

Fall 2011

No Means No, But Silence Means Yes? The Policy and Constitutionality of the Recent State Proposals for Opt-Out Organ Donation Laws

Sara Naomi Rodriguez

Follow this and additional works at: <https://ecollections.law.fiu.edu/lawreview>



Part of the [Other Law Commons](#)

Online ISSN: 2643-7759

Recommended Citation

Sara N. Rodriguez, *No Means No, But Silence Means Yes? The Policy and Constitutionality of the Recent State Proposals for Opt-Out Organ Donation Laws*, 7 FIU L. Rev. 149 (2011).

DOI: <https://dx.doi.org/10.25148/lawrev.7.1.9>

This Article is brought to you for free and open access by eCollections. It has been accepted for inclusion in FIU Law Review by an authorized editor of eCollections. For more information, please contact lisdavis@fiu.edu.

No Means No, But Silence Means Yes? The Policy and Constitutionality of the Recent State Proposals for Opt-Out Organ Donation Laws

*Sara Naomi Rodriguez**

I. INTRODUCTION

Waiting. That is what 113,555 people in this country in need of life-saving organ transplants are doing right now.¹ They are waiting for the phone call that will usher in a second chance at life. However, for many of those on the organ transplant waitlist, that phone call will not come in time. They will die while waiting because the demand for transplantable organs in this country greatly exceeds the available supply.² This is particularly true for those in need of kidney transplants – and the gap appears to be growing larger each year.³

Undeniably, it is a horrific scenario. But what is particularly frustrating about the shortage of transplantable organs is that the reality of the crisis is not reflected in public opinion surveys, which consistently show that the majority of Americans are open to the idea of organ donation.⁴ For example, in a 2005 Gallup national survey, 95% of those surveyed said they “support or strongly support organ donation.”⁵ Further, 78% of those surveyed said they “would be likely or very likely to have their organs donated after their death.”⁶ Both of

* J.D., 2012, Florida International University College of Law. I would like to thank the following: Professor Thomas E. Baker, for helping me find my way; my parents, for their love and sacrifice so that anything was possible; my sister, for setting the bar high; Chris, for bringing fun into my life; Shari, for being my inspiration, always.

¹ Based on data as of March 21, 2012. *The Need is Real*, ORGANDONOR.GOV, <http://organdonor.gov/index.html> (last visited Mar. 21, 2012).

² See 2009 *OPTN/SRTR Annual Report*, HRSA, http://www.ustransplant.org/annual_reports/current/default.htm (last visited Mar. 9, 2012).

³ See 2009 *OPTN/SRTR Annual Report*, *supra* note 2.

⁴ See 2005 *National Survey of Organ and Tissue Donation Attitudes and Behaviors*, THE GALLUP ORG., <ftp://ftp.hrsa.gov/organdonor/survey2005.pdf> (last visited Mar. 9, 2012) [hereinafter Gallup survey]; Sean R. Fitzgibbons, *Cadaveric Organ Donation and Consent: A Comparative Analysis of the United States, Japan, Singapore, and China*, 6 ILSA J. INT'L & COMP. L. 73, 85 (1999).

⁵ Gallup survey, *supra* note 4, at 3.

⁶ *Id.*

these figures represent increases from 1993 when the Gallup national survey was last conducted.⁷ Based on current death rates, these figures seem to suggest that there should be an ample, if not surplus, supply of transplantable organs in the United States.⁸ The reality, however, is that thousands of people die every year while waiting for an organ transplant that will never happen because there are just not enough organ donors.⁹ So, where is the disconnect? If so many Americans are willing to donate their organs after death, why is the United States currently facing the greatest shortage of donor kidneys in a decade?¹⁰ Many believe that the disconnect stems from the ability of the decedent's next of kin to intervene in the organ donation decision.¹¹ Currently, in situations where the decedent's organ donor status is unknown, doctors must obtain consent from the decedent's next of kin before procuring organs for transplantation.¹² Unaware of what their deceased loved one's wishes would have been, family members often "err on the side of caution" in such situations and refuse to provide consent.¹³ However, even where the decedent's wishes to be an organ donor are known, doctors are often hesitant to procure organs over the objection of the decedent's next of kin.¹⁴

Whatever the reason for the disconnect, both the federal and state governments have employed various methods in an effort to increase the number of organ donors in the United States, including revised organ donation legislation,¹⁵ government funded research,¹⁶ and public awareness and education initiatives.¹⁷ The latest attempt

⁷ See *id.*

⁸ See Christy M. Watkins, *A Deadly Dilemma: The Failure of Nations' Organ Procurement Systems and Potential Reform Alternatives*, 5 CHI.-KENT J. INT'L & COMP. L. 1, 2 (2005).

⁹ See *The Gap Continues to Widen*, ORGANDONOR.GOV, <http://www.organdonor.gov/images/pdfs/gapgraph.pdf> (last visited Mar. 21, 2012); see also *The Need is Real*, ORGAN DONOR.GOV, <http://organdonor.gov/becomingdonor/index.htm> ("Each day, about 79 people receive organ transplants. However, 18 people die each day waiting for transplants that can't take place because of the shortage of donated organs.") (last visited Mar. 21, 2012).

¹⁰ See Kevin B. O'Reilly, *Kidney Foundation Plan Targets Financial Barriers to Donation*, amednews.com (Feb. 23, 2009), <http://www.ama-assn.org/amednews/2009/02/23/prsb0223.htm>; Matt Cover, *Obama Regulation Czar Advocated Removing People's Organs Without Explicit Consent*, CNSNEWS (Sept. 3, 2009), <http://www.cnsnews.com/print/53534>.

¹¹ See Cover, *supra* note 10.

¹² See *id.*

¹³ See *id.* at 1.

¹⁴ See David Orentlicher, *Presumed Consent to Organ Donation: Its Rise and Fall in the United States*, 61 RUTGERS L. REV. 295, 298 (2009).

¹⁵ See Watkins, *supra* note 8, at 11.

¹⁶ See *Grants & Research*, ORGANDONOR.GOV, <http://www.organdonor.gov/dtcp/> (last visited Mar. 6, 2011).

¹⁷ See Watkins, *supra* note 8, at 11; see also Fitzgibbons, *supra* note 4, at 85; see also *About Us*, UNITED NETWORK FOR ORGAN SHARING (UNOS), <http://www.unos.org/about/index.php> (last visited Mar. 6, 2011); see also *Awareness & Promo-*

by state law-makers has come by way of proposed “presumed consent” or “opt-out” organ donation laws.¹⁸ Such laws propose to flip the current organ donation system in the United States, an opt-in system, on its head by rendering all persons de facto organ donors unless they choose to expressly opt-out.¹⁹ The idea that presumed consent laws can increase organ donation rates is based on the theory that “more people ‘choose’ to be organ donors” when they must take affirmative steps to opt-out rather than opt-in.²⁰ Further, in cases where the decedent’s organ donor status is unknown, some propose that presumed consent laws can help to address the issue of family consent by changing the dynamics of the interaction between doctors and family members.²¹ “‘The next of kin can be approached quite differently when the decedent’s silence is presumed to indicate a decision to donate rather than when it is presumed to indicate a decision not to donate. This shift may make it easier for the family to accept organ donation.’”²²

While it is commendable that the states have taken the lead in addressing the organ crisis, and while law-makers undoubtedly have the best interests of their citizens in mind, opt-out organ donation laws raise serious legal, ethical, and policy concerns that cannot be overlooked.²³ Can it be that the only solution to the organ shortage crisis is one which poses a serious threat to our individual liberty, autonomy, and privacy? Are Americans willing to sacrifice such cherished values for the benefit of the common good? And even if the answers to these questions are yes, will opt-out organ donation laws withstand the constitutional challenges that are sure to come?

This Comment explores the policy implications and constitutionality of the recent state proposals for presumed consent organ donation laws. Part II offers an overview of the current opt-in organ dona-

tion, Donation & Transplantation, UNOS, <http://www.unos.org/donation/index.php?topic=awareness> (last visited Mar. 6, 2011).

¹⁸ See Madison Park, *California, New York Mull Changes to Organ Donor Laws*, CNN HEALTH, May 10, 2010, http://articles.cnn.com/2010-05-10/health/organ.donation.jobs.laws_1_kidney-transplants-organ-transplants-donor-registry?_s=PM:HEALTH.

¹⁹ See Watkins, *supra* note 8, at 18, 20; see also Orentlicher, *supra* note 14, at 295; see also Catherine Rampell, *How Can Countries Encourage Organ Donation?*, N.Y. TIMES, (Dec. 22, 2009, 2:12 PM), <http://economix.blogs.nytimes.com/2009/12/22/how-can-we-encourage-organ-donation/>; see also Cover, *supra* note 10.

²⁰ Cover, *supra* note 10, at 2 (“[I]n a 2003 study only 42 percent of people actively chose to be organ donors, while only 18 percent actively opted out when their consent was presumed.”).

²¹ *Id.*

²² *Id.*

²³ *Id.* (“‘Another [problem] is that [presumed consent laws are] a hard sell politically. . . . More than a few people object to the idea of ‘presuming’ anything when it comes to such a sensitive matter.’”).

tion system in the United States. Part III examines the history of opt-out organ donation laws in the United States, the recent state proposals, and presumed consent systems around the world. Part IV discusses some of the policy implications of presumed consent for the United States. Finally, the constitutional implications of presumed consent are examined in Part V.

II. THE CURRENT OPT-IN SYSTEM

A. Living Donation

Living organ donation occurs when an organ is procured from a living donor and transplanted into an organ recipient.²⁴ This differs from cadaveric organ donation where the organ donor has been declared legally dead.²⁵ There are five types of living donor transplants performed in the United States: kidney (entire organ), liver (segment), lung (lobe), intestine (portion), and pancreas (portion).²⁶ Although living organ donation is a vital part of the organ procurement system in the United States, it will not be discussed further in this Comment since presumed consent laws pertain only to cadaveric organ donation.

B. Cadaveric Donation

1. History

The current cadaveric organ procurement system in the United States first began to take shape with the passage of the 1968 Uniform Anatomical Gift Act (1968 UAGA).²⁷ Besides setting forth the first comprehensive legislation dealing with organ transplantation, the primary goal of the 1968 UAGA was to harmonize the various state organ donation laws that had already come into effect.²⁸ The 1968 UAGA addressed such issues as who may donate an organ and how a person's desire to donate should be documented.²⁹ In 1977, the first computerized donor-donee matching system, the United Network for Organ Sharing (UNOS), was established by the South-Eastern Organ

²⁴ See *Living Donation, Information You Need to Know*, UNOS, http://www.unos.org/docs/Living_Donation.pdf (last visited Mar. 6, 2011).

²⁵ See *Common Myths, Fact Sheets, Patient Education, Donation & Transplantation*, UNOS, http://www.unos.org/donation/index.php?topic=fact_sheet_7 (last visited Mar. 7, 2011).

²⁶ See *Living Donation, Information You Need to Know*, *supra* note 24.

²⁷ See Watkins, *supra* note 8, at 10.

²⁸ See Fitzgibbons, *supra* note 4, at 75-76.

²⁹ See *id.* at 75-78.

Procurement Foundation.³⁰ Although charged with many duties, the primary task of UNOS was, and continues to be, the matching of donors and candidates.³¹ Two subsequent pieces of legislation addressed two critical issues that the 1968 UAGA neglected to address: (1) the sale of human organs and (2) the determination of death for the purposes of cadaveric organ donation.³² In 1980, the National Organ Transplant Act (NOTA) provided that “[i]t shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce.”³³ The NOTA also called for the establishment of an Organ Procurement and Transplantation Network (OPTN).³⁴ Then, in 1984, the Uniform Determination of Death Act (UDDA) codified the preexisting common law definition of death as “an individual who has sustained either (1) irreversible cessation of all functions of circulatory and respiratory function or (2) irreversible cessation of all functions of the entire brain, including the brain stem”³⁵

In 1987, the progression of science and technology in the field of organ transplantation, as well as an increased need for cadaveric organ donation, necessitated a revised version of the UAGA.³⁶ The 1987 UAGA featured some much needed improvements, such as the simplification of the process by which one could designate himself or herself a cadaveric donor.³⁷ This simplification enabled states to begin utilizing the present method of recording a person’s desired donor status on identification cards, such as driver’s licenses.³⁸ Further, the 1987 UAGA required hospitals to designate specific personnel to conduct “routine inquiries” as to patients’ donor wishes and “required requests” of next of kin for an anatomical gift from a decedent.³⁹ In addition, the 1987 UAGA incorporated NOTA’s prohibition on the sale of human organs.⁴⁰ Most significant, however, is the fact that the

³⁰ See Watkins, *supra* note 8, at 11.

³¹ See *id.*; *About Us*, *supra* note 17.

³² See Fitzgibbons, *supra* note 4, at 79.

³³ 42 U.S.C. § 274e(a) (2010).

³⁴ See 42 U.S.C. § 274. UNOS has run the OPTN since its inception in 1986. See *History, Donation & Transplantation*, UNOS, <http://www.unos.org/donation/index.php?topic=history> (last visited Mar. 6, 2011).

³⁵ The New York Academy of Medicine, *Statement and Resolution on the Definition of Death* (Nov. 1984), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1911797/pdf/bullnyacadmed00075-0103.pdf> (quoting the Uniform Determination of Death Act).

³⁶ See Fitzgibbons, *supra* note 4, at 81.

³⁷ See *id.* at 82.

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ See *id.* at 82-83.

1987 UAGA contained a limited presumed consent provision.⁴¹ Under the 1987 UAGA, a medical examiner or coroner could authorize the removal of any needed donor organ or tissue from a decedent in the absence of any knowledge that a decedent or a decedent's next of kin objected to such removal.⁴² Although the 1987 UAGA provision presented the first national experiment with limited scope presumed consent laws, it is noteworthy that many states, as early as the 1960s, had enacted limited scope presumed consent laws in an effort to increase cadaveric organ donation.⁴³ These early statutes were most often restricted to cornea or pituitary gland removal, and nearly all were limited in their application to cadavers in the custody of medical examiners or coroners.⁴⁴ These precursor state presumed consent laws will be discussed in more detail *infra* at Section III.A. However, by 2006, when the UAGA was revised, yet again, a number of lawsuits involving the once popular state presumed consent laws resulted in the elimination of the presumed consent provisions from the 2006 UAGA.⁴⁵ Ultimately, most states followed suit and eliminated their presumed consent laws by either adopting the 2006 UAGA or repealing their individual presumed consent statutes.⁴⁶

2. How the Current Opt-In System Works

a. Becoming a Donor – Providing Consent

The current opt-in system in the United States requires potential donors or their next of kin to opt-in or provide explicit consent to organ donation.⁴⁷ Thus, absent such explicit consent, it is presumed that a decedent did not wish to be an organ donor, or opted-out. Potential donors can document their explicit consent by (1) registering with their state donor registry, (2) designating their donor status on a driver's license, (3) signing and carrying a donor card, and (4) informing their family about their decision to be an organ donor.⁴⁸ Although often overlooked, family awareness is an important aspect of ensuring

⁴¹ See *id.* at 82.

⁴² See *id.*; Orentlicher, *supra* note 14, at 300.

⁴³ See Orentlicher, *supra* note 14, at 299, 302.

⁴⁴ See *id.* at 302-03.

⁴⁵ See *id.* at 300, 305-08.

⁴⁶ See *id.* at 300-01.

⁴⁷ See Watkins, *supra* note 8, at 14; Fitzgibbons, *supra* note 4, at 74; Orentlicher, *supra* note 14, at 298-99; Jacob M. Appel, *Scavenging for Organs: Why the Donor Famine Justifies a Radical Harvest*, HUFFINGTON POST, (Mar. 15, 2010, 02:09 PM), http://www.huffingtonpost.com/Jacob-m-appel/scavenging-for-organs-why_b_499479.html.

⁴⁸ See *Becoming a Donor*, ORGANDONOR.GOV, <http://www.organdonor.gov/become.asp> (last visited Mar. 6, 2011).

that one's wishes to become an organ donor are carried out.⁴⁹ Concerns about liability often prevent doctors from removing organs without the consent of next of kin despite a decedent's properly documented organ donor status.⁵⁰

b. Becoming a Transplant Candidate – Registering as a Candidate

To be placed on the national waiting list for an organ transplant, a person must first obtain a referral from a physician and be evaluated by a hospital with a transplant center [hereinafter transplant hospital].⁵¹ After evaluation, the hospital's transplant team will determine when and at what status code a person will be added to the national waiting list.⁵² The status code indicates how urgent a person's need is for a particular organ transplant.⁵³

c. Matching Donors and Candidates

There are several players involved in facilitating the matching process that unites available donor organs with compatible transplant candidates. Besides, of course, the donors and transplant candidates themselves, organ procurement organizations (OPOs), transplant centers, and UNOS play pivotal roles.⁵⁴ Using DonorNet, a centralized Internet-based database created by UNOS, Organ Procurement Coordinators at OPOs communicate information regarding newly acquired donor organs to transplant hospitals with compatible transplant candidates.⁵⁵ Many different considerations are factored into the compatibility determination, such as the age of the candidate, the blood and tissue type of the candidate (otherwise known as histocompatibility), the urgency of the candidate's need, the amount of time the candidate has spent on the national waiting list, the geographic distance between the donor organ and the candidate,⁵⁶ the size of the

⁴⁹ See *id.*; *Organ Donor FAQs, How to Be a Donor, If I Register as a Donor Will My Wishes Be Carried Out?*, ORGANDONOR.GOV, <http://www.organdonor.gov/faqs.html> (last visited Mar. 21, 2012).

⁵⁰ See Fitzgibbons, *supra* note 4, at 84.

⁵¹ See *Organ Donation: The Process, About Donation & Transplantation*, ORGAN DONOR.GOV, <http://www.organdonor.gov/about/transplantationprocess.html#process2> (last visited Aug. 3, 2012).

⁵² See *id.*

⁵³ See *id.*

⁵⁴ See *Organ Donation: The Process*, ORGAN DONOR.GOV, <http://www.organdonor.gov/about/organdonationprocess.html#process1> (last visited Aug. 15, 2012).

⁵⁵ See *Organ Allocation, Donation & Transplantation*, UNOS, http://www.unos.org/donation/index.php?topic=organ_allocation (last visited Mar. 6, 2011).

⁵⁶ The length of time a donor organ remains viable for transplantation varies according to the specific type of organ being transplanted. Heart: 4-6 hours, Liver: 12-24 hours, Kidney: 48-72 hours, Heart-Lung: 4-6 hours, Lung: 4-6 hours. See *id.*

donor organ in relation to the size of the candidate,⁵⁷ and the type of donor organ needed.⁵⁸

d. A Hybrid System – Mandated Choice

The main point of difference for the varying types of organ procurement systems lies at the point of consent.⁵⁹ However, the opt-in and opt-out systems do share at least one common aspect – they both entail the raising of a presumption based on a decedent's failure to affirmatively act. Accordingly, in an opt-in system, a decedent is presumed to have not consented to organ donation if s/he never opted-in. Conversely, in an opt-out system, a decedent is presumed to have consented to organ donation if s/he never opted-out. However, there is an organ procurement system that involves the raising of no presumptions whatsoever. This system is referred to as “mandated choice” and is seen as a middle-ground in the debate over opt-in and opt-out systems.⁶⁰ Under a mandated choice system, individuals must explicitly choose to either opt-in or opt-out of organ donation.⁶¹ There is also a “soft” version of the mandated choice system that allows individuals to select a third option, which instructs doctors to ask the individual's next of kin for consent.⁶² Neither consent nor lack of consent is presumed in mandated choice, and thus, it is more palatable to those individuals who express discomfort with the presumption of consent (or lack thereof).⁶³ California recently passed legislation establishing a mandated choice system after initial efforts to pass legislation estab-

⁵⁷ A donor organ from a large adult would be too big for a small child. See *Organ Donation: The Process*, *supra* note 54.

⁵⁸ See *Organ Matching Process, Common Elements*, ORGANDONOR.GOV, <http://www.organdonor.gov/about/organmatching.html> (last visited Mar. 21, 2012).

⁵⁹ See Watkins, *supra* note 8, at 14-20.

⁶⁰ See Cover, *supra* note 10 (“Another [problem] is that [presumed consent] is a hard sell politically. . . . [P]eople object to the idea of ‘presuming’ anything when it comes to such a sensitive matter. For these reasons, . . . the best choice architecture for organ donations is mandated choice.”).

⁶¹ See Carol J. Roberts, *Presumed Consent for Organ Procurement—Does It Have a Future in the U.S.? (Ethical-Legal Perspectives)*, 35 J. NEUROSCIENCE NURSING 107, 108-09 (Apr. 2003); Cover, *supra* note 10.

⁶² See Roberts, *supra* note 61; Appel, *supra* note 47.

⁶³ See Cover, *supra* note 10 (“Another [problem] is that [presumed consent] is a hard sell politically. . . . [P]eople object to the idea of ‘presuming’ anything when it comes to such a sensitive matter. For these reasons, . . . the best choice architecture for organ donations is mandated choice.”).

lishing an opt-out system failed.⁶⁴ Texas, Colorado, and Illinois have also passed mandated choice laws.⁶⁵

III. THE OPT-OUT SYSTEM

A. The History of Presumed Consent Laws in the United States

As discussed above in Section II, presumed consent laws are not entirely new to the United States.⁶⁶ Starting as early as the 1960's, various states implemented presumed consent laws in an effort to increase organ donation.⁶⁷ All of these statutes, with the exception of one,⁶⁸ were limited in application to cadavers in the custody of medical examiners or coroners.⁶⁹ The rationale behind allowing for presumed consent in these contexts was that such decedents would already be subjected to a major intrusion by way of an autopsy.⁷⁰ In addition, the majority of the early presumed consent laws only allowed for the removal of corneas and pituitary glands.⁷¹ The pro-presumed consent stance of the 1987 UAGA further reinforced the trend in state presumed consent laws such that, at their peak, presumed consent laws were in effect in more than two-thirds of the fifty states.⁷² It is important to note, however, that these early presumed consent laws were of the "soft" variety, and as such, allowed for a family member to object to the donation and thus override the presumption of consent.⁷³

The success of the early presumed consent laws in the United States seemed to largely depend on their acceptance by medical professionals.⁷⁴ In those states where presumed consent laws were embraced by medical professionals, they enjoyed much success and

⁶⁴ See Judd Kessler, *Organ Donation Legislation in California*, MARKET DESIGN, (Oct. 8, 2010, 05:19 AM), <http://marketdesigner.blogspot.com/2010/10/organ-donation-legislation-in.html>.

⁶⁵ See *Thaler on Mandated Choice*, MARKET DESIGN, (Sep. 27, 2009, 05:59 AM), <http://marketdesigner.blogspot.com/2009/09/thaler-on-mandated-choice.html>; see also *Organ Transplants*, ENOTES, <http://www.enotes.com/organ-transplants-article> (last visited Mar. 6, 2011).

⁶⁶ See Orentlicher, *supra* note 14, at 302.

⁶⁷ See *id.*

⁶⁸ A California presumed consent statute was also applicable to hospital patients. See Orentlicher, *supra* note 14, at 302.

⁶⁹ See *id.*

⁷⁰ See *id.* at 299-300.

⁷¹ See *id.* at 302-03.

⁷² See *id.* at 300.

⁷³ See *id.* at 300, 310.

⁷⁴ See *id.* at 303-04.

achieved the desired results of increasing cadaveric organ donation.⁷⁵ However, presumed consent laws were less successful in other states where medical professionals, wary of the controversial nature of the laws or fearful of incurring liability, refused to harvest organs without express consent from either a decedent or next of kin.⁷⁶

The decline of presumed consent laws in the United States began in the early 1990's with a few high-profile legal challenges, discussed in more detail in Section V.⁷⁷ The decline continued over the course of the next fifteen years with official recognition of presumed consent's demise coming in 2006 with a revised UAGA noticeably lacking the presumed consent provisions of the 1987 UAGA.⁷⁸ Forty-five states, in addition to the District of Columbia and the United States Virgin Islands, have since enacted the 2006 UAGA.⁷⁹ The majority of those states have followed the 2006 UAGA's rejection of presumed consent and have repealed their presumed consent laws.⁸⁰ A few states, however, have retained presumed consent for an unclaimed decedent's corneas.⁸¹ However, as the next section discusses, the worsening organ shortage crisis has fueled a resurgence of interest on the part of the states in alternative organ procurement systems – and the opt-out system seems to have taken center stage in the debate.

B. Recent State Proposals for Opt-Out Organ Donation Laws.

In the past year alone, four states, California, New York, Illinois, and Colorado, have made serious attempts to pass comprehensive presumed consent legislation in an effort to implement state-wide opt-out organ donation systems.⁸² In California, constitutional concerns forced Governor Arnold Schwarzenegger to abandon his push for a state-wide opt-out system and instead settle for a mandated choice system.⁸³ If passed, the recently proposed presumed consent laws in

⁷⁵ See *id.* at 303.

⁷⁶ See *id.* at 303-04.

⁷⁷ See *id.* at 305-08.

⁷⁸ See *id.* at 307-08.

⁷⁹ Pennsylvania is currently considering its enactment. See *Anatomical Gift Act (2006), Enactment Status Map*, UNIF. LAW COMM'N, [http://uniformlaws.org/Act.aspx?title=Anatomical Gift Act \(2006\)](http://uniformlaws.org/Act.aspx?title=Anatomical%20Gift%20Act%20(2006)) (last visited Aug. 3, 2012).

⁸⁰ See Orentlicher, *supra* note 14, at 308.

⁸¹ See *id.*

⁸² See Appel, *supra* note 47.

⁸³ See *Our View on End-of-Life Choices: States Overlook Easy Way to Raise Organ Donation Rates*, USA TODAY, http://www.usatoday.com/news/opinion/editorials/2010-05-19-editorial19_ST_N.htm (last updated May 18, 2010, 08:55 PM).

New York, Illinois, and Colorado would implement the first opt-out organ procurement systems in the nation.⁸⁴

1. California

The impetus behind Governor Schwarzenegger's brief foray into presumed consent laws came from an unlikely source – Steve Jobs, Chairman and Chief Executive Officer of Apple, Inc.⁸⁵ Mr. Jobs, a liver transplant recipient himself, suggested the move to an opt-out system after returning to California from a trip to Europe where he saw the potential benefits of an opt-out system first-hand.⁸⁶ With California having one of the lowest rates of organ donation in the country,⁸⁷ Governor Schwarzenegger thought an opt-out system might be the answer for California.⁸⁸ However, the ensuing public outcry soon prompted Governor Schwarzenegger to abandon the opt-out proposal citing constitutional concerns.⁸⁹ In the end, the bill that Governor Schwarzenegger signed into effect on October 5, 2010 was a compromise.⁹⁰ Instead of an opt-out system, senate bill (SB) 1395 established a mandated choice system in California.⁹¹ All driver's license applicants in California will now be asked to choose whether they want to be an organ donor (and thus be added to the state's organ and tissue donor registry).⁹² Previously, applicants had to volunteer this information in order to have their organ donor status reflected on a driver's license.⁹³ Further, the bill established the first ever live donor registry for kidney transplants in the nation.⁹⁴ SB 1395 provides in pertinent part:

[A]n application for an original or renewal driver's license or identification card shall contain a space for the applicant to enroll in the Donate Life California Organ and Tissue Donor Registry. The application shall include check boxes for an applicant to mark either (A) Yes, add my name to the donor registry or (B) I do not wish to register at this time. The department shall

⁸⁴ See Appel, *supra* note 47; Park, *supra* note 18; Kathleen Gilbert, *Illinois Considers 'Presumed Consent' Organ Harvesting Bill*, LIFEITENEWS.COM (Mar. 4, 2010, 12:15 EST), <http://www.lifesitenews.com/news/archive/ldn/2010/mar/10030408>.

⁸⁵ See Park, *supra* note 18.

⁸⁶ See Kessler, *supra* note 64.

⁸⁷ See USA TODAY, *supra* note 83.

⁸⁸ See Kessler, *supra* note 64.

⁸⁹ See *id.*

⁹⁰ See *id.*

⁹¹ See S.B. 1395, 2010 Cal. Legis. Serv. Ch. 217 (Cal. 2010).

⁹² See *id.*

⁹³ See *id.*

⁹⁴ See *id.*

inquire verbally of an applicant applying in person for an original or renewal driver's license or identification card at a department office as to whether the applicant wishes to enroll in the Donate Life California Organ and Tissue Donor Registry.⁹⁵

2. New York

On February 4, 2010, New York State Assemblyman Richard Brodsky introduced bill number A09865 which "provides that individuals must opt[-]out of organ donation."⁹⁶ With regard to driver's license applicants, A09865 proposes in pertinent part:

[T]he commissioner also shall . . . provide space on the application so that the applicant may . . . OPT-OUT OF the New York state organ and tissue donor registry . . . IF THE APPLICANT DOES NOT DECLINE TO BE REGISTERED IN THE NEW YORK STATE ORGAN AND TISSUE DONOR REGISTRY THEY WILL BE AUTOMATICALLY ENROLLED.⁹⁷

The self-professed purpose of the bill is to "significantly increas[e] [New York's organ donation rate] while taking into consideration all of the individual rights of persons to decline enrollment into the program." For justification, the bill points to the fact that New York has the lowest organ donation rate in the country.⁹⁸

3. Illinois

In February of 2010, Illinois Senator Dale Risinger introduced bill 3613, the Presumed Donor bill.⁹⁹ If passed, the bill will replace Illinois's current opt-in organ procurement system with one that is opt-out.¹⁰⁰ Like the California and New York presumed consent proposals, the bill has already been met with opposition.¹⁰¹ The proposed bill provides in pertinent part:

⁹⁵ See *id.*

⁹⁶ See Bill No. A09865, N.Y. State Assemb., http://assembly.state.ny.us/leg/?default_fld=&bn=A09865&term=2009&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y (last visited Aug. 3, 2012).

⁹⁷ See *id.*

⁹⁸ See *id.*; see also USA TODAY, *supra* note 83.

⁹⁹ See Appel, *supra* note 47; see also Warner Todd Huston, *Illinois Dangerous 'Presumed Consent' Organ Donor Bill*, CANADA FREE PRESS (Mar. 7, 2010), <http://www.canadafreepress.com/index.php/article/20753>; see also *Bill Text: IL Senate Bill 3613 - 96th General Assembly*, ELOBBYIST, <http://e-lobbyist.com/gaits/text/13009> (last visited Mar. 6, 2011).

¹⁰⁰ See ELOBBYIST, *supra* note 99.

¹⁰¹ See *id.*

[E]ach resident of Illinois who is of sound mind and who has attained the age of 18 years is presumed, by operation of law, to have given all of his or her body for any purpose stated in section 5-10 [medical or dental education, research, advancement of medical or dental science, therapy, or transplantation]. The gift takes effect upon the individual's death without the need to obtain the consent of any survivor. . . .an individual may . . . opt[-]out . . . by filing with the Secretary of State[. . .]an organ donor opt[-] out document. An individual who has filed [an organ donor opt-out] document shall be included in an Organ Donor Opt Out Registry maintained by the Secretary of State.¹⁰²

4. Colorado

In mid-January 2011, State Representative Dan Pabon introduced a presumed consent organ donation bill, SB 11-042, in the Colorado General Assembly.¹⁰³ Perhaps Representative Pabon is hoping that his donor-friendly state¹⁰⁴ will be more receptive to the idea of presumed consent than other states where similar proposals have failed to pass.¹⁰⁵ If passed, SB 11-042, entitled "A Bill Concerning Presumed Consent for Organ and Tissue Donation," would

change[] [Colorado's] organ donation program so that a person is presumed to have consented to organ and tissue donation at the time the person applies for or renews a driver's license or [state] identification card unless the person initials a statement that states that the person does not want to be considered as a possible organ and tissue donor.¹⁰⁶

The proposed text of the opt-out statement appears in the bill as follows:

You are automatically deemed to have consented to being an organ and tissue donor and this designation will appear on your driver's license or identification card. If you do not want to be

¹⁰² See *id.*

¹⁰³ See Daniel Sayani, *Colorado Proposes "Presumed Consent" Organ Harvesting*, THE NEW AMERICAN (Jan. 24, 2011, 03:15 PM) <http://www.thenewamerican.com/index.php/usnews/politics/6012-colorado-proposes-presumed-consent-organ-harvesting>.

¹⁰⁴ See Dayle Cedars, *Colorado May Make Organ Donation Approval Automatic*, THE DENVER CHANNEL.COM (Jan. 19, 2011, 10:15 PM), <http://www.thedenverchannel.com/news/26540152/detail.html> ("Nearly two-thirds of people carrying driver's licenses or state-issued IDs volunteer as donors—a higher rate than in any other state.").

¹⁰⁵ See Cedars, *supra* note 104.

¹⁰⁶ S.B. 11-042, 68th Gen. Assembly Reg. Sess. (Co. 2011), available at http://www.leg.state.co.us/clics/clics2011a/csl.nsf/fsbillcont3/319B3F36D587959D872578010060499C?open&file=042_01.pdf.

considered an organ and tissue donor, you must elect to not be included on the organ donor registry by inserting your initials on the line below.

_____ At this time, I do not wish to be included on the organ donor registry.¹⁰⁷

The bill further states that

[u]nless an applicant responds that he or she does not want to be considered a possible organ and tissue donor, the applicant will be deemed to have consented to organ and tissue donation. The consent is sufficient to satisfy all requirements necessary to evidence the applicant's consent to anatomical donation of the applicant's organs and tissue.¹⁰⁸

Colorado State Senator Lucia Guzman was initially supporting the bill, but soon after its proposal, dropped her support.¹⁰⁹ Thus, the future of the bill is now uncertain.¹¹⁰ Nevertheless, SB 11-042 has managed to create a lot of controversy in a relatively short amount of time.¹¹¹

C. Opt-Out Systems Around the World

There are several countries around the world that utilize opt-out organ procurement systems, some more successfully than others.¹¹² Spain, Austria, France, Belgium, Italy, Norway, and Sweden are among some of the countries that have adopted presumed consent organ donation laws.¹¹³ Austria utilizes a "hard" opt-out system, in which the consent of next of kin is not required prior to removing organs from a decedent who did not previously opt-out.¹¹⁴ Spain utilizes a "soft" opt-out system, in which next of kin are given the opportunity

¹⁰⁷ *Id.* at 4.

¹⁰⁸ *Id.* at 4.

¹⁰⁹ *See* Sayani, *supra* note 103, at 1.

¹¹⁰ *See id.* at 3.

¹¹¹ *See* Sayani, *supra* note 103; Tammy Vigil, *Trip to DMV Could Make You an Automatic Organ Donor, If State Bill Passes*, KDVR.COM (Jan. 19, 2011), <http://www.ky3.com/kdvr-state-bill-would-make-you-an-organ-donor-automatically-20110119,0,3821743.story>; Jessica Hyduke, *Organ Donation: Opt-In System Should Become Opt-Out*, STATEPRESS.COM (Jan. 27, 2011, 08:06 PM), <http://www.statepress.com/2011/01/27/organ-donation-opt-in-system-should-become-opt-out/>; Wesley J. Smith, *Colorado: Say No to "Presumed Consent" Organ Conscripton*, FIRST THINGS (Jan. 20, 2011), <http://www.firstthings.com/blogs/secondhandsmoke/2011/01/20/colorado-say-no-to-presumed-consent-organ-conscripton/>.

¹¹² *See* Watkins, *supra* note 8, at 2, 3.

¹¹³ *Id.* at 3.

¹¹⁴ *See id.* at 22.

to object to organ donation, even if the decedent did not previously opt-out.¹¹⁵ In some countries, such as France, “hard” systems are effectively rendered “soft” by physicians that are hesitant to remove a decedent’s organs without the consent of next of kin.¹¹⁶ In a 2008 international comparison of organ donation rates, all of these countries were ranked in the top twenty, with Spain leading the way with a rate of 34.2 organ donors per million.¹¹⁷ Indeed, many countries that have implemented presumed consent donation systems have seen drastic increases in their organ donation rates.¹¹⁸

However, whether the presumed consent laws of these countries are single-handedly responsible for their higher procurement rates is a subject of much debate.¹¹⁹ For instance, some commentators argue that although Spain’s presumed consent laws have been in effect for several decades, they are, for the most part, inactive.¹²⁰ They point to Spain’s lack of spending on public awareness of its presumed consent legislation, and the fact that Spain does not have an opt-out registry for recording the objections of those who do not wish to become organ donors.¹²¹ Instead, these commentators posit other theories for Spain’s success.¹²² Some theorize that Spain’s high organ donation rate is partly attributable to the larger numbers of healthy individuals killed there in automobile accidents.¹²³ Others, including Dr. Rafael Matesanz, the director of Organizacion Nacional de Trasplantes, the organization that manages Spain’s organ donation system, attribute Spain’s success in increasing organ donation rates to its investment in

¹¹⁵ See *id.* at 20.

¹¹⁶ See *id.*

¹¹⁷ Marti Manyalich et al., *2008 International Donation and Transplantation Activity*, EUROPEAN TRANSPLANT COORDINATORS (last updated Oct. 11, 2009), <http://www.europeantransplantcoordinators.org/uploads/pdfs/Irodat/03Irodat%202008.pdf>.

¹¹⁸ Since Spain adopted a presumed consent organ donation system in 1990, its donation rates have nearly doubled. After adopting a system of presumed consent in 1982, Vienna saw its organ donation rates quadruple, “and by 1990 the number of kidney transplants performed was nearly equal to those on the waiting list.” *Everyone ‘Should Donate Organs,’* BBC NEWS (Jul. 17, 2007, 18:45:32 GMT), <http://news.bbc.co.uk/go/pr/fr/-/2/hi/health/6902519.stm>.

¹¹⁹ See Watkins, *supra* note 8, at 20; see also Kieran Healy, *Do Presumed-Consent Laws Raise Organ Procurement Rates?*, 55 DePaul L. Rev. 1017, 1043 (Spring 2006) (“As best we can tell, countries with high procurement rates do not owe their success to any . . . legal conception of consent. . . . Rather, more fine-grained organizational differences—specifically in logistics and process management—are responsible for their success.”); see also *Statistics-International Donor Statistics*, TRANSPLANT.ORG.AU., http://www.transplant.org.au/Statistic_s.html (last visited Mar. 6, 2011).

¹²⁰ See Jennifer Trueland, *Presumed Consent May Not Increase Organ Donation – Study*, CALEDONIAN MERCURY (Oct. 19, 2010), <http://health.caledonianmercury.com/2010/10/19/presumed-consent-may-not-increase-organ-donation-study/00939>.

¹²¹ See *id.*

¹²² See *id.*

¹²³ See *Everyone ‘Should Donate Organs,’ supra* note 118.

the infrastructure of its organ procurement system.¹²⁴ Thus, it may be that presumed consent laws do not provide the easy fix that many hope they will.

IV. THE POLICY & ETHICS OF PRESUMED CONSENT ORGAN DONATION

Ask any American what core moral and ethical values underlie American society, and you are sure to hear back words such as individualism, beneficence, altruism, and autonomy.¹²⁵ After all, these values form the bedrock of the “most American” of American institutions: democracy and capitalism. Americans champion these values and look to their government and courts to defend and reinforce them. It is no wonder then that the most emphatic objections against the adoption of presumed consent systems in the United States stem from these most sacred of principles.¹²⁶

A. Of Liberty, Autonomy, and Privacy

As Americans, perhaps there is no area where we value our liberty, autonomy, and privacy more than in the realm of “freedom of choice.”¹²⁷ We take pride in the fact that our country affords us more freedom of choice than perhaps any other country in the world. From what type of cereal to grab off the shelf in the dizzying grocery store cereal aisle, to which politician to vote for when we step inside the voting booth, to whether to remain silent or confess – when it comes to personal decision-making, there is nothing more American than liberty and autonomy; regardless of whether we like the choices we are presented with at any given time, we take comfort in knowing that we at least have a choice, while others do not.

In fact, the paramount importance that Americans put on privacy and autonomy when exercising their freedom of choice is no better evidenced than by the numerous United States Supreme Court opinions in recent decades that have constitutionalized privacy within the

¹²⁴ In 1989, Spain overhauled its organ procurement system, bringing in intensive-care doctors and nurses to serve as transplant coordinators, establishing 24-hour organ retrieval teams at hospitals, and improving training for doctors who talk to grieving families. See Rampell, *supra* note 19; see also Vidya Ram, *Solving the Organ Crisis, The Spanish Way*, FORBES.COM (Sep. 2, 2009, 6:00 PM EDT), <http://www.forbes.com/2009/09/02/public-private-healthcare-business-healthcare-organ-donation.html> (“Having intensive-care doctors is key. . . .Spain[’s organ procurement system] currently has 198 doctors and 150 nurses in 174 hospitals across the country.”); see Trueland, *supra* note 120.

¹²⁵ See Roberts, *supra* note 61 at 111.

¹²⁶ See *id.*

¹²⁷ See *id.* at 112.

context of American personal decision-making.¹²⁸ Accordingly, Americans have come to expect that, without their affirmative consent, this sphere of privacy cannot be invaded by the government (except for certain compelling reasons). Although controversial at times, the current opt-in organ donation system in the United States is still generally acceptable precisely because it is consistent with these principles. No one in this country is an organ donor unless s/he affirmatively chooses to be one;¹²⁹ the decision to be an organ donor is an autonomous one – the government and/or medical professionals do not enter the decision-making process until after the decision has been made.

On the other hand, to most Americans, an opt-out or presumed consent system of organ donation flies directly in the face of these values. Under a presumed consent system, government intrusion into the personal decision of organ donation is the default, rather than a consented-to transgression.¹³⁰ Such unbridled government intrusion into a personal decision concerning death and the sanctity of one's own body would undoubtedly be met with much opposition – as already demonstrated by the California and New York attempts to establish state-wide presumed consent organ donation systems.

A mandated choice system, discussed in Section II.B.2.d., may in fact provide the best compromise between addressing America's organ crisis and preserving individuals' autonomy in making the decision whether to become an organ donor.¹³¹ Moreover, the increased public awareness that would result from a mandated choice system may help to spur further evolution in America's organ donation policy.¹³²

¹²⁸ See *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (“This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”) (quoting *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974)); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (“Various guarantees [in the Bill of Rights] create zones of privacy.”); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear . . . a child.”); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“Under our Constitution, the freedom [of choice] to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.”); *Lawrence v. Texas*, 539 U.S. 558, 572, 574 (2003) (“[L]iberty gives substantial protection to adult persons in deciding how to conduct their private lives. . . . [O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”).

¹²⁹ With the exception of the few “John Doe” state laws that still remain on the books; these are discussed in Section III.A., *supra*.

¹³⁰ See *Watkins*, *supra* note 8, at 9.

¹³¹ See *Roberts*, *supra* note 61 at 108-09.

¹³² See *id.* at 109.

1. Requiring an Affirmative Act and Altruism

It goes without saying that part of freedom of choice is choosing not to act. In fact, in the interest of individual liberty and autonomy, both tort and criminal common law caution against legally obligating individuals to act for the benefit of others.¹³³ Instead, laws in our country traditionally require only that individuals act in ways that do not result in harm to others.¹³⁴ Nevertheless, many proponents of presumed consent laws contend that their imposition on personal autonomy is justified by virtue of the moral good of saving lives.¹³⁵ According to this argument, a presumed consent system presumes that most people “wish to do the morally right thing.”¹³⁶ Thus, from an ethical perspective, presumed consent laws impose what is called passive altruism; they obligate people to act for the benefit of others (unless they register an affirmative objection).¹³⁷ However, as noted above, legislating altruism is not a part of the American legal tradition. Instead, American society has come to endorse a policy of active altruism, whereby an individual affirmatively chooses whether to act for the benefit of others.¹³⁸ Such is the case with the current opt-in organ donation system in the United States, which relies on the active altruism of organ donors and their families for its survival.

Along the same lines, perception plays a big part in Americans’ acceptance of laws and policies that challenge these notions.¹³⁹ For many Americans, the individual rights surrounding the most fundamental aspects of their personal lives and bodies are only theirs to forfeit or “give away.” Accordingly, laws and policies that are consistent with the notion of active altruism, such as explicit consent organ donation laws, are most palatable to the American public. As evidenced by the term “donor,” the act of organ procurement under explicit consent organ donation laws is perceived as an act of “giving”, with the individual affirmatively choosing to waive certain individual rights for the benefit of another.¹⁴⁰ Conversely, under presumed consent organ donation laws, the act of organ procurement is more likely to be perceived as an act of “taking” – with the government intruding upon the rights of the individual without consent.¹⁴¹ This perception

¹³³ See Restatement (Second) of Torts, div. 2, ch. 12, topic 7, § 314 (1965).

¹³⁴ See *id.*

¹³⁵ See Roberts, *supra* note 61 at 111.

¹³⁶ *Id.*

¹³⁷ See *id.*

¹³⁸ See *id.*

¹³⁹ See *id.*

¹⁴⁰ See *id.*

¹⁴¹ See *id.*

may very well be the fatal flaw that makes it very difficult, if not impossible, for presumed consent laws to gain wide acceptance by the American public.

2. The Legal Fiction of Presumed Consent

In law, a presumption is best described as “[a] conclusion made as to the existence or nonexistence of a fact that [is] drawn from other evidence that is admitted and proven to be true.”¹⁴² There are two types of legal presumptions: rebuttable and irrebuttable.¹⁴³ Within the context of evidence law, however, the vast majority of presumptions are rebuttable, meaning the presumed fact can be negated by the offering of sufficient evidence.¹⁴⁴ It is on this point that the concept of presumed consent reveals itself as a legal fiction.

Under the usual operating procedures of a true legal presumption, the donor should have the opportunity to rebut or negate the presumption of consent.¹⁴⁵ Under a presumed consent system, however, the presumption of consent does not arise until a person is deceased. Put in terms of the above definition, death and the failure to opt-out are the sole evidentiary facts that must be proven to lead to the conclusion of the existence of consent. So, when does the presumed donor have the opportunity to rebut or negate the presumption of consent? The answer here is obviously never, since the donor is deceased and can no longer raise any objections.¹⁴⁶

One could argue that the presumed donor has at least one, and possibly two, chances to rebut or negate the presumption: prior to death by opting-out and after death by the objection of next of kin. The first argument fails, however, because as noted above, the presumption does not arise until the person is deceased. Opting-out before death is an affirmative expression by the individual that s/he does not wish to be an organ donor. As such, opting-out merely prevents the presumption from arising in the first place; it does not operate to rebut or negate it. The second argument, although stronger, is also problematic. First, the objection of next of kin only comes into play in a “soft” presumed consent system.¹⁴⁷ As discussed in Section III.C., in

¹⁴² *Legal Dictionary*, THE FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/> presumption (last visited Mar. 6, 2011); BLACK'S LAW DICTIONARY (9th ed. 2009).

¹⁴³ See PAUL C. GIANNELLI, UNDERSTANDING EVIDENCE 55-56 (3d ed. 2009).

¹⁴⁴ See *id.* at 55.

¹⁴⁵ See *id.*

¹⁴⁶ See Barbara K. Pierscionek, *What is Presumed When We Presume Consent?*, BMC MEDICAL ETHICS, Apr. 25, 2008, at 2 available at <http://www.biomedcentral.com/content/pdf/1472-6939-9-8.pdf>.

¹⁴⁷ See Orentlicher, *supra* note 14, at 300, 310.

a “hard” presumed consent system, the consent of next of kin is neither sought nor considered.¹⁴⁸ Second, assuming a “soft” system, in order to register an objection on behalf of the deceased, the next of kin would have to (1) be aware of the state presumed consent statutes and (2) be able to register the objection within a relatively short amount of time after the death of the decedent. Unfortunately, the chance of both of these conditions being satisfied concurrently is slim at best. When states have presumed consent laws, the evidence shows that people are generally unaware that the statutes exist.¹⁴⁹ Further, because organs and tissues must be harvested soon after death to ensure their viability, the window of opportunity for registering an objection is brief.¹⁵⁰ Moreover, even if these conditions are satisfied, unless the decedent’s organ donor status has been explicitly provided for in a will or similar document, the possibility remains that the next of kin will provide consent contrary to the wishes of the decedent.

So, what is being presumed when one presumes consent to organ donation?¹⁵¹ In theory, one is making a presumption of donor willingness.¹⁵² In reality, however, presumed consent laws place the state’s interest in saving lives above the individual’s interest in autonomy,¹⁵³ and thus, the presumption being made is that “of state rights to post-mortem body organs.”¹⁵⁴ Accordingly, some have proposed that the phrase “presumed consent” is a misnomer that should be replaced by the phrase “specified refusal” in order to place emphasis on the action (i.e., opting-out) that is required of the individual in presumed consent systems.¹⁵⁵

3. Organ Donation as a Private Choice

As discussed in section V. *infra*, the gradual constitutionalization of individual privacy by the United States Supreme Court means that each of us, as citizens, has come to expect that we will be free of government interference when it comes to making certain personal decisions concerning life and death. Of course, the right of privacy and

¹⁴⁸ See Watkins, *supra* note 8, at 21.

¹⁴⁹ See Michele Goodwin, *Deconstructing Legislative Consent Law: Organ Taking, Racial Profiling & Distributive Justice*, 6 VA. J.L. & TECH. 2, ¶¶ 22, 26, 35-36, n.120 (Spring 2001).

¹⁵⁰ See *id.* at 37; Carrie Parsons O’Keeffe, Note, *When An Anatomical “Gift” Isn’t a Gift: Presumed Consent Laws as an Affront to Religious Liberty*, 7 TEX. F. ON C.L. & C.R. 287, 293 (Fall 2002).

¹⁵¹ See Pierscioneck, *supra* note 146.

¹⁵² See *id.*

¹⁵³ See Goodwin, *supra* note 149, at ¶ 18 (“[P]resumed consent proponents argue that saving the living should be society’s greatest concern . . .”).

¹⁵⁴ See Pierscioneck, *supra* note 146, at 2.

¹⁵⁵ See *id.*

personal liberty grounded by the Court in the Due Process Clause of the Fourteenth Amendment is not absolute.¹⁵⁶ Like all fundamental rights recognized by the Court, the government can curtail the right of privacy in furtherance of a compelling interest.¹⁵⁷

Organ donation is most certainly one area of personal decision-making in which Americans do not expect to run into government interference. And unlike other modern, controversial privacy issues, such as abortion and assisted suicide, most people seem to agree that the government should not have a say in whether a person chooses to donate his/her organs. Of course, this sense of universal agreement could merely be a reflection of the fact that proposals calling for increased government involvement in cadaveric organ donation are relatively recent and have escaped wide-spread public scrutiny, at least on a national scale.¹⁵⁸ However, a consideration of the values at play in each of these areas reveals that there is a more likely explanation for the congruence than lack of public awareness. In both the abortion and assisted suicide contexts, many Americans accept, and even condone, government intrusion into such decisions to prevent intentional harm to a human life.¹⁵⁹ Besides being an underlying theme of most major religions, “do no harm” is a principle underlying tort and criminal common law. Moreover, in the Court’s view, it is the prevention of intentional harm to a human life what furnishes the compelling interest necessary to justify government intrusion into these areas.¹⁶⁰

In contrast, few Americans would argue that the decision not to donate one’s organs is equivalent to an intentional act of harm towards another individual. Rather, most would view such a decision as an act of self-preservation, with any incidental third-party harm being indirect at best.¹⁶¹ Further, while many would argue that saving the lives of those individuals waiting for organ transplants is a compelling

¹⁵⁶ See *Roe v. Wade*, 410 U.S. 113, 154, 155 (1973).

¹⁵⁷ See *id.* at 155.

¹⁵⁸ Notably, the recent attempts to implement state-wide presumed consent organ donation systems have received relatively little national attention. Rather, a quick internet search reveals that, in each case, the public reaction and media coverage appears to be fairly localized.

¹⁵⁹ See Lydia Saad, *Four Moral Issues Sharply Divide Americans*, GALLUP (May 26, 2010), <http://www.gallup.com/poll/137357/four-moral-issues-sharply-divide-americans.aspx>; see also Lydia Saad, *The New Normal on Abortion: Americans More “ProLife,” Underlying Moral Reaction to Abortion is Unchanged*, GALLUP (May 14, 2010), <http://www.gallup.com/poll/128036/new-normal-abortion-americans-pro-life.aspx>; Lydia Saad, *More Americans “ProLife” Than “Pro-Choice” for First Time*, GALLUP (May 15, 2009), <http://www.gallup.com/poll/118399/more-americans-pro-life-than-pro-choice-first-time.aspx>.

¹⁶⁰ See *Roe*, 410 U.S. at 163-64.

¹⁶¹ Of course, self-preservation can also be an argument in favor of abortion. However, in such cases, self preservation can only be accomplished at the cost of inflicting harm to another human life.

government interest, the question remains whether it is compelling enough to justify government intrusion into such a personal and private decision. Absent the moral underpinnings present within the contexts of abortion and assisted suicide, the answer here would appear to be “no.” Moreover, one would assume that, to require individuals to affirmatively act for the benefit of others, the nature and degree of the compelling interest at play would have to rise above and beyond those compelling interests which justify government intrusion into the abortion and assisted suicide contexts. Such is not the case here, and thus presumed consent laws will not likely pass the muster of today’s privacy jurisprudence.

B. Where is the Social Justice?

Socioeconomics and Disparate Impact

Presumed consent organ donation laws are also problematic from a social justice perspective.¹⁶² Past experiences with presumed consent laws have shown that racial, cultural, and socioeconomic factors inevitably lead to their disparate impact on marginalized groups, such as the poor, uneducated, and minorities.¹⁶³ For example, in those states that had presumed consent laws prior to their widespread eradication with the promulgation of the 2006 UAGA, implementation was placed primarily in the hands of coroners and medical examiners.¹⁶⁴ As a result, a disproportionate number of presumed consent organ and tissue donations under these laws came from donors who had met violent deaths¹⁶⁵ or could not be identified – groups traditionally comprised of minorities and the poor.¹⁶⁶ This disparity seems all the more unfair when one considers that members of such groups are also the least likely to be recipients of a donor organ.¹⁶⁷

Even if one imagines a better future for presumed consent laws – one in which such disparities are eliminated by a more standardized and widespread implementation scheme – the fact remains that those people who are uneducated and/or ignorant about the law will be dis-

¹⁶² See Goodwin, *supra* note 149.

¹⁶³ See *id.* at ¶ 44.

¹⁶⁴ See *id.* at ¶ 22.

¹⁶⁵ See *id.* (Violent deaths, such as “homicides, trauma, and poisonings, . . . [occur] disproportionately in urban and poor communities”); *Id.* at ¶ 44 (As a result, presumed consent laws, as applied, disproportionately affect minorities, such as blacks and latinos, who are “more likely to die by violent deaths than whites”); *Id.* at ¶ 45. (“In a Los Angeles study . . . over eighty percent of those autopsied (and who became involuntary tissue donors)[] were black and latino. Only sixteen percent were white.”).

¹⁶⁶ See *id.* at ¶¶ 43-46.

¹⁶⁷ See *id.* at ¶ 43.

advantaged in a system that requires prospective awareness and comprehension of the law in order to effectively opt-out. Thus, although presumed consent laws are often justified as good for the whole,¹⁶⁸ they are anything but equitable, and are more likely to end up benefiting some to the detriment of others.¹⁶⁹

C. Medical Ethics Concerns

Of the numerous bioethical concerns raised by presumed consent laws, perhaps the two most significant, from the perspective of the modern medical establishment, are the lack of explicit informed consent¹⁷⁰ and the risks posed by procuring organs and tissues from donors with unknown social histories.¹⁷¹

The modern-day requirement of explicit informed consent as a condition precedent to medical treatment and research is an important one.¹⁷² Nothing better illustrates this point than its historical roots. In particular, two atrocities of the twentieth century are responsible for the mandate of explicit informed consent – the Tuskegee Syphilis Study¹⁷³ and the Holocaust.¹⁷⁴ Both events revealed modern

¹⁶⁸ See *id.* at ¶ 49.

¹⁶⁹ See *id.* ¶¶ 51-52.

¹⁷⁰ See Pierscionek, *supra* note 146, at 2 (“[C]onsent to medical treatment and/or study on any part of the body must always be sought.”).

¹⁷¹ See Goodwin, *supra* note 149, at ¶¶ 39-42.

¹⁷² See OFFICE OF HUMAN SUBJECTS RESEARCH, NATIONAL INSTITUTES OF HEALTH, REGULATIONS AND ETHICAL GUIDELINES, PROTECTION OF HUMAN SUBJECTS (June 23, 2005), <http://ohsr.od.nih.gov/guidelines/45cfr46.html> (“Except as provided elsewhere in this policy, no investigator may involve a human being as a subject in research covered by this policy unless the investigator has obtained the legally effective informed consent of the subject or the subject’s legally authorized representative.”).

¹⁷³ The Tuskegee Syphilis Study was a 40-year study, spanning 1932-1972, that involved six hundred black men from Macon County, Alabama, a predominantly poor, rural area. See *U.S. Public Health Service Syphilis Study at Tuskegee*, CDC.GOV, <http://www.cdc.gov/tuskegee/timeline.htm> (last visited Mar. 21, 2012); *Inside the National Archives, Southeast Region: 6. The Tuskegee Study*, NATIONALARCHIVES, <http://www.archives.gov/southeast/exhibit/6.php>. The study was conducted to follow the natural progression of syphilis in blacks, with the hopes of justifying black treatment programs. See *id.* Three hundred and ninety nine of the men had syphilis, the other two hundred and one did not. See *id.* Although the men agreed to be in the study, none of them provided “informed” consent as the term is used today – the men were not informed of the real purpose for the study and in fact, none of the three hundred and ninety nine men who had syphilis were informed of this fact or were treated for it, even after the emergence, in 1947, of penicillin as the standard treatment for the disease. See *id.* For taking part in the study, the men received “free medical exams, free meals, and burial insurance.” *Id.* Only in 1972, after the publication of an associated press story about the study, did public outcry lead to the termination of the study. See *id.* By that time, numerous study participants had died from syphilis and related complications. See *Remembering Tuskegee*, NPR.ORG (July 25, 2002), <http://www.npr.org/programs/morning/features/2002/jul/tuskegee/>. Moreover, many had passed the disease on to their wives and children. See *id.*

medicine's potential for abuse, especially with respect to those who are marginalized in society.¹⁷⁵ The subsequent outcries for better protections of human subjects of treatment and/or research eventually led to the regulations mandating the use and documentation of explicit informed consent in such activities today.¹⁷⁶

Some in the medical community also express concern about the "quality" of tissues and organs procured by way of presumed consent.¹⁷⁷ They point to the lax health requirements for presumed consent donors and the fact that presumed consent statutes typically "do not mandate that [the] social histories [of donors] be obtained."¹⁷⁸ These shortfalls, combined with the "lifestyles of some [likely] presumed consent donors,"¹⁷⁹ can lead to the transmission of communicable diseases from donor to recipient.¹⁸⁰ Obviously, such an outcome would be contrary to the paramount justification for organ donation and transplantation – that of saving a life. Thus, both the lack of explicit informed consent and the potentially subpar quality of tissues and organs procured by way of presumed consent present significant medical ethics barriers to the widespread implementation of presumed consent laws in the United States.

D. Religious Liberty

The question of whether organ donation is objectionable on religious grounds seems simple enough, but the answer apparently is not. Depending on which source you reference, you get one of three answers: (1) all/most major religions approve of organ donation,¹⁸¹ (2) some religions flat out prohibit organ donation,¹⁸² and (3) some reli-

¹⁷⁴ It is well-known that during the Holocaust, concentration camp prisoners were subjected to medical research experiments against their will. For more information and photographs, see *Holocaust Encyclopedia, Nazi Medical Experiments*, THE UNITED STATES HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005168> (last visited Mar. 6, 2011); see also Goodwin, *supra* note 149, at ¶ 37.

¹⁷⁵ See Goodwin, *supra* note 149, at ¶ 37.

¹⁷⁶ See OFFICE OF HUMAN SUBJECTS RESEARCH, *supra* note 172.

¹⁷⁷ See Goodwin, *supra* note 149, at ¶¶ 39-42.

¹⁷⁸ *Id.* at ¶ 39.

¹⁷⁹ See *supra* Section IV.B.

¹⁸⁰ See Goodwin, *supra* note 149, at ¶¶ 39, 41.

¹⁸¹ See *Common Myths of Organ Donation*, UNOS, http://www.unos.org/donation/index.php?topic=fact_sheet_7 (last visited Aug. 15, 2012); Mayo Clinic Staff, *Consumer Health, In-Depth, Organ Donation: Don't Let These Myths Confuse You*, MAYOCLINIC.COM, <http://www.mayoclinic.com/health/organ-donation/FL00077> (last visited Mar. 6, 2011); *Understanding Donation, Learn the Facts*, DONATELIFE.NET, <http://donatelife.net/UnderstandingDonation/LearnTheFacts.php> (last visited Aug. 15, 2012).

¹⁸² See O'Keeffe, *supra* note 150, at 292 ("In the Middle East, religious precepts discourage and in some places prohibit cadaveric organ donation.") (quoting the Bellagio Task Force Re-

gions that traditionally objected to organ donation now approve of it as “an act of charity.”¹⁸³ Even this seems like an oversimplification, however, since some religions remain split on the issue.¹⁸⁴ Further complicating the issue is the fact that most people’s religious beliefs are highly influenced by their cultural and moral beliefs as well.¹⁸⁵ Simply put – religion is personal. Thus, within a given religion, you may find some individuals who object to organ donation and others who do not.¹⁸⁶

Confusion aside, it is clear that for some people, objections to cadaveric organ donation are grounded in their religious beliefs and traditions. For such people, presumed consent laws are a direct affront to religious liberty because they “burden[] . . . free exercise of religion by precluding quintessentially religious burial rites.”¹⁸⁷

The case of *You Vang Yang v. Sturner*¹⁸⁸ is illustrative here. The Yangs, who lived in Rhode Island, were members of the Hmong religion.¹⁸⁹ The Hmong religion “prohibits any mutilation of the body, including autopsies or the removal of organs during an autopsy.”¹⁹⁰ When the Yangs’ twenty-three year-old son unexpectedly died at a Rhode Island hospital, his body, pursuant to a state statute, was transferred to the state medical examiners’ office for investigation into his unexplained death.¹⁹¹ The chief medical examiner then proceeded to perform an autopsy on the Yangs’ son without their knowledge or

port on Transplantation, Bodily Integrity, and the International Traffic in Organs). The two main religious objections to cadaveric organ donation involve the concepts of brain death and bodily integrity. *See id.* at 292-93. For instance, many religions do not recognize brain death as the sole indicator of death. *Id.* Thus, “for followers of these traditions, extraction of organs from a “brain dead” individual [whose heart and lungs are still functioning] constitutes live dismemberment or murder.” *Id.* at 292. Moreover, many religions view death holistically, involving both the body and the soul. *Id.* at 292. Accordingly, for such religions, it is often paramount that the integrity of the body be maintained for burial. *Id.*

¹⁸³ *See id.* at 292; *see also* UNOS, *supra* note 181; DONATELIFE.NET, *supra* note 181.

¹⁸⁴ *See* O’Keeffe, *supra* note 150, at 292 (“[A]lthough many religious leaders have sanctioned organ donation as a gift of life, others continue to object to the practice.”).

¹⁸⁵ *See* Allison Pond, *Myths About Religion and Organ Donation Create Hesitation*, DESERET NEWS, Aug. 5, 2011, <http://www.deseretnews.com/article/700168701/Myths-about-religion-and-organ-donation-cause-hesitation.html?pg=all> (last visited Aug. 15, 2012),

¹⁸⁶ *See* O’Keeffe, *supra* note 150, at 292-93 (“[S]ome Orthodox Jewish rabbis sanction cadaveric donation However, others reject the principle of brain death (equating it with murder), thereby making organ retrieval almost impossible.”) (quoting Bellagio Task Force Report on Transplantation, Bodily Integrity, and the International Traffic in Human Organs).

¹⁸⁷ *See id.* at 289.

¹⁸⁸ 728 F. Supp. 845 (D.R.I. 1990) (*Yang I*), *opinion withdrawn by You Vang Yang v. Sturner*, 750 F. Supp. 558 (D.R.I. 1990) (*Yang II*).

¹⁸⁹ *See Yang I*, 728 F. Supp. at 846; Goodwin, *supra* note 149, at ¶ 38.

¹⁹⁰ *Yang I*, 728 F. Supp. at 846.

¹⁹¹ *See id.*

consent.¹⁹² The Yangs subsequently brought suit against the chief medical examiner claiming that, among other things, the state statute that compelled their son's autopsy violated their First Amendment right to the free exercise of their religion.¹⁹³ Under the then-applicable strict scrutiny standard of review,¹⁹⁴ the district court ruled in favor of the Yangs on their First Amendment claim.¹⁹⁵ The Yangs' triumph was short-lived, however, as the district court was forced to withdraw its initial opinion in light of the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*,¹⁹⁶ which held that "generally-applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest"¹⁹⁷ The *Smith* decision was not received well by Congress, however, and in 1993, Congress attempted to undue its effect and re-implement the strict scrutiny standard of review for free exercise challenges by passing the Religious Freedom Restoration Act (RFRA).¹⁹⁸ Federalism concerns subsequently prompted the Supreme Court to hold the RFRA unconstitutional as applied to the states in *City of Boerne v. Flores*.¹⁹⁹ Significantly, however, *Flores* did not prevent the states from enacting their own state versions of the RFRA. Indeed, as of 2002, eleven states have done so.²⁰⁰

The point of this discussion is two-fold: (1) the *Yang* case serves as a sobering example of the dangers presumed consent laws could pose to the religious liberties of those who object to cadaveric organ donation;²⁰¹ and (2) because several states have enacted their own RFRA's, free exercise challenges to state presumed consent laws are not only viable, but likely.

¹⁹² *See id.*

¹⁹³ *See id.* at 847.

¹⁹⁴ *See id.* at 855-56.

¹⁹⁵ *See id.* at 857.

¹⁹⁶ 494 U.S. 872 (1990).

¹⁹⁷ *You Vang Yang v. Sturner*, 750 F. Supp. 558, 559 (D.R.I. 1990) (*Yang II*) (quoting *Smith*, 494 U.S. at 1604 n.3).

¹⁹⁸ 42 U.S.C. §§ 2000bb-1 to -4 (Supp. V 1993).

¹⁹⁹ 521 U.S. 507 (1997). *See also* O'Keefe, *supra* note 150, at 303 ("[The RFRA] continues to apply to the federal government.").

²⁰⁰ *See id.* at 303.

²⁰¹ Although the dispute in *Yang I* involved an unconsented-to autopsy, it is not difficult to imagine this same scenario playing out with regard to an unconsented-to organ procurement.

E. The Alternatives

1. Combatting the Misconceptions

Most commentators agree that some commonly held misconceptions about organ donation contribute to the organ shortage in the United States.²⁰² Thus, all that may be needed to increase the organ donation rate in the United States is increased public education and awareness about organ donation.²⁰³

a. Religion

As discussed in Section IV, opinions vary as to the acceptance of cadaveric organ donation among the various religious traditions. It is apparent, however, that at least some major religions do not prohibit cadaveric organ donation, but rather embrace it as an act of charity.²⁰⁴ Still, many people in the United States believe that their religion prohibits or frowns upon organ donation.²⁰⁵ Thus, increased education and awareness concerning religious attitudes towards organ donation would certainly help to combat this common misconception.

b. A Culture of Distrust

A lack of public trust in the American healthcare system is viewed as another obstacle to improving the organ donation rate in the United States.²⁰⁶ As demonstrated in the recent debates surrounding “Obamacare,” this lack of trust can lead to public fear.²⁰⁷ Many individuals still fear that their status as an organ donor will impact the quality of medical care they will receive in life-threatening situations.²⁰⁸ Further, as discussed in Section IV, abuse of medical research

²⁰² See *Busting the Myths About Organ Donation*, GIFT OF LIFE DONOR PROGRAM, <http://www.donors1.org/learn/myths/> (last visited Aug. 15, 2012).

²⁰³ See *id.*; Watkins, *supra* note 8, at 6; Fitzgibbons *supra* note 4, at 85; see also *About Us*, *supra* note 17; see also *Awareness & Promotion*, *supra* note 17.

²⁰⁴ See O’Keeffe, *supra* note 150, at 292; UNOS, *supra* note 181; DONATELIFE.NET, *supra* note 181.

²⁰⁵ See UNOS, *supra* note 181.

²⁰⁶ Although many factors undoubtedly contribute to this lack of trust, the poor quality (both real and perceived) of our healthcare system must be among them. See Vidya Ram, *Solving the Organ Crisis, the Spanish Way*, FORBES.COM (Sep. 2, 2009, 6:00 PM EST), <http://www.forbes.com/2009/09/02/public-private-healthcare-business-healthcare-organ-donation.html>. Of note, Spain, with the highest organ donation rate in the world, has the seventh-best healthcare system in the world. *Id.* The United States, however, ranks thirty-seventh. *Id.*

²⁰⁷ See Ram, *supra* note 206.

²⁰⁸ See Sayani, *supra* note 103; UNOS, *supra* note 181.

in the past has resulted in widespread mistrust of the medical establishment within certain racial and cultural groups.

c. Brain Death

Misconceptions surrounding the concept of brain death also act as an impediment to increasing the organ donation rate in the United States.²⁰⁹ Polls show that people still refuse to donate a loved one's organs when the loved one has been declared brain dead because they are under the mistaken belief that a person can "recover" from a diagnosis of brain death.²¹⁰ In reality, however, brain death is irreversible and serves, in many jurisdictions, as a legal indicator of death.²¹¹ Thus, increased public awareness and education about brain death may result in the availability of an entirely new pool of organ donors.²¹²

2. Financial Incentives

Beyond presumed consent and increasing awareness of organ donation, financial incentives present another means of increasing organ donation. Financial incentives are an attractive option because they offer a variety of choice. Indeed, states have employed various types of financial incentives aimed at encouraging organ donation, specifically from the perspective of eliciting family members' consent.²¹³ Pennsylvania piloted a program whereby a family consenting to the donation of a decedent's organ(s) was given \$300 towards a funeral home of choice.²¹⁴ Other proposals have included tax credits for those who consent to donation.²¹⁵ Of course, financial incentives raise ethical concerns and fears of exploitation. However, financial incentives raise considerably less concerns than their controversial counterpart, the organ market.

A Regulated Organ Market²¹⁶

²⁰⁹ See Roberts, *supra* note 61, at 112.

²¹⁰ Jacqueline Sullivan, Debbie L. Seem, & Franki Chabalewski, *Determining Brain Death*, <http://classic.aacn.org/aacn/jrn/ccn.nsf/0/5ebf8de743ead0fa8825674e005a8950?opendocument> (last visited Mar. 7, 2011).

²¹¹ See *id.*

²¹² See Roberts, *supra* note 61, at 112.

²¹³ See *id.* at 111.

²¹⁴ See *id.*

²¹⁵ See Appel, *supra* note 47.

²¹⁶ This section will only examine legal organ markets. While the existence of illegal and unregulated black market organ trading throughout the world is undisputed, it merits a separate discussion not relevant here. For more information about the international illegal organ trade,

Since federal law prohibits the sale of organs, a regulated organ market is not currently a realistic option for the United States.²¹⁷ There are those, however, that think it is time for Congress to re-think, or even repeal, the prohibition on the sale of organs in light of the organ donor crisis.²¹⁸ However, the idea of a regulated organ market is not popular with Americans,²¹⁹ and their experiences are both cautionary and illuminating. The sale of human organs has, at one time or another, been legal in three countries—the Philippines, India, and Iran.²²⁰ Due to ethical concerns, India’s legal organ market was brought to an end in 1994 with the passage of the Transplantation of Human Organs Act.²²¹ Similarly, the Philippines maintained a legal organ market until the passage of the Anti-Trafficking in Persons Act in 2009.²²² In Iran, however, the organ market is alive and well.²²³ In fact, Iran’s legal kidney market is viewed by some as an example of what a well-regulated and standardized legal organ market could look like in the United States.²²⁴ Although, obviously not a perfect system, Iran’s legal kidney market has been successful.²²⁵ Perhaps the greatest

see Yosuke Shimazono, *The State of the International Organ Trade: A Provisional Picture Based on Integration of Available Information*, WORLD HEALTH ORGANIZATION, <http://www.who.int/bulletin/volumes/85/12/06-039370/en/> (last visited Mar. 21, 2012).

²¹⁷ See 42 U.S.C. § 274(e) (2010). The 2006 UAGA also prohibits the sale of body parts. See Unif. Anatomical Gift Act § 16 (2009), available at http://www.uniformlaws.org/shared/docs/anatomical_gift/uaga_final_aug09.pdf (last visited Aug. 15, 2012).

²¹⁸ See Benjamin E. Hippen, *Organ Sales and Moral Travails: Lessons from the Living Kidney Vendor Program in Iran*, CATO INSTITUTE, POLICY ANALYSIS, POLICY ANALYSIS NO. 614, at 1, 3 (2008), available at <http://www.cato.org/publications/policy-analysis/organ-sales-moral-travails-lessons-living-kidney-vendor-program-iran>; Stephen J. Dubner, *Human Organs for Sale, Legally, in . . . Which Country?*, FREAKONOMICS, (Apr. 29, 2008, 4:20 PM), <http://freakonomics.com/2008/04/29/human-organs-for-sale-legally-in-which-country/>.

²¹⁹ Consistently, polls show that public opinion is overwhelmingly against the idea of a regulated organ market. See Roberts, *supra* note 61; Dubner, *supra* note 218 (“The repugnance factor in this country [to a regulated organ market] . . . may simply be too large to overcome.”).

²²⁰ See Dubner, *supra* note 218; *Amendment to the Transplantation of Human Organs Act, 1994*, LAW RESOURCE INDIA, <http://indialawyers.wordpress.com/2009/09/19/mendment-to-the-transplantation-of-human-organs-act-1994/> (last visited Mar. 6, 2011); Rasheed Abou-Alsamh, *Cabral Warns: No More Organs for Sale in Philippines*, ARAB NEWS (June 26, 2009), <http://archive.arabnews.com/?page=4§ion=0&article=124049>; Tetch Torres, *Philippines Says No to Organ Trafficking*, INQUIRER GLOBAL NATION (June 24, 2009), <http://globalnation.inquirer.net/news/breakingnews/view/20090624-212208/Philippines-says-no-to-organ-trafficking>; see also Appel, *supra* note 47.

²²¹ See Amendment to the Transplantation of Human Organ Acts, 1994, *supra* note 220.

²²² See Abou-Alsamh, *supra* note 220; Torres, *supra* note 220.

²²³ Iran is currently the only country in the world with a legal organ market. See Dubner, *supra* note 218; Shimazono, *supra* note 216.

²²⁴ See Hippen, *supra* note 218.

²²⁵ See *id.* Although, there is an acknowledged lack of data regarding the long-term outcomes for donors. See *id.* at 5.

proof of its success is the fact that, as of 1999, Iran had eliminated its waiting list for kidney transplants.²²⁶

Under the Iranian system, paid kidney donors (“kidney vendors”) are identified and matched to recipients by the Dialysis and Transplant Patients Association (DATPA).²²⁷ DATPA is staffed by volunteers and receives no compensation for facilitating the matching program.²²⁸ Thus, DATPA serves the important role of neutral intermediary between the kidney vendors and transplant recipients.²²⁹ Kidney vendors are paid a flat fee of \$1,200 from the Iranian government for the donation of a kidney.²³⁰ They are also given limited health insurance policies to cover only those medical issues that arise secondary to the transplantation surgery.²³¹ Moreover, kidney vendors receive a second payment – typically between \$2,300 and \$4,500 – from either the recipient, if s/he can afford it, or a designated charitable organization.²³² The compensation to the kidney vendor, however, is not solely monetary.²³³ The Iranian government also pays for all transplant-associated medical care, for both the kidney vendor and the recipient.²³⁴

The Iranian experience with organ markets is enlightening in two ways. First, while the Iranian legal kidney market pertains only to living kidney vendors, it is not difficult to imagine such a system being implemented for deceased donors as well.²³⁵ Second, a cursory accounting of the pros and cons of the Iranian kidney market reveals that it presents no worse an alternative and about the same risks as an explicit consent system, and perhaps a better alternative and fewer risks than a presumed consent system. For instance, the Iranian kidney market relies on the explicit consent of kidney vendors.²³⁶ Thus, it preserves individual autonomy and privacy at least as well as an explicit consent system, and certainly better than a presumed consent

²²⁶ See *id.* at 4.

²²⁷ See *id.* at 3.

²²⁸ See *id.*

²²⁹ See *id.* at 3-4. (“Neither the transplant center nor transplant physicians are involved in identifying potential vendors.”).

²³⁰ See *id.*

²³¹ See *id.* These limited health insurance policies are in effect for one year following the transplantation surgery. See *id.*

²³² See *id.*

²³³ See *id.*

²³⁴ See *id.*

²³⁵ Of course, some tweaks would obviously be needed. For example, provisions would have to be made for compensation to go either to the decedent’s estate or next-of-kin.

²³⁶ See *id.* at 3 (“Neither the transplant center nor transplant physicians are involved in identifying potential vendors. Instead, vendors express their own interest in participating by contacting DATPA.”).

system. Further, at worst, it raises the same ethical concerns with respect to disparate impact and exploitation of the poor as does presumed consent.²³⁷

Moreover, despite the fact that many Americans morally object to the idea of an organ market, one must admit that it comports nicely with the notion of capitalism and the American market economy. Thus, with the proper safeguards and regulations in place, a legal organ market may prove to be a missed opportunity for increasing organ donation rates in the United States.

3. Reciprocity in Israel

Israel recently became the first country in the world to incentivize organ donation by implementing a reciprocal organ donation system.²³⁸ Under such a system, individuals who consent to being organ donors are given priority over those who do not if they ever find themselves in the unfortunate position of needing an organ transplant themselves.²³⁹ Israeli officials hope that the prospect of receiving priority treatment is a sufficient incentive to increase Israel's low organ donation rates.²⁴⁰

V. THE CONSTITUTIONALITY OF PRESUMED CONSENT

A. The Fourteenth Amendment Due Process Clause

Under the Court's modern interpretation of the Fourteenth Amendment Due Process Clause, whenever the government deprives a person of life, liberty, or property, the government must offer that person some sort of procedural due process, i.e., notice and the right to be heard.²⁴¹ The property interests protected by the Fourteenth Amendment are not created by the Constitution.²⁴² Rather, they are the products of rules and understandings established by independent sources — such as state law, common policy and practice, or precedent.²⁴³ However, the liberty interests protected by the Fourteenth

²³⁷ See *id.* at 5.

²³⁸ See Rampell, *supra* note 19; Appel, *supra* note 47.

²³⁹ See Rampell, *supra* note 19.

²⁴⁰ See *id.*

²⁴¹ See *Bd. of Regents v. Roth*, 408 U.S. 564, 569 (1972) (“The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment’s protection of liberty and property.”).

²⁴² See *id.* at 577.

²⁴³ See *id.*

Amendment find their source in both state law and the Constitution.²⁴⁴ Presumed consent organ donation laws implicate deprivations of both liberty and property. Thus, in examining the constitutionality of presumed consent organ donation laws under the Fourteenth Amendment, one must first address the question of whether presumed consent laws have the potential to deprive people of either liberty or property.²⁴⁵ If the answer to this question is yes, the next question must then be what process is due?²⁴⁶ As discussed below, several courts have had occasion to pass on the first question with varying results.²⁴⁷ Nevertheless, some courts have concluded that next-of-kin have cognizable and protected property interests in a decedent's body.²⁴⁸ These precedents will undoubtedly provide the predominant basis for objections to presumed consent organ donation laws as a deprivation of property in violation of the Fourteenth Amendment Due Process Clause.

1. The Property Interest of Next of Kin

In *Brotherton v. Cleveland*, the decedent's wife brought suit against the county coroner after discovering that her deceased husband's corneas had been removed during an autopsy without her consent.²⁴⁹ At the hospital, the wife declined to give consent to the donation of her husband's organs.²⁵⁰ Subsequently, because the husband's death was ruled a possible suicide, his body was taken to the county coroner's office where an autopsy was performed.²⁵¹ During the autopsy, the county coroner authorized, pursuant to an Ohio presumed consent law, the removal of the husband's corneas for the purposes of donation.²⁵² The coroner did not make any effort to ask either the decedent's wife or the hospital whether there was any objection to

²⁴⁴ See *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (“[The government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . .”).

²⁴⁵ See RONALD D. ROTUNDA, *MODERN CONSTITUTIONAL LAW, CASES AND NOTES* 502 (8th ed. 2007).

²⁴⁶ See *id.* It would seem that the subsidiary issue of *when* the process is due is moot in the organ donation context. Objections to the donation of a decedent's organs are raised before said donation, either by the decedent himself or next-of-kin. For the process to be meaningful at all, it would have to be offered before a decedent's organs are removed, since process after removal would not leave any opportunity to rectify an alleged deprivation.

²⁴⁷ See *Albrecht v. Treon*, 617 F.3d 890 (6th Cir. 2010); *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991).

²⁴⁸ See *Brotherton*, 923 F.2d at 477; *Newman v. Sathyavaglswaran*, 287 F.3d 786 (9th Cir. 2002).

²⁴⁹ See *Brotherton*, 923 F.2d at 478.

²⁵⁰ See *id.* at 478.

²⁵¹ See *id.*

²⁵² See *id.*

such a donation.²⁵³ The Ohio presumed consent law, under which the coroner acted, allowed for the removal of corneas for transplantation as long as the coroner's office was not aware "of an objection by the decedent, the decedent's spouse, or []. . . the next of kin . . ." ²⁵⁴ Further, it had become the common practice of the coroner's office to not seek out the next of kin's consent or inspect the decedent's medical or hospital records.²⁵⁵

In addressing the wife's due process claim, the Sixth Circuit Court of Appeals first pointed out that historically, other courts have found that next of kin have a "quasi-property interest" in a decedent's dead body.²⁵⁶ Nevertheless, the court found that it was unnecessary to address the merits of this finding.²⁵⁷ Instead, the court concluded that section 2108.02(B) of the Ohio statutes granted an explicit right to the decedent's wife to control the disposal of her husband's body.²⁵⁸ In so doing, the court found that the statute effectively gave the decedent's wife a possessory interest in her husband's dead body which rose to a sufficient level as to create a "legitimate claim of entitlement' . . . protected by the [D]ue [P]rocess [C]lause of the [F]ourteenth Amendment."²⁵⁹ Further, although acknowledging that the right to possess is at "the very core of a property interest,"²⁶⁰ the court emphasized that the question of whether an interest rises to the level of due process protection rests on the substance of the right rather than the label attached to it by the State.²⁶¹ Nevertheless, the Sixth Circuit's holding was significant in that it (1) acknowledged that next of kin have a cognizable and constitutionally protected interest in a decedent's dead body, and (2) that this interest is substantial enough to warrant some form of predeprivation process under the Fourteenth Amendment Due Process Clause.²⁶² However, the court did not elaborate as to what this predeprivation process should look like or how extensive it should be.²⁶³

Similarly, in *Newman v. Sathyavaglswaran*, the Ninth Circuit held that the parents of children whose corneas had been removed by the Los Angeles County Coroner's office, without consent and pursuant

²⁵³ *See id.*

²⁵⁴ *Id.*

²⁵⁵ *See id.*

²⁵⁶ *See id.* at 480.

²⁵⁷ *See id.* at 481-82.

²⁵⁸ *See id.* at 482.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 481.

²⁶¹ *See id.* at 482.

²⁶² *See id.*

²⁶³ *See id.*

to a California presumed consent law, stated a valid claim under Title 42, United States Code, section 1983 for violation of the Due Process Clause of the Fourteenth Amendment.²⁶⁴

However, where the *Brotherton* court had been hesitant to put a label on the interest it deemed worthy of due process protection, the *Newman* court explicitly recognized that a next-of-kin's exclusive right to possess a decedent's dead body directly translated into a cognizable and constitutionally protected property interest.²⁶⁵ Yet, as in *Brotherton*, the *Newman* court stopped short of explaining "the type and extent of predeprivation process" due.²⁶⁶

In addition, the *Newman* case is significant for another reason – its factual underpinnings aptly demonstrate the potential for abuse posed by presumed consent laws. The *Newman* case arose out of an exposé in the Los Angeles Times chronicling the Los Angeles County Coroner's rather sketchy practices surrounding presumed consent cornea donations.²⁶⁷ Not only did the article reveal that the coroner went out of his way to avoid any knowledge of next-of-kin objections, it also revealed that the primary motivation for such practices was monetary.²⁶⁸ The coroner's office was selling the corneas to a for-profit tissue bank and earning approximately \$250,000 per year by doing so.²⁶⁹

Nineteen years later, in *Albrecht v. Treon*, the Sixth Circuit reinforced the significance of *Brotherton* for the purpose of analyzing the constitutionality of presumed consent organ donation laws. Although it declined to extend *Brotherton* beyond the scope of the organ donation context,²⁷⁰ the *Albrecht* court clarified any doubt as to the nature of the interest the *Brotherton* Court had seen fit to protect.²⁷¹ According to the *Albrecht* court, the *property interest* protected in *Brotherton* arose directly from Ohio state law, "which expressly granted next of kin the right to [possess and] dispose of a relative's remains."²⁷² Further, the *Albrecht* court explained that, within the organ donation

²⁶⁴ See *Newman v. Sathyavaglswaran*, 287 F.3d 786, 788 (9th Cir. 2002).

²⁶⁵ See *id.*; *Brotherton*, 923 F.2d at 482.

²⁶⁶ *Brotherton*, 923 F.2d at 482; see *Newman*, 287 F.3d at 799.

²⁶⁷ See Orentlicher, *supra* note 14, at 306.

²⁶⁸ See *id.*

²⁶⁹ See *id.*

²⁷⁰ See *Albrecht v. Treon*, 617 F.3d 890, 897 (6th Cir. 2010) ("[T]his Court and the Supreme Court of Ohio agree that *Brotherton* applies only in the narrow circumstance of unauthorized removal of body parts for donations, and should not be expanded to include claims by next of kin for bodily tissues retained by a government official for legitimate criminal investigations.").

²⁷¹ See *id.* at 898. ("*Brotherton* did not create a property interest in the next of kin's deceased relative's corneas, but, instead, interpreted that right as it already existed pursuant to Ohio's Uniform Anatomical Gift Act.").

²⁷² *Id.* at 894.

context, the next of kin's *property interests* in the decedent's dead body were paramount to any state property interests that existed.²⁷³ Finally, the *Albrecht* court repeatedly distinguished *Brotherton* and emphasized that its seemingly contrary holding turned on one "key difference."²⁷⁴ Whereas the removal of the brain in *Albrecht* was "in furtherance of a lawful criminal investigation,"²⁷⁵ there was no such investigative purpose behind the removal of the corneas in *Brotherton*. Rather, in *Brotherton*, the corneas were removed for the sole purpose of organ donation.²⁷⁶ Accordingly, *Brotherton* not only remains good law but has been fortified by *Albrecht*.²⁷⁷ Consequently, it will inevitably serve as the launching point for the many constitutional challenges that are sure to be mounted against presumed consent organ donation laws.

B. The Liberty Interest of the Deceased

Although the liberty interest of the deceased has been focused upon less frequently by claimants and the courts, it remains a viable, though perhaps tenuous, means of challenging the constitutionality of presumed consent laws. Inherently linked to autonomy, the policy side of the liberty argument was discussed above in Section IV. Here, it is worthwhile to examine the constitutional side of the liberty argument.

In a seemingly insignificant part of its opinion, the *Newman* court actually seems to give a preview of how the liberty argument could play-out from the constitutional law perspective.²⁷⁸ Personal liberty, the court points out, "is so rooted in the traditions and conscience of our people"²⁷⁹ . . . as to be ranked as one of the fundamental liberties protected by the substantive component of the Due Process Clause.²⁸⁰ The court further explains that, according to the United States Supreme Court, this sphere of personal liberty includes "the right of every individual to the possession and control of his own person, free from all restraint *or interference of others* . . ."²⁸¹ Moreover, the court notes that the Supreme Court has "strongly suggested" that

²⁷³ *See id.*

²⁷⁴ *Id.* at 897.

²⁷⁵ *Id.*

²⁷⁶ *See Brotherton v. Cleveland*, 923 F.2d 477, 478, 482 (6th Cir. 1991).

²⁷⁷ *See Albrecht*, 617 F.3d at 897 ("[T]his Court and the Supreme Court of Ohio agree that *Brotherton* applies only in the narrow circumstance of unauthorized removal of body parts for donations . . .").

²⁷⁸ *See Newman v. Sathyavaglswaran*, 287 F.3d 786, 789-90 (9th Cir. 2002).

²⁷⁹ *Id.* at 789 (quoting *Snyder v. Massachusetts*, 291 U.S. 97 (1934)).

²⁸⁰ *Id.* (citations omitted).

²⁸¹ *Id.* (quoting *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250 (1891)) (emphasis added).

this protected liberty interest “extends to the personal decisions about how to best protect dignity and independence at the end of life.”²⁸² Thus, according to *Newman*, one may not need to rely on a next-of-kin objection in order to mount an attack against presumed consent laws. If personal liberty is indeed a fundamental right, it carries with it the full force of our constitutional protections by way of a strict scrutiny standard of review. And if personal liberty encompasses end of life decisions, such as organ donation, then laws pertaining to organ donation must withstand strict scrutiny review, i.e., the laws must be narrowly tailored to further a compelling government interest.²⁸³

Another aspect of the liberty argument against presumed consent laws is provided by the fact that fundamental rights need not be affirmatively invoked.²⁸⁴ By their very nature, fundamental rights are a constitutional given, as is the protection they receive.²⁸⁵ If, as discussed above, the personal liberty with which organ donation laws are concerned is a fundamental right, a presumed consent organ donation system stands in direct contradiction to this tenet of constitutional law. Under a presumed consent system, an individual’s default status becomes constitutionally unprotected unless s/he affirmatively invokes or activates the protection of the Due Process Clause by “opting-out.” This proposition flies directly in the face of Supreme Court precedents interpreting the nature of the fundamental rights protected by the Federal Constitution.²⁸⁶

C. The Fifth Amendment Takings Clause

In addition, the recognition of next-of-kins’ property interests in the dead body of a decedent has obvious implications under the Takings Clause of the incorporated Fifth Amendment.²⁸⁷ The Takings Clause provides that private property shall not “be taken for public use, without just compensation.”²⁸⁸ Assuming arguendo that a decedent’s body is the private property of the next-of-kin, one could certainly argue that presumed consent laws, which authorize the removal of a decedent’s organ(s) for the purpose of organ donation without compensation to the next-of-kin, constitute a “taking” under the Fifth Amendment. The “public use” requirement of the Takings Clause

²⁸² See *id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702 (1997)).

²⁸³ See *Adarand Constructors v. Peña*, 515 U.S. 200 (1995).

²⁸⁴ See *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Saenz v. Roe*, 526 U.S. 489, 525 (1999)

²⁸⁵ See *Johnson*, 304 U.S. at 458; *Saenz*, 526 U.S. at 489.

²⁸⁶ See *Johnson*, 304 U.S. at 458; *Saenz*, 526 U.S. at 489.

²⁸⁷ See U.S. CONST. amend. V; *Chicago, Burlington & Quincy Ry. Co. v. Chicago*, 166 U.S. 226, 233-34 (1897)

²⁸⁸ U.S. CONST. amend. V.

can be satisfied by an expressed intent that the “taking” serve a generalized “public purpose”.²⁸⁹ Presumably then, the public purpose in the context of presumed consent organ donation laws would be that of increasing cadaveric organ donation rates, with the end result being that more lives are saved.

In this scenario, a state government’s only means of avoiding the “takings” problem would be to compensate the affected decedent’s next of kin. However, such a proposal would raise many controversial questions. How would a decedent’s organs be valued, according to the value assigned to them by the State, the decedent, the decedent’s next of kin, or the organ recipient? Should the valuation be done pre or post death? Should organ values be uniform by type, regardless of the identity of the donor? Or should *who* the donor is factor into the valuation? If so, what factors should be considered in the valuation of an organ? Race? Sex? Religion? How about a decedent’s level of education, earning potential, or family history? Certainly, the age and overall health of the decedent should be taken into account since such characteristics may contribute significantly to the quality of the procured organ.

But what role, if any, should the identity of the organ recipient play? Should the value of the life potentially saved factor into the equation? Should the aforementioned factors also come into play on the side of the organ recipient? Should an organ be valued greater if it is going to save the life of a young person versus that of an older person? How about if the organ recipient is married and has children, versus an individual who is single and has fewer dependents? Perhaps the difficulties posed by these questions are proof that we should not go down the road of “body as property”. However, as evidenced by *Brotherton*, *Newman*, and *Albrecht*, in the area of organ donation law, we are not far off this course.

Notably, in the little case law that exists in the area, courts have managed to avoid the mere mention of the looming Takings Clause problem.²⁹⁰ Perhaps this is wishful thinking on their part. Nevertheless, if attempts like the one in New York gain traction and succeed, courts will undoubtedly be forced to address the question of whether the Fifth Amendment’s Takings Clause protects “quasi” property rights, as it does fully vested property rights.

²⁸⁹ See *Kelo v. City of New London*, 545 U.S. 469, 482 (2005) (quoting *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984)).

²⁹⁰ See *Newman v. Sathyavaglswaran*, 287 F.3d 786 (9th Cir. 2002); *Albrecht v. Treon*, 617 F.3d 890 (6th Cir. 2010); *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991).

VI. CONCLUSION

Is presumed consent the answer to the organ shortage crisis in the United States? And even if it is, is it an answer that will be acceptable to the American people? Moreover, considering the inequities that have plagued presumed consent laws thus far, is it a just answer?

As things stand right now, the answer to all of these questions is most likely no. The American people cherish their autonomy and privacy too much to view presumed consent laws as anything other than a direct affront to their personal liberty. And while the American courts may be more receptive to presumed consent laws as a valid exercise of the state police powers, they inevitably will have to deal with some very sticky constitutional issues should state-wide opt-out systems become a reality.

To be sure, there are alternatives. As offensive as some Americans may find the idea of offering financial incentives or remuneration for donor organs, such options may prove more palatable and consistent with American values than presumed consent. Reciprocity also seems promising. Further, increasing the organ donation rates may be as simple as increasing education and public awareness about organ donation. In light of the values at stake, the alternatives must be worth exploring.

The future for presumed consent organ donation laws in the United States is uncertain. However, the controversy surrounding them is not. And yet the states seem undeterred in their quest to be the first in the nation to boast an opt-out organ donation system. Time will only tell.