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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. 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. This is particularly true for those in need of kidney transplants – and the gap appears to be growing larger each year.

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. For example, in a 2005 Gallup national survey, 95% of those surveyed said they “support or strongly support organ donation.” Further, 78% of those surveyed said they “would be likely or very likely to have their organs donated after their death.”

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.


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


5 Gallup survey, supra note 4, at 3.

6 Id.
these figures represent increases from 1993 when the Gallup national survey was last conducted. 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. 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. 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? Many believe that the disconnect stems from the ability of the decedent’s next of kin to intervene in the organ donation decision. 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. 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. 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.

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, government funded research, and public awareness and education initiatives. The latest attempt

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7 See id.
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, ORGANDONOR.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).
11 See Cover, supra note 10.
12 See id.
13 See id. at 1.
15 See Watkins, supra note 8, at 11.
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. 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. 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. 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. “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.”

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. 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?


20 Cover, supra note 10, at 2 (“In 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. This differs from cadaveric organ donation where the organ donor has been declared legally dead. 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). 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). 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. The 1968 UAGA addressed such issues as who may donate an organ and how a person’s desire to donate should be documented. In 1977, the first computerized donor-donee matching system, the United Network for Organ Sharing (UNOS), was established by the South-Eastern Organ

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.
Although charged with many duties, the primary task of UNOS was, and continues to be, the matching of donors and candidates. 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. 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.” The NOTA also called for the establishment of an Organ Procurement and Transplantation Network (OPTN). 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 . . . .’”

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. 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. 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. 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. In addition, the 1987 UAGA incorporated NOTA’s prohibition on the sale of human organs. 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.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{44} These precursor state presumed consent laws will be discussed in more detail \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{48} Although often overlooked, family awareness is an important aspect of ensuring

\textsuperscript{41} See \textit{id.} at 82.
\textsuperscript{42} See \textit{id.;} Orentlicher, \textit{supra} note 14, at 300.
\textsuperscript{43} See Orentlicher, \textit{supra} note 14, at 299, 302.
\textsuperscript{44} See \textit{id.} at 302-03.
\textsuperscript{45} See \textit{id.} at 300, 305-08.
\textsuperscript{46} See \textit{id.} at 300-01.
that one’s wishes to become an organ donor are carried out.\textsuperscript{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.\textsuperscript{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].\textsuperscript{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.\textsuperscript{52} The status code indicates how urgent a person’s need is for a particular organ transplant.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{56} the size of the

\textsuperscript{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).

\textsuperscript{50} See Fitzgibbons, supra note 4, at 84.


\textsuperscript{52} See id.

\textsuperscript{53} See id.


\textsuperscript{56} The length of time a donor organ remains viable for transplantation varies according 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.
A donor organ in relation to the size of the candidate, and the type of donor organ needed.

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. 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. Under a mandated choice system, individuals must explicitly choose to either opt-in or opt-out of organ donation. 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. 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).

California recently passed legislation establishing a mandated choice system after initial efforts to pass legislation estab-

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57 A donor organ from a large adult would be too big for a small child. See Organ Donation: The Process, supra note 54.
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.”).
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.\textsuperscript{64} Texas, Colorado, and Illinois have also passed mandated choice laws.\textsuperscript{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.\textsuperscript{66} Starting as early as the 1960's, various states implemented presumed consent laws in an effort to increase organ donation.\textsuperscript{67} All of these statutes, with the exception of one,\textsuperscript{68} were limited in application to cadavers in the custody of medical examiners or coroners.\textsuperscript{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.\textsuperscript{70} In addition, the majority of the early presumed consent laws only allowed for the removal of corneas and pituitary glands.\textsuperscript{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.\textsuperscript{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.\textsuperscript{73}

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


\textsuperscript{66} See Orentlicher, supra note 14, at 302.

\textsuperscript{67} See id.

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

\textsuperscript{69} See id.

\textsuperscript{70} See id. at 299-300.

\textsuperscript{71} See id. at 302-03.

\textsuperscript{72} See id. at 300.

\textsuperscript{73} See id. at 300, 310.

\textsuperscript{74} See id. at 303-04.
achieved the desired results of increasing cadaveric organ donation.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{78} Forty-five states, in addition to the District of Columbia and the United States Virgin Islands, have since enacted the 2006 UAGA.\textsuperscript{79} The majority of those states have followed the 2006 UAGA’s rejection of presumed consent and have repealed their presumed consent laws.\textsuperscript{80} A few states, however, have retained presumed consent for an unclaimed decedent’s corneas.\textsuperscript{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.\textsuperscript{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.\textsuperscript{83} If passed, the recently proposed presumed consent laws in

\textsuperscript{75} See id. at 303.
\textsuperscript{76} See id. at 303-04.
\textsuperscript{77} See id. at 305-08.
\textsuperscript{78} See id. at 307-08.
\textsuperscript{80} See Orentlicher, supra note 14, at 308.
\textsuperscript{81} See id.
\textsuperscript{82} See Appel, supra note 47.
New York, Illinois, and Colorado would implement the first opt-out organ procurement systems in the nation.\textsuperscript{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.\textsuperscript{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.\textsuperscript{86} With California having one of the lowest rates of organ donation in the country,\textsuperscript{87} Governor Schwarzenegger thought an opt-out system might be the answer for California.\textsuperscript{88} However, the ensuing public outcry soon prompted Governor Schwarzenegger to abandon the opt-out proposal citing constitutional concerns.\textsuperscript{89} In the end, the bill that Governor Schwarzenegger signed into effect on October 5, 2010 was a compromise.\textsuperscript{90} Instead of an opt-out system, senate bill (SB) 1395 established a mandated choice system in California.\textsuperscript{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).\textsuperscript{92} Previously, applicants had to volunteer this information in order to have their organ donor status reflected on a driver’s license.\textsuperscript{93} Further, the bill established the first ever live donor registry for kidney transplants in the nation.\textsuperscript{94} SB 1395 provides in pertinent part:

\begin{quote}
[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
\end{quote}

\begin{footnotes}
\textsuperscript{85} See Park, supra note 18.
\textsuperscript{86} See Kessler, supra note 64.
\textsuperscript{87} See USA TODAY, supra note 83.
\textsuperscript{88} See Kessler, supra note 64.
\textsuperscript{89} See id.
\textsuperscript{90} See id.
\textsuperscript{91} See S.B. 1395, 2010 Cal. Legis. Serv. Ch. 217 (Cal. 2010).
\textsuperscript{92} See id.
\textsuperscript{93} See id.
\textsuperscript{94} See id.
\end{footnotes}
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.\footnote{See id.}

2. New York


\begin{quote}
[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.\footnote{See id.}
\end{quote}

The self-professed purpose of the bill is to “significantly increase[\textit{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.\footnote{See id.; see also USA TODAY, supra note 83.}

3. Illinois

In February of 2010, Illinois Senator Dale Risinger introduced bill 3613, the Presumed Donor bill.\footnote{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).} If passed, the bill will replace Illinois’s current opt-in organ procurement system with one that is opt-out.\footnote{See eLOBBYIST, supra note 99.} Like the California and New York presumed consent proposals, the bill has already been met with opposition.\footnote{See id.} The proposed bill provides in pertinent part:
[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.

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. Perhaps Representative Pabon is hoping that his donor-friendly state will be more receptive to the idea of presumed consent than other states where similar proposals have failed to pass. 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.

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
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.\(^\text{107}\)

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.\(^\text{108}\)

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

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.\(^\text{112}\) Spain, Austria, France, Belgium, Italy, Norway, and Sweden are among some of the countries that have adopted presumed consent organ donation laws.\(^\text{113}\) 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.\(^\text{114}\) 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.  
\(^{112}\) 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. 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. 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. Indeed, many countries that have implemented presumed consent donation systems have seen drastic increases in their organ donation rates.

However, whether the presumed consent laws of these countries are single-handedly responsible for their higher procurement rates is a subject of much debate. 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. 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. Instead, these commentators posit other theories for Spain’s success. Some theorize that Spain’s high organ donation rate is partly attributable to the larger numbers of healthy individuals killed there in automobile accidents. 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

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115 See id. at 20.
116 See id.
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).
121 See id.
122 See id.
123 See Everyone ‘Should Donate Organs,’ supra note 118.
the infrastructure of its organ procurement system. 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. 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.

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.” 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

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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. 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; 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. 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. 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.

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.\(^\text{133}\) Instead, laws in our country traditionally require only that individuals act in ways that do not result in harm to others.\(^\text{134}\) 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.\(^\text{135}\) According to this argument, a presumed consent system presumes that most people “wish to do the morally right thing.”\(^\text{136}\) 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).\(^\text{137}\) 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.\(^\text{138}\) 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.\(^\text{139}\) 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.\(^\text{140}\) 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.\(^\text{141}\) 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 im-
possible, 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 of-
fering 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 presump-
tion, the donor should have the opportunity to rebut or negate the
presumption of consent.145 Under a presumed consent system, howev-
er, the presumption of consent does not arise until a person is de-
ceased. 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 pre-
sumed donor have the opportunity to rebut or negate the presump-
tion 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 pre-
sumption does not arise until the person is deceased. Opting-out be-
fore 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/
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. 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. 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. 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? In theory, one is making a presumption of donor willingness. In reality, however, presumed consent laws place the state’s interest in saving lives above the individual’s interest in autonomy, and thus, the presumption being made is that “of state rights to post-mortem body organs.” 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.

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.
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 Pierscionek, 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 Pierscionek, 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.\textsuperscript{156} Like all fundamental rights recognized by the Court, the government can curtail the right of privacy in furtherance of a compelling interest.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{161} Further, while many would argue that saving the lives of those individuals waiting for organ transplants is a compelling


\textsuperscript{157} See id. at 155.

\textsuperscript{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.


\textsuperscript{160} See Roe, 410 U.S. at 163-64.

\textsuperscript{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. 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. 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. As a result, a disproportionate number of presumed consent organ and tissue donations under these laws came from donors who had met violent deaths or could not be identified – groups traditionally comprised of minorities and the poor. 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.

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-

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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, they are anything but equitable, and are more likely to end up benefiting some to the detriment of others.

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 consent and the risks posed by procuring organs and tissues from donors with unknown social histories.

The modern-day requirement of explicit informed consent as a condition precedent to medical treatment and research is an important one. 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 Study and the Holocaust. Both events revealed modern

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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, NATIONAL ARCHIVES, 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. 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.

Some in the medical community also express concern about the “quality” of tissues and organs procured by way of presumed consent. 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.” These shortfalls, combined with the “lifestyles of some [likely] presumed consent donors,” can lead to the transmission of communicable diseases from donor to recipient. 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, (2) some religions flat out prohibit organ donation, and (3) some religions have mixed views.

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.


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.” Even this seems like an oversimplification, however, since some religions remain split on the issue. Further complicating the issue is the fact that most people’s religious beliefs are highly influenced by their cultural and moral beliefs as well. 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.

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.”

The case of You Vang Yang v. Sturner is illustrative here. The Yangs, who lived in Rhode Island, were members of the Hmong religion. The Hmong religion “prohibits any mutilation of the body, including autopsies or the removal of organs during an autopsy.” 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. The chief medical examiner then proceeded to perform an autopsy on the Yangs’ son without their knowledge or consent.
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. Under the then-applicable strict scrutiny standard of review, the district court ruled in favor of the Yangs on their First Amendment claim. 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, 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 . . . .” 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). Federalism concerns subsequently prompted the Supreme Court to hold the RFRA unconstitutional as applied to the states in City of Boerne v. Flores. 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.

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; 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.

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192 See id.
193 See id. at 847.
194 See id. at 855-56.
195 See id. at 857.
199 521 U.S. 507 (1997). See also O’Keeffe, 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. 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.

   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. Still, many people in the United States believe that their religion prohibits or frowns upon organ donation. 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. As demonstrated in the recent debates surrounding “Obamacare,” this lack of trust can lead to public fear. 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. Further, as discussed in Section IV, abuse of medical research...
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 Market\(^{216}\)

\(^{209}\) See Roberts, supra note 61, at 112.


\(^{211}\) 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 rethink, 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

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\[219\] 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.”).


\[221\] 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.”).
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system. Further, at worst, it raises the same ethical concerns with respect to disparate impact and exploitation of the poor as does presumed consent.\textsuperscript{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.\textsuperscript{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.\textsuperscript{239} Israeli officials hope that the prospect of receiving priority treatment is a sufficient incentive to increase Israel’s low organ donation rates.\textsuperscript{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.\textsuperscript{241} The property interests protected by the Fourteenth Amendment are not created by the Constitution.\textsuperscript{242} Rather, they are the products of rules and understandings established by independent sources — such as state law, common policy and practice, or precedent.\textsuperscript{243} However, the liberty interests protected by the Fourteenth

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\textsuperscript{237} See id. at 5.
\textsuperscript{238} See Rampell, supra note 19; Appel, supra note 47.
\textsuperscript{239} See Rampell, supra note 19.
\textsuperscript{240} See id.
\textsuperscript{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.”).
\textsuperscript{242} See id. at 577.
\textsuperscript{243} See id.
Amendment find their source in both state law and the Constitution. 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. If the answer to this question is yes, the next question must then be what process is due? As discussed below, several courts have had occasion to pass on the first question with varying results. Nevertheless, some courts have concluded that next-of-kin have cognizable and protected property interests in a decedent’s body. 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. At the hospital, the wife declined to give consent to the donation of her husband’s organs. 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. 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. The coroner did not make any effort to ask either the decedent’s wife or the hospital whether there was any objection to

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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. Satyavagiswaran, 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. 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 . . . .” Further, it had become the common practice of the coroner’s office not to seek out the next of kin’s consent or inspect the decedent’s medical or hospital records.

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. Nevertheless, the court found that it was unnecessary to address the merits of this finding. 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. 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.” Further, although acknowledging that the right to possess is at “the very core of a property interest,” 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. 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. However, the court did not elaborate as to what this predeprivation process should look like or how extensive it should be.

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
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

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264 See *Newman v. Sathyavagiswaran*, 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. Finally, the *Albrecht* court repeatedly distinguished *Brotherton* and emphasized that its seemingly contrary holding turned on one “key difference.” Whereas the removal of the brain in *Albrecht* was “in furtherance of a lawful criminal investigation,” 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. Accordingly, *Brotherton* not only remains good law but has been fortified by *Albrecht*. 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. Personal liberty, the court points out, “is so rooted in the traditions and conscience of our people . . . as to be ranked as one of the fundamental liberties protected by the substantive component of the Due Process Clause.” 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 . . . .” The court notes that the Supreme Court has “strongly suggested” that

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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).  
this protected liberty interest “extends to the personal decisions about how to best protect dignity and independence at the end of life.”\textsuperscript{282} Thus, according to \textit{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.\textsuperscript{283}

Another aspect of the liberty argument against presumed consent laws is provided by the fact that fundamental rights need not be affirmatively invoked.\textsuperscript{284} By their very nature, fundamental rights are a constitutional given, as is the protection they receive.\textsuperscript{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.\textsuperscript{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.\textsuperscript{287} The Takings Clause provides that private property shall not “be taken for public use, without just compensation.”\textsuperscript{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

\textsuperscript{282} See \textit{id.} (quoting Washington v. Glucksberg, 521 U.S. 702 (1997)).
\textsuperscript{285} See \textit{Johnson}, 304 U.S. at 458; \textit{Saenz}, 526 U.S. at 489.
\textsuperscript{286} See \textit{Johnson}, 304 U.S. at 458; \textit{Saenz}, 526 U.S. at 489.
\textsuperscript{287} See U.S. CONST. amend. V; Chicago, Burlington & Quincy Ry. Co. v. Chicago, 166 U.S. 226, 233-34 (1897)
\textsuperscript{288} U.S. CONST. amend. V.
can be satisfied by an expressed intent that the “taking” serve a generalized “public purpose.” 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. 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.


290 See Newman v. Sathyavagiswaran, 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.