | usual and customary | medical standards | medical practice | by one | by two | licensed | authorized | qualified | physician(s). | neurologist(s). | registered nurse(s). |
| GA. | a | | | | | | | | | e | | | | | e | | | | -- | e | e | | e | e | e | e | e | e |
| HAW. | n | e | | | | | | | | | | | | | e | | | | e | e | e | | | | | | | e |
| IDAHO | a | | | | | | | | | | | | | | | | | | e | e | | | | | | | | |
| ILL. | n | | | | | | | | | | | | | | | | | e | e | e | | | | | | | | |
| IND. | a | | | | | | | | | | | | | | | | | | e | e | | | | | | | | |
| KAN. | n | | | | | | | | | | | | | | | | | | e | e | | | | | | | | |
| KY. | n | | | | | | | | | | | | | | | | | | e | e | e | b | b | | e | | | |
| LA. | n | | | | | | | | | | | | | | | | | | e | e | e | | | | | | | |
| ME. | u | | | | | | | | | | | | | | | | | | e | e | e | | | | | | | |
| MD. | a | e | | e | | | | | | | | | | | e | | | | e | e | e | | | | | | | |
| MICH. | a | | | | | | | | | | | | | | e | | | | e | e | e | | | | | | | |
| MINN. | a | | | | | | | | | | | | | | | | | | e | e | e | | | | | | | |

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Instructions:

To verbalize the text of a particular statute, concatenate its constituent elements from left to right.

For example, the Alabama (A.L.A.) statute would be verbalized as follows:

A determination of death must be made in accordance with

+ "accepted" + "medical standards" + "by one" + "licensed" + "physician."

| Jurisdiction | Statutory Model | Determinative Prerequisites | | | | | | Determinative Criteria | | | | | | | | | | Determinative Involvement | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
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| | | and | unless | before | after | attempts to restore cardiopulmonary functions. | would not be successful. | artificial means of support are terminated. | any vital organ is removed for transplantation. | currently | generally | acceptable | accepted | approved | ordinary | reasonable | recognized | usual and customary | medical standards | medical practice | by one | by two | licensed | authorized | qualified | physician(s). | neurologist(s). | registered nurse(s). | emergency medical technician(s). | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
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Legend:

- = Official adoption of the UDDA with substantive modifications.
- "a" = For purposes of determining brain death.
- "b" = Discussed within official comments or notes.
- "d" = Explicitly stated within statutory text.
- "e" = Implicitly conveyed by statutory text.
- "f" = Non-UDDA legislation.
- "n" = Official adoption of the UDDA as originally drafted by the NCCUSL.
- "u" =

Instructions:

To verbalize the text of a particular statute, categorize its constituent elements from left to right. For example, the Alabama (ALA.) statute would be verbalized as follows:
A determination of death must be made in accordance with
+ "accepted" + "medical standards" + "by one" + "licensed" + "physician."

| Jurisdiction | Statutory Model | Determinative Prerequisites | | | | | | Determinative Criteria | | | | | | | | | | Determinative Involvement | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
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| | | and | unless | before | after | attempts to restore cardiopulmonary functions. | would not be successful. | artificial means of support are terminated. | any vital organ is removed for transplantation. | currently | generally | acceptable | accepted | approved | ordinary | reasonable | recognized | usual and customary | medical standards | medical practice | by one | by two | licensed | authorized | qualified | physician(s). | neurologist(s). | registered nurse(s). | emergency medical technician(s). | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| PA. | a | | | | | | | | | | | a | | | | | | | e | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | </ |

Legend.

- "a" = Official adoption of the UDDA with substantive modifications.
- "b" = For purposes of determining brain death.
- "d" = Discussed within official comments or notes.
- "e" = Explicitly stated within statutory text.
- "f" = Implicitly conveyed by statutory text.
- "n" = Non-UDDA legislation.
- "u" = Official adoption of the UDDA as originally drafted by the NCCUSL.

Instructions.

To verbalize the text of a particular statute, categorize its constituent elements from left to right. For example, the Alabama (ALA.) statute would be verbalized as follows:
 A determination of death must be made in accordance with
 + "accepted" + "medical standards" + "by one" + "licensed" + "physician."