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THE “NEW BODY SNATCHERS”: ANALYZING THE EFFECT OF PRESUMED CONSENT ORGAN DONATION LAWS ON PRIVACY, AUTONOMY, AND LIBERTY

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Cover Page Footnote

J.D. Candidate, Fordham University School of Law, 2001; B.A., Sociology, magna cum laude, New York University, 1996. I would like to thank my parents, Jerome and Annette Liddy, for their continuous support and understanding throughout my many years of higher education. Special thanks to Professor Charles Kelbley for his assistance in the preparation of this Note, as well as for awakening my interest in constitutional law. Finally, this Note is dedicated to the memory of my grandfather, Michael Gramegna, who came to the United States many years ago in search of a better life--in every way that matters, I am here because of him.

THE “NEW BODY SNATCHERS”:* ANALYZING THE EFFECT OF PRESUMED CONSENT ORGAN DONATION LAWS ON PRIVACY, AUTONOMY, AND LIBERTY

Maryellen Liddy**

Death is unique. It is unlike aught else in its certainty and its incidents. A corpse in some respects is the strangest thing on earth. A man who but yesterday breathed, and thought, and walked among us has passed away. Something has gone. The body is left still and cold, and is all that is visible to mortal eye of the man we knew. Around it cling love and memory. Beyond it may reach hope. It must be laid away. And the law—that rule of action which touches all human things—must touch also this thing of death.¹

INTRODUCTION

On the morning of July 22, 1999, Fort Worth, Texas police found an unconscious, unidentified man lying in a field in the far southeastern corner of the city.² Upon examination at John Peter Smith Hospital, doctors discovered that “John Doe” was suffering from bleeding and swelling on the brain, though his body showed no signs of trauma.³ He also tested positive for cocaine use.⁴ Although doctors declared John Doe brain dead at 5:30 p.m. that evening, they maintained him on a ventilator for an additional thirty-two hours while the LifeGift Organ Donation Center sought a

* Melanie Phillips, *Tyranny of the New Body Snatchers*, SUN. TIMES (London), July 11, 1999, at 17.

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1. *Perry v. Saint Francis Hosp.*, 886 F. Supp. 1551, 1553 (D. Kan. 1995) (quoting *Louisville & N.R. Co. v. Wilson*, 51 S.E. 24 (Ga. 1905)).

2. Charlotte Huff, *Organs of Brain-Dead Patient Granted*, FORT WORTH STAR-TELEGRAM, July 24, 1999, at 1.

3. *Id.*

4. *Id.*

court order authorizing the coroner to release all organs from the man's body.⁵ In its petition, LifeGift cited a Texas law allowing organs to be harvested from unidentified persons under the coroner's jurisdiction, provided a four-hour search is conducted for the next of kin.⁶ Late in the evening of July 23, 1999, Texas District Judge Bob McGrath granted LifeGift's request, and the following morning a team of surgeons removed John Doe's heart, liver, pancreas, intestines, kidneys, and remaining lung.⁷

Four days after the organ removal, a technician at a neighboring police department, acting upon a request from the Tarrant County Medical Examiner's office, conducted a second fingerprint check and discovered that John Doe was actually Arthur Forge Jr. of Fort Worth.⁸ Subsequent investigation revealed that Forge's nephew had filed a missing persons report with the Fort Worth Police Department on Monday, July 20, two days before Forge's body was found and a full four days before the organ harvesting.⁹ At the time, Fort Worth Police officials could not explain why their fingerprint analysis was unsuccessful, nor could they offer any reason for their failure to check the missing persons list.¹⁰ While officials maintained that their search was reasonable and the organ harvesting proper, one commentator, reflecting on the incident, noted that Texas' presumed consent organ donation law might "scare people [into believing] that the state could be body snatchers. I don't think anybody had that in mind."¹¹

As medical technology advances, doctors are increasingly able to replace failing organs with fully functioning, donated organs.¹²

5. Charlotte Huff, *With Time Critical, Rights of John Doe Kin Cloud Transplant Issue*, FORT WORTH STAR-TELEGRAM, July 31, 1999, at 1.

6. *Id.*

7. *Organs for Transplant Harvested from Clinically Dead 'John Doe'*, HOUSTON CHRON., July 25, 1999, at 41. According to Ron Ehrle, Managing Director of LifeGift's North Texas office, "[O]ne of the lungs had deteriorated to the point that it couldn't be used for transplant." Huff, *supra* note 5.

8. Charlotte Huff, *Fingerprint Tests Identify Organ Donor*, FORT WORTH STAR-TELEGRAM, July 29, 1999, at 1.

9. *Id.*

10. See *Court-Ordered Organ Donor Belatedly Identified*, AUSTIN AM.-STATESMAN, July 30, 1999, at B9.

11. Huff, *supra* note 5; see also Phillips, *supra* note 1 (criticizing a proposed consent system in England as body snatching).

12. *E.g.*, Shelby E. Robinson, Comment, *Organs for Sale? An Analysis of Proposed Systems for Compensating Organ Providers*, 70 U. COLO. L. REV. 1019, 1022 (1999) (citation omitted); Theodore Silver, *The Case for a Post-Mortem Organ Draft and a Proposed Model Organ Draft Act*, 68 B.U. L. REV. 681, 682 (1988). *But cf.* Fiona Barton, *Donor Crisis 'is Causing Thousands of Deaths'*, MAIL ON SUN. (Eng.), July 25, 1999, at 45 (quoting the Medical Director of a Cambridge transplant service

However, because organ transplantation has become successful in a wide variety of cases, there are simply not enough organs available to meet the high level of need.¹³ To understand the extent of the shortage, it may be helpful to first examine the current statistics regarding organ donation in the United States. An estimated 70,000 Americans are currently awaiting life saving organ transplants.¹⁴ While approximately 21,000 people “receive the gift of life” through transplantation each year, nearly 5000 people—or thirteen each day—will die waiting for an organ to become available.¹⁵ Moreover, although 15,000 potential donors die annually under circumstances making organ donation possible, consent to donation is only received in about 6000 of these cases.¹⁶

The numbers clearly illustrate the nature of the problem. Interestingly, though the American public is quite aware of the need for donated organs,¹⁷ this awareness has not yet translated into increased donations, and most Americans are still not signing organ

as saying, “We are in the same sort of business as mechanics. Instead of tinkering with a [carburetor] that is not working, you stick a new one in. But you can’t do that for everyone”).

13. E.g., Laurie G. Futterman, *Presumed Consent: The Solution to the Critical Donor Shortage?*, in *THE ETHICS OF ORGAN TRANSPLANTS* 161, 168 (Arthur L. Caplan & Daniel H. Coelho eds., 1998) (noting that, in spite of medical advances, unceasing demand has depleted the organ supply in the United States). “[B]ecause of [transplantation] technology, even more people have been added to the national waiting list.” 146 Cong. Rec. H333-07, 106th Cong. (2000) (statement of Rep. Karen L. Thurman).

14. H.R. Con. Res. 247 (2000) (establishing National Donor Day on February 12, 2000); S. Res. 225 (1999) (designating November 23, 2000 as a day to “Give Thanks, Give Life”).

15. S. Res. 225.

16. *Id.*

17. Two recent examples should illustrate how organ transplantation has become a common news topic. In a much-publicized 1999 case, Walter Payton, popular former professional football player with the Chicago Bears, died from a rare liver disease. Although a liver transplant could have saved Payton’s life, his disease had progressed too quickly, making a transplant impossible. 145 Cong. Rec. S14927-02, 106th Cong. (1999) (statement of Sen. Richard Durbin) (emphasizing that “[t]he prevention of deaths like that of this great man and of so many other silent heroes is why our efforts in this life-saving cause must continue”). Moreover, on March 15, 2000, Sean Elliott, of the National Basketball Association San Antonio Spurs, was the subject of numerous national news stories as he became the first professional athlete in any sport to return to active participation after a kidney transplant. E.g., *Elliott’s Return Inspires Spurs*, *THE STAR-LEDGER* (N.J.), Mar. 15, 2000, at 41; cf. Phyllis Coleman, *Brother Can You Spare a Liver? Five Ways to Increase Organ Donation*, 31 *VAL. U. L. REV.* 1 (1996) (discussing the public controversy over the remarkably short periods of time that former New York Yankee Mickey Mantle, musician David Crosby, actor Larry Hagman, and Pennsylvania Governor Robert Casey each had to wait before receiving organ transplants).

donation pledge cards.¹⁸ Therefore, politicians and medical professionals are debating alternative solutions for the critical organ shortage, including presumed consent organ donation laws.

Part I of this Note will discuss presumed consent and explain the salient features of presumed consent laws. Part I also will examine organ donation in the United States from a legal standpoint, analyzing anatomical gift statutes in this country and illustrating the ways in which our current system already encompasses presumed consent. This Part will conclude by discussing case law that addresses the aftermath of unauthorized organ or tissue harvesting. Part II of this Note will examine the United States Supreme Court's evolving conceptions of the rights of individual and family-based privacy, autonomy, and liberty, for subsequent application to the presumed consent organ donation controversy. In addition, Part II will discuss legal scholars' efforts to interpret these sometimes conflicting Supreme Court decisions, as a means of clarifying the rights involved in the presumed consent organ donation debate. Finally, in Part III, this Note will analyze presumed consent laws in light of the donors and their families' privacy, autonomy, and liberty interests. Using this framework, this Note will conclude that current presumed consent organ donation laws in the United States are both unethical and unconstitutional.

I. PRESUMED CONSENT AND ITS CONSEQUENCES IN THE AMERICAN SYSTEM OF ORGAN DONATION

A. Presumed Consent Models

In a presumed consent system, doctors assume that every person wishes to become an organ donor upon death.¹⁹ Specifically, unless a person has rebutted the presumption of consent by affirmatively "opting out" of the system, the greater community may claim

18. Aaron Spital, *Mandated Choice for Organ Donation: Time to Give it a Try*, in THE ETHICS OF ORGAN TRANSPLANTS, *supra* note 13, at 147, 147-48 (stating that "relatively few people take advantage of this law and record their wishes about posthumous organ donation"); UNIF. ANATOMICAL GIFT ACT, Prefatory Note, 8A U.L.A. 20 (1993) (citing a 1985 Gallup Poll in which seventy-five percent of Americans approved of organ donation, while only seventeen percent had actually completed organ donor cards).

19. *E.g.*, Linda Beecham, *BMA Wants Presumed Consent for Organ Donors*, BRIT. MED. J., July 17, 1999, at 141; Andrew C. MacDonald, *Organ Donation: The Time Has Come to Refocus the Ethical Spotlight*, 8 STAN. L. & POL'Y REV. 177, 181 (1997).

the right to remove much-needed organs.²⁰ Presumed consent laws are based upon the belief that while most people wish to donate their organs, they are simply reluctant to address the seemingly remote issues of death and organ transplantation while still healthy.²¹ Thus, presumed consent allows the state to act upon a silent consensus and remove organs without explicit permission.²² Moreover, because everyone is considered a potential donor, subject to opt-out, supporters believe that presumed consent laws will result in an increased supply of organs for transplant and an end to donee waiting lists.²³

A properly functioning presumed consent system must, of course, be based upon popular support. However, this protection alone is not sufficient. For example, because individuals must affirmatively express their refusal to donate organs while still legally competent, presumed consent systems require a well-educated and motivated public.²⁴ Otherwise, the underlying support for the system is eroded, resulting in society's recovery of organs based upon people's "lethargy" and "ignorance," rather than their unexpressed

20. Mark D. Fox, *Directed Organ Donation: Donor Autonomy and Community Values*, in ORGAN AND TISSUE DONATION 43, 45 (Bethany Spielman ed., 1996); Coleman, *supra* note 17, at 18.

21. Arthur L. Caplan, *Ethical and Policy Issues in the Procurement of Cadaver Organs for Transplantation*, in THE ETHICS OF ORGAN TRANSPLANTS, *supra* note 13, at 142, 144 (noting that while surveys show the public supports organ donation, many people find the topic "upsetting and distasteful"); Futterman, *supra* note 13, at 163 (stating that "[n]atural hesitation to confront one's mortality is a major reason that only 15 percent of the public sign and carry an organ donor card, request notation on their driver's license, or make some provision in a living will"); MacDonald, *supra* note 19, at 180 (commenting that most potential organ donors are "reluctant to contemplate and plan for their own deaths").

22. Some commentators argue that removing organs without permission amounts to a system of "routine salvage." R.M. Veatch & J.B. Pitt, *The Myth of Presumed Consent: Ethical Problems in New Organ Procurement Strategies*, in THE ETHICS OF ORGAN TRANSPLANTS, *supra* note 13, at 173 (explaining that laws authorizing organ removal without permission are not based on presumed consent); Silver, *supra* note 12, at 706 (arguing that "presumed consent represents conscription in disguise"); Robinson, *supra* note 12, at 1031 (equating presumed consent with routine salvage). However, as these laws are more commonly referred to with the "presumed consent" label, this Note will adhere to that convention.

23. MacDonald, *supra* note 19, at 181; Coleman, *supra* note 17, at 18 (stating that "[a]lthough the evidence is not overwhelming, presumed consent seems to increase organ supply").

24. Lisa Melton, *Inroads Made Into Transplantation Problems*, 354 LANCET 1272 (1999) (noting that presumed consent schemes need "strong public education" to "ensure consent is truly given"); see Silver, *supra* note 12, at 706 (arguing that most people are not inclined to actively assert their rights).

true desires.²⁵ A presumed consent system must also contain an effective mechanism for recording and reviewing opt-outs, such as a centralized data bank or registry.²⁶ Finally, hospitals must be willing to face the legal ramifications and negative publicity that may accompany presumed consent organ harvesting.²⁷ If doctors and administrators routinely fail to act upon presumed consent, any benefits of the system will likely be lost.

Presumed consent systems have varying degrees of support in other nations. Countries with presumed consent laws include Austria, Belgium, France, Italy, Norway, Sweden, and Switzerland.²⁸ In particular, Belgium has utilized a presumed consent model for more than ten years.²⁹ In the Belgian system, people may exercise their right to opt out by filing an objection at any local town hall.³⁰ These individual donation decisions are then registered in a centralized database and made accessible only to transplant officials.³¹ However, despite the existence of the registry, doctors are still encouraged to discuss organ and tissue removal with the decedent's relatives.³² Moreover, physicians are not compelled to harvest any organs under the presumed consent scheme if they are uncomfortable doing so.³³ Overall, presumed consent is credited with increasing organ donation in Belgium by fifty-five percent within a five-year period, even though traffic fatalities (a major source of organ donations) decreased over that same time.³⁴ Presumed consent supporters point out that only two percent of the Belgian people

25. Clifton Perry, *The Right Not to Donate Transplantable Organs*, in ORGAN AND TISSUE DONATION, *supra* note 20, at 123, 126.

26. See Futterman, *supra* note 13, at 167 (discussing Belgium's technology as a model for achieving a centralized data bank under a presumed consent system in the United States).

27. Commentators point to fear of litigation as a major obstacle in acting upon donor's wishes under our current system. Caplan, *supra* note 21, at 145 (stating that "many hospitals fear adverse legal and financial consequences from their involvement with organ procurement"); Robert E. Sullivan, *The Uniform Anatomical Gift Act*, in ORGAN AND TISSUE DONATION, *supra* note 20, at 19, 31-33 (discussing "unfounded" fear of liability as a factor in ignoring signed documents of gift).

28. Robinson, *supra* note 12, at 1031 n.85; MacDonald, *supra* note 19, at 181.

29. See Beecham, *supra* note 19.

30. I. Kennedy et al., *The Case for 'Presumed Consent' in Organ Donation*, 351 LANCET 1650 (1998).

31. Futterman, *supra* note 13, at 167.

32. Kennedy et al., *supra* note 30.

33. Futterman, *supra* note 13, at 167; Kennedy et al., *supra* note 30.

34. Kennedy et al., *supra* note 30.

have opted out of the system,³⁵ implying that near-unanimous support for presumed consent exists within that country.

Other countries have not had similar success with their presumed consent laws. For instance, the Brazilian government implemented a presumed consent system in February 1997, only to abolish it one year later, citing widespread public fear and criticism.³⁶ In the United Kingdom, heated public debate followed the British Medical Association's ("BMA") 1999 resolution to change its longstanding policy of rejecting presumed consent.³⁷ Critics labeled the BMA's proposed opt-out system "body snatching" and warned that it would violate human rights standards and demean people's dignity.³⁸ Because of the lack of public support, the government eventually rejected the proposal.³⁹

B. Organ Transplantation in the United States

1. Statutes That Embody Presumed Consent

a. Uniform Anatomical Gift Act (1968)

Organ and tissue transplantation is a relatively recent phenomenon. Until the early 1960s, surgeons regularly failed in their efforts to transplant human organs.⁴⁰ However, with the development of immunosuppressive therapies, physicians finally were able to control organ rejection, and successful transplantation became a reality.⁴¹ As the frequency of organ transplants increased, the need arose for legislation to regulate the burgeoning technology. In 1965, the National Conference of Commissioners on Uniform State Laws (the "Conference") began to draft a uniform law addressing

35. *Id.*; Sarah Boseley, *Taking it with You: It is Fatuous to Offer Sentimental Respect to Corpses When Their Organs Could Be Used to Save Lives*, THE GUARDIAN (London), July 9, 1999, at 9.

36. Claudio Csillag, *Brazil Abolishes 'Presumed Consent' in Organ Donation*, 352 LANCET 1367 (1998) (noting that "popular imagination" helped defeat the law, as people feared that organs would be removed before clinical death occurred).

37. *E.g.*, Beecham, *supra* note 19, at 141; Dr. Jackie Cassell, *Health and Wellbeing: Options for Organ Donors*, THE DAILY TELEGRAPH (London), July 16, 1999, at 20.

38. *See, e.g.*, Phillips, *supra* note 1, at 17 (arguing that presumed consent creates a tyrannical system in which "humanity itself . . . become[s] no more than the sum of its body parts"). One commentator suggested that presumed consent would inevitably fail in England, because of the country's ethnic diversity. Cassell, *supra* note 37, at 20 (stating that presumed consent would have a "disastrous" effect on "ethnic minorities, such as first generation Bangladeshis, [who] might lack the literacy and knowledge to opt out effectively").

39. Charles Erin & John Harris, *Presumed Consent or Contracting Out*, 25 J. MED. ETHICS 365 (1999).

40. Silver, *supra* note 12, at 682.

41. *Id.*

organ transplantation in the United States.⁴² The Conference reviewed data and then-existing laws, issued findings, and ultimately promulgated a uniform law to be enacted by state legislatures.⁴³

According to the Prefatory Note included in the original 1968 statute, the Conference sought to reconcile the following competing interests: (1) the decedent's wishes during his lifetime; (2) the desires of his surviving spouse or next of kin; (3) the state's interest in conducting an autopsy to determine the cause of a death resulting from crime or violence; (4) the need for such an autopsy when private legal rights rest upon the cause of death; and (5) society's need for organs and tissue for education, research, therapy, and transplantation.⁴⁴ The Conference attempted to balance these interests by creating the concept of a voluntary anatomical gift.⁴⁵ Thus, if a competent donor executed a document of gift before two witnesses, the organs could be removed for transplantation upon the donor's death.⁴⁶

The Uniform Anatomical Gift Act (the "1968 Act") also created a priority scheme under which other persons would be allowed to donate the decedent's organs.⁴⁷ The descending hierarchy, which corresponds to the interests discussed above, is as follows:

Any of the following persons, in order of priority stated, when persons in prior classes are not available at the time of death, and in the absence of actual notice of contrary indications by the decedent or actual notice of opposition by a member of the same or a prior class, may give all or any part of the decedent's body for any purpose specified . . . :

- (1) the spouse,
- (2) an adult son or daughter,
- (3) either parent,
- (4) an adult brother or sister,
- (5) a guardian of the person of the decedent at the time of his death,
- (6) any other person authorized or under obligation to dispose of the body.⁴⁸

42. *Id.* at 693.

43. Sullivan, *supra* note 27, at 19-21.

44. UNIF. ANATOMICAL GIFT ACT, Prefatory Note, 8A U.L.A. 64 (1993). One critic has noted that organ shortages are inevitable when society's need for organs and tissues is given the lowest priority. Silver, *supra* note 12, at 694 n.60.

45. Sullivan, *supra* note 27, at 22.

46. 8A U.L.A. 109, § 4(b).

47. *Id.* § 2.

48. *Id.* § 2(b). "Taking into account the very limited time available following death for the successful removal of such critical tissues as the kidney, the liver and the

Interestingly, although the 1968 Act is consistently described as creating a system of “encouraged voluntarism,”⁴⁹ medical examiners, as “person[s] authorized or under obligation to dispose of the body,” are permitted to release a decedent’s organs when next of kin are not available to object.⁵⁰ This residual authorization thus creates a “weak” version of presumed consent, as the provision seemingly allows a coroner to both assume and act upon the decedent’s unexpressed desire to donate organs. Again, in certain situations, the priority scheme does not require the coroner to receive explicit permission from either the donor (through records) or any of his or her relatives before harvesting organs. The residual authorization, as embodied by the 1968 Act, is currently the law in the majority of states, including Alabama,⁵¹ Colorado,⁵² Kentucky,⁵³ Maine,⁵⁴ Michigan,⁵⁵ New Jersey,⁵⁶ New York,⁵⁷ and North Carolina.⁵⁸

b. Uniform Anatomical Gift Act (1987)

During the 1970s and 1980s, as researchers continued to make remarkable strides in organ transplantation, individual states began to modify their versions of the Uniform Anatomical Gift Act to facilitate organ donation.⁵⁹ According to the Executive Committee of the National Conference of Commissioners on Uniform State Laws, which reconvened in 1984, the state modifications, while necessary, led to increased uncertainty, thus undermining one of the original objectives of the 1968 Act.⁶⁰ Therefore, in 1987, the Conference adopted a new version of the Uniform Anatomical

heart, it seems desirable to eliminate all possible question by specifically stating the rights of and the priorities among the survivors.” *Id.* cmt.

49. *E.g.*, Silver, *supra* note 12, at 694; *cf.* Perry v. Saint Francis Hosp., 886 F. Supp. 1551, 1564 (D. Kan. 1995) (stating that “[f]or whatever reason, whether it be metaphysical, religious, or philosophical, society presently rejects the commercialization of human organs and tissues and tolerates only an altruistic system of voluntary donation”).

50. 8A U.L.A. 99, § 2(b).

51. ALA. CODE 1975 § 22-19-42 (2000).

52. COLO. REV. STAT. ANN. § 12-34-103 (West 2000).

53. KY. REV. STAT. ANN. § 311.175 (Michie 2000).

54. ME. REV. STAT. ANN. tit. 22, § 2902 (West 1999).

55. MICH. COMP. LAWS ANN. § 333.10102 (West 2000).

56. N.J. STAT. ANN. § 26:6-58 (West 2000).

57. N.Y. PUB. HEALTH LAW § 4301 (Consol. 2000).

58. N.C. GEN. STAT. § 130A-404 (2000).

59. *See* UNIF. ANATOMICAL GIFT ACT, Prefatory Note, 8A U.L.A. 21 (1993) (discussing state amendments allowing non-doctors to remove eyes and “address[ing] specific emerging problems”).

60. *Id.*

Gift Act (the "1987 Act"), essentially replacing the existing statute.⁶¹

The new law requires a designated hospital administrator to discuss organ donation with every person admitted to the hospital.⁶² The 1987 Act explicitly provides that a donor's unrevoked anatomical gifts become irrevocable upon death, eliminating the need for additional family consent.⁶³ Moreover, when a patient with no documented organ choice dies, the 1987 Act requires the administrator to ask family members to make an anatomical gift.⁶⁴ These provisions are designed to increase organ supply by identifying potential donors, respecting the donors' wishes, and simplifying the anatomical gift process for family members.⁶⁵

The 1987 Act also contains a provision authorizing a controversial method for procuring additional organs, namely, by coroner release. To understand this provision, it is first necessary to review the Act's modified priority scheme, which is as follows:

- (a) Any member of the following classes of persons, in the order of priority listed, may make an anatomical gift of all or part of the decedent's body for an authorized purpose, unless the decedent, at the time of death, has made an unrevoked refusal to make that anatomical gift:
 - (1) the spouse of the decedent;
 - (2) an adult son or daughter of the decedent;
 - (3) either parent of the decedent;
 - (4) an adult brother or sister of the decedent;
 - (5) a grandparent of the decedent; and
 - (6) a guardian of the person of the decedent at the time of death.⁶⁶

The new scheme clarifies that family donations cannot be made if a person in a prior class is available to make an anatomical gift and/or if the person making the gift knows of a "refusal or contrary indications" by the decedent or an objection by a person in the same or prior class.⁶⁷ In explaining the priority scheme, the Act

61. *Id.* at 22; Sullivan, *supra* note 27, at 25 (arguing that the "1987 version is not a mere update of the 1968 act. It is a comprehensive revision, a replacement").

62. 8A U.L.A. 47, § 5(a) (requiring a designated person to "ask each patient who is at least [18] years of age: 'Are you an organ or tissue donor?'").

63. *Id.* § 2(h).

64. *Id.* § 5(b) (stating that a "required request" should "be made with reasonable discretion and sensitivity to the circumstances of the family").

65. *Id.* Prefatory Note.

66. *Id.* § 3(a).

67. *Id.* § 3(b).

states that an individual's failure to make an anatomical gift does not necessarily reflect an objection to organ donation.⁶⁸

When the Conference revised the priority scheme, it added the "grandparents" category and deleted the 1968 Act's residual category, which had allowed organ donation by persons authorized to dispose of the decedent's body.⁶⁹ The Conference drafters replaced the residual category with a separate section specifically authorizing a medical examiner, coroner, or other official to "release and permit the removal of a part from a body within that official's custody, for transplantation or therapy," provided that certain requirements are met.⁷⁰ First, an organ procurement facility must request the body part from the official, who must make a "reasonable effort" to locate the decedent's medical records and inform the individuals listed in the priority scheme.⁷¹ Second, the official must not know of a decedent's "refusal or contrary indication" or a family member's objection to organ donation prior to the removal.⁷² Third, the official must ensure that organ harvesting does not interfere with an autopsy or investigation, and the body's cosmetic appearance must be restored after the organ removal, if necessary.⁷³ Finally, the 1987 Act allows a coroner or other official to release and remove body parts from decedents who are not within that official's custody, as long as the official complies with the safeguards described above.⁷⁴

According to the 1987 Act's Comment, the coroner's release of organs under the revised statute is "more limited" than the 1968 Act's residual authorization.⁷⁵ Thus, in theory, the refined provision should make it more difficult for a coroner to release organs and tissues without express consent. However, this notion of restraint is undermined by the Conference's statement that, in balancing society's need for organs with the family's interest in the body, the Conference decided to give greater weight to increased organ procurement.⁷⁶ Moreover, in clarifying the coroner's "reasonable effort" to learn of the decedent's or family's organ dona-

68. *Id.* § 3(e). The Comment notes that this provision is "based on the concept that failure to act is ambiguous." *Id.*

69. *Id.* § 4 cmt.

70. *Id.* § 4(a).

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* § 4(b).

75. *Id.* § 4 cmt.

76. *Id.* (stating that, in this section of the statute, the balance is "on the side of increasing the size of the donor pool").

tion wishes, the drafters of the 1987 Act emphasized that there is a "very limited time available following death for the successful recovery of such critical tissues."⁷⁷ Therefore, if immediate removal is necessary to maintain organ viability, the coroner may proceed, provided that the decedent's records or next of kin cannot be located within the very short period of time in which organ transplantation is feasible.⁷⁸ Expedience thus outweighs the need for notice and actual consent.⁷⁹

Because the 1987 Act expressly allows a coroner to release organs in the absence of contrary notice, the statute seems to be based on the presumption that decedents and/or their family members would have consented to donation if given the opportunity. Otherwise, the statute merely authorizes blatant organ conscription to satisfy state needs, which seems anomalous in a democratic society. Thus, based on the separate and explicit organ removal authorization and the "free" state of American society, the coroner release statute can be deemed a "strong" version of presumed consent. The eighteen states that have adopted some version of the coroner release statute include Arizona,⁸⁰ California,⁸¹ Hawaii,⁸² Idaho,⁸³ Indiana,⁸⁴ Minnesota,⁸⁵ Montana,⁸⁶ New Mexico,⁸⁷ Rhode Island,⁸⁸ and Utah.⁸⁹

77. *Id.* (citing the Comment to the 1968 Act).

78. *Id.*

79. One court has explained that "[i]t would be prohibitively costly in lost organ transplants (and, consequently, human lives) to affirmatively undertake lengthy searches for interested parties (as defined by statute) who may have a personal, moral or religious objection to the organ harvesting." *Mansaw v. Midwest Organ Bank*, No. 97-0271-CV-W-6, 1998 WL 386327, at *5 (W.D. Mo. July 8, 1998).

80. ARIZ. REV. STAT. ANN. § 36-842 (West 2000).

81. CAL. HEALTH & SAFETY CODE § 7151.5 (West 2000). The statute defines a "reasonable effort" as twelve hours of searching, unless the "useful life of the part does not permit." *Id.*

82. HAW. REV. STAT. ANN. § 327-4 (Michie 2000).

83. IDAHO CODE § 39-3405 (Michie 2000).

84. IND. CODE ANN. § 29-2-16-4.5 (West 2001).

85. MINN. STAT. ANN. § 525.9213 (West 2000). The statute does not include the cosmetic restoration provision. *Id.*

86. MONT. CODE ANN. § 72-17-215 (2000).

87. N.M. STAT. ANN. § 24-6A-4 (Michie 2000).

88. R.I. GEN. LAWS § 23-18.6-4 (2000). The Rhode Island statute does not allow organ removal from bodies that are not within the medical examiner's custody. *Id.*

89. UTAH CODE ANN. § 26-28-5 (2000). Utah's provision expands on the uniform law by permitting organ removal for "transplantation, therapy, medical or dental education, research, or advancement of medical or dental science." *Id.* However, the Utah statute does not permit non-custodial organ removal. *Id.*

c. *State Modifications*

In adopting either the 1968 or 1987 version of the Uniform Anatomical Gift Act, individual state legislatures have modified their priority schemes to include health care agents,⁹⁰ friends,⁹¹ and domestic partners.⁹² Moreover, several states that have adopted the 1987 Act's revised priority scheme have not adopted the separate coroner release provision, even though the revised scheme eliminates the residual category.⁹³ In these states, there is no express or implied presumed consent authorization, and coroners should not be able to remove organs without a donor's document of gift or the family's approval.

The Texas state legislature has modified the 1987 Act by limiting the coroner release provision. Under Texas law, a medical examiner may remove organs from a decedent who died under circumstances requiring an inquest.⁹⁴ However, to remove "visceral organs,"⁹⁵ the medical examiner must obtain consent from a family member.⁹⁶ If such a person cannot be identified and located within four hours after the pronouncement of death, the medical examiner may remove only *nonvisceral* organs and tissues.⁹⁷ Thus, the

90. *E.g.*, GA. CODE ANN. § 44-5-143 (2000) (adding a person with "durable power of attorney" as the first category in the 1968 Act's priority scheme); KAN. STAT. ANN. § 65-3210 (1999) (amending the 1968 Act's priority scheme to include "an agent for health care decisions" as the primary category, provided that the agent has specific organ donation authorization); N.H. REV. STAT. ANN. § 291-A:4 (2000) (modifying the 1987 Act's priority scheme by including "a designated agent under the durable power of attorney for health care"). The New Hampshire priority scheme also contains the 1968 Act's residual category, even though the New Hampshire legislature has adopted the separate coroner release statute. N.H. REV. STAT. ANN. § 291-A:5.

91. *E.g.*, MD. CODE ANN., EST. & TRUSTS § 4-503 (1999). Maryland's priority scheme places a decedent's "friend or other relative" in the last category, and provides that the friend must swear out an affidavit before organ donation can be allowed. *Id.*; *see also* N.M. STAT. ANN. § 24-6A-3 (2000) (including "an adult who has exhibited special care and concern for the decedent and who is familiar with the decedent's values" as the final category in the priority scheme).

92. *E.g.*, ARIZ. REV. STAT. ANN. § 36-843 (2000) (including the "decedent's domestic partner" as the sixth priority category, provided that the decedent was unmarried and no other person had assumed financial responsibility for the decedent); *see also* HAW. REV. STAT. ANN. § 327-3 (Michie 2000) (placing the decedent's "spouse or reciprocal beneficiary" in the first priority category).

93. *E.g.*, 2000 CONN. LEGIS. SERV. 99-120 (West); NEV. REV. STAT. ANN. § 451.557 (Michie 2000).

94. TEX. HEALTH & SAFETY CODE ANN. § 693.002 (Vernon 2000).

95. The Texas legislature has defined a "visceral organ" as any organ requiring a support system to maintain viability. *Id.* § 693.001.

96. *Id.* § 693.003.

97. *Id.* Texas' current coroner release statute should not allow the release of all organs, as occurred in the Arthur Forge Jr. case. *See id.*

Texas statute, which recognizes a distinction between the relative invasiveness of harvesting different body parts, seems to provide a slightly higher degree of protection to unidentified decedents.

Other states have amended their anatomical gift statutes to include safeguards respecting the decedent's and family's religious beliefs. In New Jersey, hospital administrators need not request anatomical gifts from family members when there is reason to believe that the decedent's religious beliefs prohibited organ donation.⁹⁸ Similarly, New York's statute forbids individuals listed in the priority scheme from donating the decedent's organs when there is evidence that such a gift would be contrary to the donor's "religious or moral beliefs."⁹⁹ Under Iowa's coroner release statute, the medical examiner cannot harvest organs when the examiner knows that the decedent's religion either relied on faith healing or forbade organ donation.¹⁰⁰

In addition, some state legislatures have modified their anatomical gift laws to limit the applicability of coroner release to certain body parts or tissues. Specifically, fifteen states, including Delaware,¹⁰¹ Florida,¹⁰² Georgia,¹⁰³ Kentucky,¹⁰⁴ Maryland,¹⁰⁵ Massachusetts,¹⁰⁶ Ohio,¹⁰⁷ and Pennsylvania,¹⁰⁸ allow coroners to remove only the corneas or eyes from decedents based on presumed consent,¹⁰⁹ while Mississippi allows coroners to harvest a decedent's

98. N.J. STAT. ANN. § 26:6-58.1 (West 2000). Wisconsin has a similar provision limiting required request of family members because of religious or cultural objections to organ donation. WIS. STAT. § 157.06(5)(b)(3) (2000).

99. N.Y. PUB. HEALTH LAW § 4301 (Consol. 2000). The New York statute also forbids a donee from accepting donated organs or tissue when the donee has evidence that such a gift is contrary to the decedent's religious or moral beliefs. *Id.*

100. IOWA CODE ANN. § 142C.4A (West 1999). California's priority scheme includes a similar exemption for decedents who are members of faith-healing religious sects. CAL. HEALTH & SAFETY CODE § 7151 (West 2000).

101. DEL. CODE ANN. tit. 29, § 4712 (1999).

102. FLA. STAT. ch. 732.9185 (2000).

103. GA. CODE ANN. § 31-23-6 (2000). Georgia does require express consent for whole eye removal. *Id.*

104. KY. REV. STAT. ANN. § 311.187 (Michie 2000).

105. MD. CODE ANN., EST. & TRUSTS § 4-509.1 (1999).

106. MASS. ANN. LAWS ch. 113, § 14 (Law. Co-op. 2000).

107. OHIO REV. CODE ANN. § 2108.60 (Anderson 2000).

108. 20 PA. CONS. STAT. § 8641 (2000).

109. See Stephen R. Munzer, *The Special Case of Property Rights in Umbilical Cord Blood for Transplantation*, 51 RUTGERS L. REV. 493, 517 (1999) (discussing the ways in which some states "presume consent" for corneal removal by coroners); Erik S. Jaffe, Note, "She's Got Bette Davis's] Eyes": Assessing the Nonconsensual Removal of Cadaver Organs Under the Takings and Due Process Clauses, 90 COLUM. L. REV. 528, 535 (1990) (detailing the requirements for "presumed consent" removal of corneas and pituitary glands under state statutes).

corneas, pituitary glands, or "other tissues."¹¹⁰ The limited coroner release statutes typically require a request for the cornea or gland¹¹¹ and a reasonable search for the decedent's next of kin or medical records.¹¹² Furthermore, the coroner usually cannot proceed if he or she knows of a donation objection by the decedent or the family members.¹¹³ Finally, the decedent's post-mortem physical appearance must be restored after the corneal or gland harvesting.¹¹⁴

2. Cases Addressing the Aftermath of Presumed Consent Organ Harvesting

a. Property Interest in the Body

In *Georgia Lions Eye Bank, Inc. v. Lavant*,¹¹⁵ the Supreme Court of Georgia became one of the first courts in the United States to address the ramifications of presumed consent organ harvesting. Acting under Georgia's limited coroner release statute, state-affiliated eye bank officials had removed the corneal tissue of an infant during an autopsy.¹¹⁶ The parents of the infant, who had died of sudden infant death syndrome, were not notified of the corneal removal and thus not given an opportunity to object to the procedure.¹¹⁷ Ruling on the defendants' summary judgment motions, the court noted that early common law had not recognized a property interest in the dead body.¹¹⁸ Over time, the American courts created a "quasi-property right" to protect survivors' interest in the decedent's body.¹¹⁹ This limited right was "something

110. MISS. CODE ANN. § 41-61-71 (2000).

111. *E.g.*, § 8641(A); GA. CODE ANN. § 31-23-6(a)(1) (2000).

112. *E.g.*, MASS. ANN. LAWS ch. 113, § 14 (Law. Co-op. 2000) (requiring a one-hour "good faith effort" to locate next of kin before corneal removal); TENN. CODE ANN. § 68-30-204(3) (2000) (allowing the "reasonable effort" to discover donation objections to terminate when "further delay of necessary procedures would violate the time prescribed by existing medical standards to receive tissue for eyesight restoring transplants").

113. *E.g.*, MD. CODE ANN., EST. & TRUSTS § 4-509.1(a)(4) (1999) (stating that the medical examiner cannot proceed with corneal removal when he or she knows of the decedent's religious objection); OHIO REV. CODE ANN. § 2108.60(B)(4) (Anderson 2000) (mandating that the coroner cannot proceed with corneal removal when he or she knows of a family member's objection).

114. *E.g.*, § 41-61-71(2)(b) (providing that the tissue removal must not interfere with the "postmortem facial appearance").

115. 335 S.E.2d 127 (Ga. 1985).

116. *Id.* at 128.

117. *Id.*

118. *Id.*

119. *Id.*; *Massey v. Duke Univ.*, 503 S.E.2d 155, 157 (N.C. Ct. App. 1998) (denying defendants' summary judgment motion in emotional distress eye removal case and

evolved out of thin air," a mere "fiction" designed to respect the family members' feelings at a difficult time.¹²⁰ Applying this reasoning, the *Lavant* court held that the eye bank officials did not violate plaintiffs' due process rights, because the quasi-property right does not rise to the level of constitutional protection.¹²¹

The Sixth Circuit Court of Appeals reached a contrary conclusion in *Brotherton v. Cleveland*.¹²² In *Brotherton*, plaintiff brought a civil rights class action suit after her husband's corneas were removed during an autopsy.¹²³ Plaintiff had refused to make an anatomical gift after her husband was pronounced dead; however, the hospital did not inform the coroner's office of plaintiff's donation objection.¹²⁴ The coroner proceeded under Ohio's limited coroner release statute and removed the husband's corneas.¹²⁵ After learning of the removal, plaintiff sued in federal court, alleging a violation of the Due Process Clause.¹²⁶

In its opinion, the *Brotherton* court first discussed the requirements needed to sustain a due process action, namely, deprivation of property under color of state law.¹²⁷ The court focused on whether plaintiff's property interest in her husband's body could rise to the level of a protected "legitimate claim of entitlement."¹²⁸

clarifying the family's quasi-property right as "not property in the commercial sense but a right of possession for the purpose of burial") (citing *Kyles v. Southern R.R.*, 61 S.E. 278 (N.C. 1908)); *Perry v. Saint Francis Hosp.*, 886 F. Supp. 1551, 1563 (D. Kan. 1995) (explaining the nature of the quasi-property right in allegedly unauthorized tissue removal case by stating that "Kansas common law . . . is no different from the position universally held by other states which recognizes no property right, commercial or material, in the corpse itself but only a right of possession in order to dispose of the corpse appropriately") (citations omitted).

120. *Lavant*, 335 S.E.2d at 128 (citing W.L. PROSSER ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 63 (5th ed. 1984)).

121. *Lavant*, 335 S.E.2d at 128; cf. *Mansaw v. Midwest Organ Bank*, No. 97-0271-CV-W-6, 1998 WL 386327, at *7 - *8 (W.D. Mo. July 8, 1998) (describing family members' "de minimis" property interest in a dead body as a "low right on the constitutional totem pole," and finding that the right is sufficiently protected by Missouri's Uniform Anatomical Gift Act); *State v. Powell*, 497 So. 2d 1188, 1192 (Fla. 1986) (finding that, because next of kin have only a "limited right to possess the body for burial purposes," presumed consent corneal harvesting did not amount to a taking of private property, and noting that "the right to bring an action in tort does not necessarily invoke constitutional protections").

122. 923 F.2d 477 (6th Cir. 1991).

123. *Id.* at 478.

124. *Id.*

125. *Id.*

126. *Id.* at 479.

127. *Id.* (citing *Parratt v. Taylor*, 451 U.S. 527, 536-37 (1981)).

128. *Brotherton*, 923 F.2d at 480 (citing *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

Although Ohio did not formally identify a quasi-property right in the body, the court found that several state cases did recognize a family's right to possess and keep undisturbed a body before burial.¹²⁹ The court also cited as authority the Uniform Anatomical Gift Act, which specifically allows family members to control disposal of a decedent's body by making an anatomical gift.¹³⁰ The court concluded that this collection of property rights "form a substantial interest in the dead body, regardless of Ohio's classification of that interest."¹³¹ Furthermore, the court determined that the family's property rights rose to the level of a legitimate claim of entitlement under federal law.¹³² Therefore, the court reversed the lower court's dismissal of the case and held that the Due Process Clause protected plaintiff's property interest in her dead husband's corneas.¹³³

A vigorous dissent by Justice Joiner criticized the majority's recognition of plaintiff's property right, as "Ohio law has made it very clear that there is no property right in a dead person's body."¹³⁴ The dissent noted that the state cases cited by the majority rejected such a right.¹³⁵ Moreover, the dissent argued that the Uniform Anatomical Gift Act, which only details a procedure for donating organs, "make[s] no effort to reexamine underlying property rights in the body of the decedent."¹³⁶ The dissent concluded that plaintiff's "virtually nonexistent" rights did not warrant constitutional protection.¹³⁷

When courts do find a quasi-property right in the dead body, they must then address the issue of damages for prevailing plaintiffs, as the Court of Appeals of Georgia did in *Bauer v. North Fulton Medical Center*.¹³⁸ In this case, plaintiff refused to donate any of her husband's organs after he died of a heart attack.¹³⁹ Despite this refusal, Georgia Eye Bank, Inc., acting under the state's

129. *Brotherton*, 923 F.2d at 480.

130. *Id.* at 482.

131. *Id.*

132. *Id.*

133. *Id.*; see also *Whaley v. County of Tuscola*, 58 F.3d 1111, 1117 (6th Cir. 1995) (finding that next of kin may bring a due process property claim after presumed consent corneal harvesting based solely on the fact that the family's rights in the dead body "closely correspond with the 'bundle of rights' by which property has been traditionally defined").

134. *Brotherton*, 923 F.2d at 483 (Joiner, J., dissenting) (citations omitted).

135. *Id.*

136. *Id.*

137. *Id.* at 484.

138. 527 S.E.2d 240 (Ga. Ct. App. 1999).

139. *Id.* at 242.

limited coroner release statute, removed eye tissue from the decedent's corpse.¹⁴⁰ Although the court affirmed dismissal of the medical malpractice claim,¹⁴¹ it upheld plaintiff's quasi-property right to possess her husband's body for "proper handling and burial."¹⁴²

Nevertheless, the court's discussion of compensatory damages emphasized the limited nature of the quasi-property right and stressed that the right is not pecuniary.¹⁴³ Rather, the next of kin's limited possessory rights only "ensure that the corpse is orderly handled and laid to rest, nothing more."¹⁴⁴ Otherwise, the court feared the "absurd and morbid process" of affixing a dollar amount to human body parts.¹⁴⁵ As plaintiff had no pecuniary interest in her husband's body, the court held that her claim for conversion could not be sustained.¹⁴⁶ Moreover, the court determined that a bailment claim was impossible, because no court should place a financial figure on the diminished value of a corpse.¹⁴⁷ The court further held that plaintiff's breach of contract action, based on an implied contract with the hospital to properly handle her husband's dead body, was also untenable.¹⁴⁸ The court reasoned that it could not set restitution damages for breach of contract because the corneal tissue had no numerical value.¹⁴⁹ The court did, however, believe that plaintiff could recover nominal damages for any extra costs she may have incurred in burying her husband, provided she could attribute such costs to the corneal tissue removal.¹⁵⁰

b. *Privacy, Autonomy, and Liberty*

The seminal case discussing non-property claims following presumed consent organ harvesting is *State v. Powell*.¹⁵¹ In each of the

140. *Id.*

141. *Id.* at 242-43. The court held that medical malpractice claims are not applicable to dead body cases, because "it is an impossibility to kill or injure someone who is already deceased." *Id.* at 243.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* The court stated that "impos[ing] a pecuniary value on the flesh itself . . . would make the strangest thing on earth that much stranger." *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 245.

149. *Id.* at 244-45. The court also noted that Georgia law makes it a misdemeanor to sell eye tissue, thus making any contract of sale illegal. *Id.* at 245.

150. *Id.* The court specifically discussed additional mortuary charges incurred when preparing a body without eyes for burial, as well as any increased costs related to subsequent funeral delays. *Id.*

151. 497 So. 2d 1188 (Fla. 1986).

individual cases consolidated in *Powell*, a medical examiner, acting under Florida's limited coroner release statute, removed the corneal tissue from decedents without first providing notice to or obtaining consent from family members.¹⁵² In ruling on the constitutionality of the coroner release statute, the court "beg[an] with the premise that a person's constitutional rights terminate at death."¹⁵³ Accordingly, the court only addressed constitutional rights held by the decedent's next of kin.¹⁵⁴

In quickly dismissing the donor's constitutional rights, the Florida Supreme Court failed to discuss when the determination of death, for constitutional purposes, is made. In the context of organ donation, a person must be sustained by life support, both before and during organ harvesting, in order to maintain organ viability for transplant purposes.¹⁵⁵ As the case of Texas' Arthur Forge Jr. demonstrates, an individual can be maintained in such a condition for several days.¹⁵⁶ Thus, during the decision-making process and the actual organ removal, the donor remains a living, breathing organism with a beating heart and the ability to digest food, excrete waste, and, possibly, bear children.¹⁵⁷

Moreover, although donors must be declared "brain dead" before organ harvesting can begin, studies show that up to twenty percent of so-called brain-dead patients still register electrical activity on electroencephalograms, thus demonstrating some degree of brain activity.¹⁵⁸ Research also has revealed that the donor's heart rate and blood pressure often rise upon organ incision, indicating that, on some level, the person can respond to stimuli and perhaps even feel pain.¹⁵⁹ Therefore, depending upon a state's definition of death, the presumed consent organ donor may be viewed

152. *Id.* at 1189.

153. *Id.* at 1190 (citing *Roe v. Wade*, 410 U.S. 113 (1973); *Silkwood v. Kerr-McGee Corp.*, 637 F.2d 743 (10th Cir. 1980); *Guyton v. Phillips*, 606 F.2d 248 (9th Cir. 1979)).

154. *Powell*, 497 So. 2d at 1190.

155. See Robert D. Truog, *Is it Time to Abandon Brain Death?*, in *THE ETHICS OF ORGAN TRANSPLANTS*, *supra* note 13, at 24, 27 (rejecting the cardiorespiratory standard as the sole method for determining death, as this approach would "make it virtually impossible to obtain vital organs in a viable condition for transplantation, since under current laws it is generally necessary for these organs to be removed from a heart-beating donor").

156. Huff, *supra* note 6.

157. Barbara B. Ott, *Defining and Redefining Death*, in *THE ETHICS OF ORGAN TRANSPLANTS*, *supra* note 13, at 16, 18 (discussing the physiological status of brain-dead patients) (citation omitted).

158. *Id.* at 19 (analyzing the condition of brain-dead patients under "standard criteria") (citation omitted).

159. See Truog, *supra* note 155, at 26.

as a living person, at least for the limited purpose of analyzing his or her constitutional rights.

In *Powell*, the Florida court focused solely on family rights, since it had assumed that the individual organ donors were dead when their corneal tissue was removed.¹⁶⁰ In its decision, the court rejected plaintiffs' argument that the corneal release statute violated the family's personal liberty by intruding on a fundamental right to control the decedent's remains.¹⁶¹ In particular, the court refused to extend the Supreme Court's protections of "freedom of personal choice in matters of family life" to unauthorized organ or tissue removal.¹⁶² The court stated that protected autonomy is limited to "existing, ongoing relationships among living persons," and thus is inapplicable to the next of kin's "tort claim for interference with burial."¹⁶³ Moreover, the court stressed that all governmental intrusions into an individual's personal affairs are not necessarily violations of privacy, especially when the contested statute involves public health concerns.¹⁶⁴ Therefore, finding no fundamental right, the court applied a rational basis review and determined that Florida's corneal release statute is constitutional, because it "rationally promotes the permissible state objective of restoring sight to the blind."¹⁶⁵ This conclusion was foreseeable, as the court had prefaced its holding with a lengthy discussion of the need for corneal tissue,¹⁶⁶ the time constraints involved in corneal transplantation,¹⁶⁷ and the "infinitesimally small intrusion" into the decedent's body required for corneal removal.¹⁶⁸

The dissent by Justice Shaw criticized the majority opinion for essentially holding that the state may do as it pleases with a dead body, provided that the corpse is eventually turned over to the next

160. See *State v. Powell*, 497 So. 2d 1188, 1190 (Fla. 1986).

161. *Id.* at 1193. The court, citing a lack of evidence in the record, also rejected plaintiffs' liberty claims based on their religious beliefs. *Id.*

162. *Id.*; see also *Tillman v. Detroit Receiving Hosp.*, 360 N.W.2d 275, 277 (Mich. Ct. App. 1984) (rejecting plaintiffs' privacy claim in unauthorized corneal removal case and holding that, although the privacy right includes the right to make decisions regarding bodily integrity, this personal right ends with the death of the individual).

163. *Powell*, 497 So. 2d at 1193.

164. See *id.* (citing *Whalen v. Roe*, 429 U.S. 589 (1977); *Roe v. Wade*, 410 U.S. 113 (1973)).

165. *Powell*, 497 So. 2d at 1193-94.

166. *Id.* at 1190-91. The court specifically addressed the need for expedient corneal transplants for newborn infants, as blind infants must receive corneas before their brains have "learn[ed] not to see." *Id.* at 1191.

167. *Id.* (stating that corneal tissue only remains viable for ten hours after death).

168. *Id.* (noting that the corpse's eyes must be capped to restore the decedent's appearance, regardless of whether corneal removal is performed).

of kin.¹⁶⁹ The dissent argued that the family's right to possess and control the decedent's body, recognized "since time immemorial," rests upon "religious, moral, and philosophical grounds" that were never completely forfeited to the state.¹⁷⁰ The dissent broadly conceived the right of privacy protected by Florida's Constitution as the right to be let alone.¹⁷¹ Thus, according to the dissent, the family's right to possess and control the decedent's body and "to honor and celebrate the decedent's life and death through appropriate commemoration is a quintessential privacy right."¹⁷²

II. UNDERSTANDING THE PRIVACY, AUTONOMY, AND LIBERTY FRAMEWORK

A resolution to the controversy surrounding presumed consent organ donation laws requires an examination and interpretation of the United States Supreme Court's evolving conception of individual and family-based privacy, autonomy, and liberty. The Supreme Court has protected these important constitutional rights through decisions in a series of cases addressing such diverse topics as contraception, abortion, homosexuality, education, and marriage. In addition, the complex presumed consent organ donation debate is further informed by a discussion of conflicting theories of jurisprudence, which seek to define the precise nature and scope of constitutionally protected privacy, autonomy, and liberty.

A. Supreme Court Cases

1. *Personal Privacy, Autonomy, and Liberty*

This section provides a brief overview of the United States Supreme Court's development of individual privacy rights, for subsequent application to presumed consent organ donation laws. The Court initially addressed a right of personal privacy in several cases involving the use of contraceptives. In *Poe v. Ullman*,¹⁷³ the Supreme Court dismissed on procedural grounds a case involving

169. *Id.* at 1195 (Shaw, J., dissenting).

170. *Id.*

171. *Id.* at 1195-96.

172. *Id.* at 1196; cf. Higgins v. McDonnell, No. 71341, 1997 WL 253150, at *3 (Ohio App. 8th, May 15, 1997) (noting family members' frequent "shock and anguish" following unauthorized corneal removal, and stating that "[p]ermitting the disfigurement of a loved one's body . . . is a personal decision that should be left to the decedent during life or the next-of-kin after death") (citing Brotherton v. Cleveland, 733 F. Supp. 56, 60 (S.D. Ohio 1989), *rev'd* Brotherton v. Cleveland, 923 F.2d 477 (6th Cir. 1991)).

173. 367 U.S. 497 (1961).

Connecticut's criminalization of the use of birth control.¹⁷⁴ Justice Harlan dissented from the dismissal, arguing that the Fourteenth Amendment's liberty protection¹⁷⁵ encompasses a right of privacy.¹⁷⁶ According to Harlan, Fourteenth Amendment liberty includes the right to be free "from all substantial arbitrary impositions and purposeless restraints."¹⁷⁷ Thus, Harlan argued that privacy of the home, which is "a most fundamental aspect of liberty," forbids the state from intruding upon the intimate details of married life by banning contraception.¹⁷⁸

Four years later, in *Griswold v. Connecticut*,¹⁷⁹ the Supreme Court agreed to review the Connecticut contraception provision.¹⁸⁰ In its decision, the Court found that a right of privacy predates the creation of the Bill of Rights and the formation of our political parties.¹⁸¹ In analyzing the Constitution, the Court stated that the protections of the Bill of Rights have "penumbras," which expand on enumerated constitutional guarantees.¹⁸² The Court held that the right of privacy, which is included within these penumbras, forbids a broad law banning the use of contraceptives by married couples.¹⁸³

In *Eisenstadt v. Baird*,¹⁸⁴ the Court reviewed a Massachusetts law that forbade anyone from providing birth control information to unmarried people.¹⁸⁵ Using the Fourteenth Amendment's Equal Protection Clause,¹⁸⁶ the Court struck down the statute because it created an unfair distinction between married and single persons.¹⁸⁷ The Court explained that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be

174. *Id.*

175. U.S. CONST. amend. XIV, § 1 (providing that the state cannot deprive individuals of life, liberty, or property without due process of law).

176. *Poe*, 367 U.S. at 549 (Harlan, J., dissenting).

177. *Id.* at 543 (citation omitted).

178. *Id.* at 548.

179. 381 U.S. 479 (1965).

180. *Id.*

181. *Id.* at 486.

182. *Id.* at 484 (citing *Poe v. Ullman*, 367 U.S. 497, 516-22 (1961) (Harlan, J., dissenting)).

183. *Griswold*, 381 U.S. at 485-86. Justice Harlan concurred in the majority's judgment, holding that the right of privacy is instead derived from Fourteenth Amendment liberty. *Id.* at 500 (Harlan, J., concurring in judgment).

184. 405 U.S. 438 (1972).

185. *Id.* at 440-41.

186. U.S. CONST. amend. XIV, § 1 (forbidding a state from denying equal protection of the laws to people within its jurisdiction).

187. *Baird*, 405 U.S. at 447.

free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”¹⁸⁸ Thus, the Court expanded on *Griswold* by expressly conceptualizing the right of privacy as a right of autonomy in making important personal decisions.

In the landmark case of *Roe v. Wade*,¹⁸⁹ the Supreme Court returned to the issue of privacy by examining a Texas statute that criminalized non-medically necessary abortions.¹⁹⁰ Writing for the majority, Justice Blackmun explained that although the Constitution does not specifically mention a right of personal privacy, the Court had, over time, found such a right to exist in the First,¹⁹¹ Fourth,¹⁹² Fifth,¹⁹³ Ninth,¹⁹⁴ and Fourteenth¹⁹⁵ Amendments, as well as in the penumbra of the Bill of Rights.¹⁹⁶ Blackmun described the right of privacy as protecting intimate relationships and personal decision making, including the decision to conceive children.¹⁹⁷ Using this analysis, the Court concluded that, regardless of its roots,¹⁹⁸ the privacy right is clearly “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”¹⁹⁹

Justice Blackmun further clarified his conception of the right of privacy in a dissenting opinion in *Bowers v. Hardwick*.²⁰⁰ In upholding the constitutionality of Georgia’s anti-sodomy statute, the *Bowers* majority had narrowly examined whether individuals have a fundamental right under the Fourteenth Amendment’s liberty clause to engage in homosexual sodomy.²⁰¹ Blackmun criticized

188. *Id.* at 453 (citing *Stanley v. Georgia*, 394 U.S. 557 (1969)).

189. 410 U.S. 113 (1973).

190. *Id.* at 117-18.

191. The First Amendment prohibits the state from establishing a religion, protects the free exercise of religion, and secures freedom of speech, the press, peaceable assembly, and petition of the government. U.S. CONST. amend. I.

192. The Fourth Amendment generally protects people from unreasonable searches and seizures by the government. U.S. CONST. amend. IV.

193. Under the Fifth Amendment, criminal defendants are protected from self-incrimination. U.S. CONST. amend. V.

194. The Ninth Amendment provides that certain unenumerated rights are retained by the people. U.S. CONST. amend. IX.

195. Specifically, Justice Blackmun is referring to the concept of ordered liberty inherent in the Fourteenth Amendment. U.S. CONST. amend. XIV.

196. *Roe v. Wade*, 410 U.S. 113, 152-53 (1973).

197. *Id.* (citations omitted).

198. *See id.* at 153 (noting that while the Court finds the right of privacy in the Fourteenth Amendment’s liberty clause, the district court had instead utilized the Ninth Amendment to protect personal privacy).

199. *Id.*

200. 478 U.S. 186 (1986) (Blackmun, J., dissenting).

201. *Id.* at 190.

the majority for using such a restrictive analytical framework and instead argued that the case involved “‘the most comprehensive of rights and the right most valued by civilized men,’ namely, ‘the right to be let alone.’”²⁰² According to Blackmun, the Court had delineated both a decisional and a spatial right of privacy, with the decisional right encompassing deeply personal choices, including the decision to marry and raise a family.²⁰³ Blackmun argued that these choices, which “‘form so central a part of an individual’s life,”²⁰⁴ are protected because the right of privacy recognizes the “‘moral fact that a person belongs to himself and not others nor to society as a whole.’”²⁰⁵

Six years later, in *Planned Parenthood v. Casey*,²⁰⁶ the Court seemed to adopt Justice Blackmun’s formulation of the right of privacy. In this case, the Court again confronted the abortion issue, this time by reviewing Pennsylvania’s abortion statute, which had included provisions mandating a twenty-four hour waiting period and parental consent for minors.²⁰⁷ The Court analyzed the statute under the Fourteenth Amendment’s liberty clause, beginning with the premise that there is “a realm of personal liberty which the government may not enter.”²⁰⁸ The Court reviewed cases that recognized a right of privacy and concluded that “[i]t is settled now, as it was when the Court heard arguments in *Roe v. Wade*, that the Constitution places limits on a State’s right to interfere with a per-

202. *Id.* at 199 (quoting *Olmstead v. United States*, 277 U.S. 438 (1928) (Brandeis, J., dissenting)).

203. *Bowers*, 478 U.S. at 203-06 (Blackmun, J., dissenting).

204. *Id.* at 204.

205. *Id.* (quoting *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 777 n.5 (1986) (Stevens, J., concurring)). In his dissent in *Bowers*, Justice Stevens expands on the conception of decisional privacy by citing one of his prior appellate court decisions:

[These cases deal] with the individual’s right to make certain unusually important decisions that will affect his own, or his family’s, destiny. The Court has referred to such decisions as implicating ‘basic values,’ as being ‘fundamental,’ and as being dignified by history and tradition. The character of the Court’s language in these cases brings to mind the origins of the American heritage of freedom—the abiding interest in individual liberty that makes certain state intrusions on the citizen’s right to decide how he will live his own life intolerable. Guided by history, our tradition of respect for the dignity of individual choice in matters of conscience . . . federal judges have accepted the responsibility for recognition and protection of these rights in appropriate cases.

478 U.S. at 217 (Stevens, J., dissenting) (quoting *Fitzgerald v. Porter Memorial Hosp.*, 523 F.2d 716, 719-20 (7th Cir. 1975)).

206. 505 U.S. 833 (1992).

207. *Id.* at 844.

208. *Id.* at 847.

son's most basic decisions about family and parenthood . . . as well as bodily integrity."²⁰⁹

In developing its opinion, the Court returned to Justice Harlan's conception of the Fourteenth Amendment, as embodied by his dissent in *Poe v. Ullman*.²¹⁰ The Court elaborated on Harlan's original argument, stating that constitutional liberty protects "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."²¹¹ Moreover, the Court clarified the nature of this personal autonomy, explaining that:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.²¹²

The *Casey* opinion also builds upon *Roe* by explicitly extending the right of privacy to protect a person's body from certain unwanted governmental intrusions.²¹³ Prior Supreme Court decisions had delineated early conceptions of this right of bodily integrity. For example, in *Jacobsen v. Massachusetts*,²¹⁴ the Court upheld as constitutional a law mandating smallpox vaccinations.²¹⁵ However, the Court recognized an "inherent right" to care for one's body and health and emphasized that a sphere exists within which a person "may assert the supremacy of his own will" against the state's interference.²¹⁶ Thus, in the context of the case, the *Jacobsen* Court seemed to recognize a right of bodily integrity, albeit one

209. *Id.* at 849 (citations omitted). Justice Blackmun explicitly emphasized this point in his separate opinion, stating that the Court had reaffirmed "the long recognized rights of privacy and bodily integrity." *Id.* at 926 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

210. *See id.* at 848-49 (citing *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

211. *Casey*, 505 U.S. at 851.

212. *Id. But cf.* *Washington v. Glucksberg*, 521 U.S. 702, 705-06, 727-28 (1997) (rejecting a right to commit physician-assisted suicide and stating that *Casey's* autonomy guarantees "[do] not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected . . .") (citation omitted).

213. *Casey*, 505 U.S. at 849 (declaring a right of bodily integrity and mentioning *Roe v. Wade*).

214. 197 U.S. 11 (1905).

215. *Id.* at 11-12, 39.

216. *Id.* at 26, 29.

necessarily limited by society's legitimate public health concerns and reasonable regulations.

Later, in *Rochin v. California*,²¹⁷ the Court reversed the conviction of a man from whom the state had physically extracted vital evidence by pumping his stomach.²¹⁸ The Court found the state's egregious conduct to violate the Due Process Clause, as "[i]llegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, [and] the forcible extraction of his stomach contents" were "methods too close to the rack and screw" to pass constitutional muster.²¹⁹ The Court distinguished this case from *Jacobsen* by focusing on the inviolability of a person's body against particularly invasive state intrusions.

More recently, in *Cruzan v. Director, Missouri Department of Public Health*,²²⁰ the Court assumed that a competent person has a liberty interest in rejecting lifesaving nutrition and hydration.²²¹ However, the Court upheld a heightened evidentiary standard when a surrogate decides to refuse such treatment on behalf of an incompetent person, partially out of respect for the personal autonomy involved in making the "choice between life and death."²²² In her concurring opinion, Justice O'Connor clarified that the liberty interest in refusing medical treatment is partly derived from prior decisions protecting against state intrusions into the body.²²³ According to O'Connor, liberty is "inextricably entwined with our idea of physical freedom and self-determination," making certain governmental "incursions into the body repugnant" to the Due Process Clause.²²⁴

In sum, the Supreme Court has found individual privacy to include a right of personal autonomy in making such crucial life decisions as the choice to use contraceptives or undergo an abortion. However, the Court's opinions emphasize that the right to decision-making autonomy is not limited solely to the reproductive sphere; rather, as enunciated in *Casey*, autonomy extends to ensure that people's intimate life decisions can be made free from governmental interference. The Court also has determined that the right

217. 342 U.S. 165 (1952).

218. *Id.* at 174.

219. *Id.* at 172.

220. 497 U.S. 261 (1990).

221. *Id.* at 279 & n.7. The Court does not believe that the basis for the right lies in the realm of privacy. *Id.*

222. *Id.* at 281.

223. *Id.* at 287 (O'Connor, J., concurring).

224. *Id.*

of personal privacy encompasses a right to bodily integrity, thus protecting the physical self from certain unwarranted state intrusions. Overall, the Court has identified various clauses of the Constitution as the basis for the privacy right. While some privacy decisions focus on the penumbra of the Bill of Rights, others utilize the liberty clause of the Fourteenth Amendment. Yet regardless of its source, the Court has found the personal privacy right to be fundamental.

2. Family Rights

This section discusses the United States Supreme Court's protection of the rights of family members in making important family-related decisions, as an understanding of these rights is critical in analyzing presumed consent organ donation laws. The Supreme Court has long recognized parents' freedom to raise and educate their children. In *Meyer v. Nebraska*,²²⁵ the Court responded to World War I era xenophobia by overturning a teacher's conviction for instructing a child in the German language.²²⁶ The Court found that Fourteenth Amendment liberty includes a parent's right to "establish a home and bring up children . . . according to the dictates of [one's] own conscience."²²⁷

In the related case of *Pierce v. Society of Sisters*,²²⁸ several parochial and private schools in Oregon challenged a state law mandating public education for children ages eight to sixteen.²²⁹ The Court held that the statute violated the Due Process Clause, as it unreasonably interfered with parents' and guardians' liberty to direct the upbringing and education of their children.²³⁰ Moreover, the Court feared the standardizing effect of compulsory public education, noting that a "child is not the mere creature of the State."²³¹

The Court has also recognized the important family-oriented right to bear children. In *Skinner v. Oklahoma*,²³² the Court reviewed an Oklahoma statute requiring certain criminals to be ster-

225. 262 U.S. 390 (1923).

226. *Id.* at 403.

227. *Id.* at 399.

228. 268 U.S. 510 (1925).

229. *Id.* at 529-33.

230. *Id.* at 534-35. Interestingly, both *Meyer* and *Pierce* have been subsequently construed as First Amendment cases. See *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (stating that both cases hold that the State may not restrain education, as this violates the "spirit" of the First Amendment).

231. *Pierce*, 268 U.S. at 535.

232. 316 U.S. 535 (1942).

alized.²³³ The Court began its decision by stating that the case involved a most critical area of human rights, namely, the right to have offspring.²³⁴ The court also noted that "marriage and procreation are fundamental to the very existence and survival of the human race."²³⁵ Thus, the Court held that the Equal Protection Clause of the Fourteenth Amendment protected this fundamental right to have children, making the Oklahoma law's distinctions between certain categories of criminals unconstitutional.²³⁶

The Court further developed the rights of the family in *Loving v. Virginia*.²³⁷ In *Loving*, the Court reviewed Virginia's anti-miscegenation statute, which had prohibited interracial marriage.²³⁸ The Court determined that the statute infringed upon individual liberty protected by the Fourteenth Amendment, as it violated a person's freedom to marry.²³⁹ The Court held that this right to marry, as first enunciated in *Skinner*, was "essential to the orderly pursuit of happiness by free men."²⁴⁰ Moreover, the Court stated that the highly personal decision to marry must be made free from governmental interference.²⁴¹

In *Moore v. East Cleveland*,²⁴² the Court attempted to clarify the rights of the family in its review of a local ordinance limiting the occupancy of certain housing units to the nuclear family.²⁴³ The ordinance specifically prohibited grandparents from living with their own grandchildren, when the grandchildren were cousins rather than siblings.²⁴⁴ A majority of the Court declared the law unconstitutional, with a plurality of justices focusing on the Fourteenth Amendment's protection of the family.²⁴⁵ The plurality cited a line of Court decisions recognizing "that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause."²⁴⁶ Accordingly, the plurality held that the Constitution protects the "sanctity of the

233. *Id.* at 535.

234. *Id.* at 536.

235. *Id.* at 541.

236. *Id.*

237. 388 U.S. 1 (1967).

238. *Id.* at 2.

239. *Id.* at 12; *cf.* *Zablocki v. Redhail*, 434 U.S. 374 (1978) (holding that the Equal Protection Clause protects the fundamental character of the right to marry).

240. *Loving*, 388 U.S. at 12.

241. *Id.*

242. 431 U.S. 494 (1977).

243. *Id.* at 495-96.

244. *Id.* at 496.

245. *Id.* at 499.

246. *Id.* (citing *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974)).

family” because of the family’s prominent role in American history and tradition.²⁴⁷ The plurality further emphasized that a family’s choice of living arrangements is a personal decision for the family, which cannot be “standardized” by the state’s limited conception of what constitutes an appropriate family unit.²⁴⁸

An examination of these cases, as well as an analysis of *Griswold*, *Roe*, and *Casey*, demonstrates that the Court has extended the protections of the Constitution to important family decisions, including the choice to marry, conceive and bear offspring, and direct the upbringing of one’s children. Furthermore, the Court has guaranteed the right of family integrity, forbidding the state from unreasonably intruding upon the autonomous family by dictating living arrangements. Thus, the Court has used the Constitution’s liberty clause and the right of privacy to create a protected sphere of family life, within which critical life decisions relating to the family can be made free from the domineering influence of the state.

B. Theories of Jurisprudence

1. *Liberty and Autonomy*

The writings of jurisprudential theorists also are useful in analyzing the constitutionality of presumed consent organ donation laws. This section discusses the works of several commentators whose theories help clarify the nature of protected individual and family-based rights. In his seminal treatise *On Liberty*, John Stuart Mill writes that the state is only justified in regulating people’s behavior, and thus interfering with their liberty, when such interference is necessary to prevent distinct harm to others.²⁴⁹ Therefore, individuals have complete freedom over their own minds and bodies,²⁵⁰ and the state cannot paternalistically intervene into private lives simply because it believes it is acting in a person’s best interests.²⁵¹ In addition, Mill believes that human liberty encompasses absolute freedom of conscience, including the critical right to “fram[e] the plan of our life to suit our own character.”²⁵² Thus, provided a person’s conduct does not violate a specific public duty or injure

247. *Moore*, 431 U.S. at 503.

248. *Id.* at 505-06 (citing *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925)).

249. John Stuart Mill, *On Liberty*, in *PHILOSOPHY OF LAW* 259, 259 (Joel Feinberg & Jules Coleman eds., 6th ed. 2000).

250. *Id.* (stating that the individual is sovereign over himself). Mill also writes that each person “is the proper guardian of his own health, whether bodily, or mental and spiritual.” *Id.* at 260-61.

251. *Id.* at 259.

252. *Id.* at 260.

others, society must respect the individual's right of self-determination, even if the person makes decisions that run contrary to society's prevailing belief system.²⁵³ As Mill notes, when the majority imposes its will by regulating a person's "self-regarding conduct," that public opinion, as embodied by law, "is quite as likely to be wrong as right."²⁵⁴ Moreover, according to Mill, a society that engages in such coercive regulation cannot be deemed truly free, regardless of its form of government, because it does not respect individual rights.²⁵⁵

In his analysis of Mill's conception of liberty, commentator Gerald Dworkin states that governments often utilize "impure paternalism" when the only means of protecting one group's welfare is by restricting the freedom of a second set of people.²⁵⁶ Dworkin further argues that governments may engage in "pure paternalism," defined as benefiting people through restriction of their own freedom,²⁵⁷ when such restriction "preserves and enhances for the individual his ability to rationally consider and carry out his own decisions."²⁵⁸ Dworkin writes that the law may act as an "insurance policy" by protecting people against nonrational and far-reaching decisions, as well as against choices made under social or psychological pressure.²⁵⁹ However, Dworkin believes that the government bears a heavy burden in justifying its need for paternalistic legislation.²⁶⁰ In particular, Dworkin stresses that "[i]f there is an alternative way of accomplishing the desired end without restricting liberty although it may involve great expense, inconvenience, et cetera, the society must adopt it."²⁶¹

2. Privacy

Theorists have vehemently disagreed about the nature and scope of the right of privacy. For example, Hyman Gross argues that the right of privacy is limited to informational privacy, that is, the right of individuals to control public knowledge of their private af-

253. *Id.* at 264-65.

254. *Id.* at 265 (noting that, when government interferes "with purely personal conduct . . . the odds are that it interferes wrongly, and in the wrong place").

255. *Id.* at 260.

256. Gerald Dworkin, *Paternalism*, in *PHILOSOPHY OF LAW*, *supra* note 249, at 271, 273.

257. *Id.*

258. *Id.* at 280.

259. *Id.* at 278-79.

260. *Id.* at 280.

261. *Id.*

fairs.²⁶² In particular, Gross believes that privacy encompasses two classes of information: 1) personal facts, including identity, habits, and interests; and 2) "private matter . . . about our lives," defined as a person's opinions, goals, and feelings.²⁶³ Moreover, Gross states that the separate issue of autonomy, which is the government's attempt to regulate, rather than learn about, personal affairs, must not be confused with the very limited right of informational privacy.²⁶⁴

However, other critics argue that the right of privacy expands beyond the informational realm. Judith Wagner Decew criticizes narrow conceptions of privacy because they do not protect against physical access to the person and his or her individual activities.²⁶⁵ Wagner Decew distinguishes liberty and privacy by stating that a "subset of autonomy cases" involves liberty because of a "concern over decision-making *power*, whereas privacy is at stake because of the *nature* of the decision."²⁶⁶

Moreover, Wagner Decew defines privacy by using tort law concepts.²⁶⁷ Wagner Decew thus "characterize[s] the realm of the private as whatever is not generally, that is, according to a reasonable person under normal circumstances, or according to certain social conventions, a legitimate concern of others because of the threat of scrutiny or judgment and the potential problems following from them."²⁶⁸ Utilizing this definition, Wagner Decew concludes that privacy is invaded by unjustified interferences into certain types of personal information and activities.²⁶⁹

Some commentators have also conceptualized the privacy right as a guarantee against the dominating hand of the state. For example, Jed Rubenfeld argues that privacy is the "fundamental freedom not to have one's life too totally determined by a progressively more normalizing state."²⁷⁰ Rubenfeld fears the "creeping totalitarianism" of a government striving to direct the

262. Hyman Gross, *Privacy and Autonomy*, in *THE NATURE AND PROCESS OF LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY* 708, 708-10 (Patricia Smith ed., 1993).

263. *Id.* at 710.

264. *Id.* at 714.

265. Judith Wagner Decew, *The Scope of Privacy in Law and Ethics*, in *THE NATURE AND PROCESS OF LAW*, *supra* note 262, at 715, 720.

266. *Id.* at 723. Wagner Decew argues that the right of privacy includes some of John Stuart Mill's protected self-regarding actions, while excluding others. *Id.* at 723-24.

267. *Id.*

268. *Id.* at 726.

269. *Id.*

270. Jed Rubenfeld, *The Right of Privacy*, 102 *HARV. L. REV.* 737, 784 (1989).

very manner in which individuals choose to live their lives.²⁷¹ Using this analytical framework, Rubenfeld construes *Pierce* and *Meyer* as limiting the state's ability to standardize children, while he views the abortion decisions as guarding against state-determined compulsory motherhood.²⁷²

Similarly, James E. Fleming believes that the Constitutional right of privacy protects "deliberative autonomy," which includes the freedom to make decisions about both external justice and internal, personal values.²⁷³ Deliberative autonomy builds upon the underlying freedoms of conscience and association,²⁷⁴ and "reserve[s] to persons the power to deliberate about and decide how to live their own lives, concerning certain matters that are unusually important or significant for such personal self-governance, over a complete life."²⁷⁵ Like Rubenfeld's thesis, Fleming's concept of deliberative autonomy protects against the overwhelming influence of the state by preserving the sanctity of individual decision making and personal sovereignty.

III. APPLICATION OF THE CONSTITUTIONAL FRAMEWORK TO PRESUMED CONSENT ORGAN DONATION

As previously discussed, most state and federal courts address presumed consent organ donation controversies by examining the dead body as property.²⁷⁶ A review of these cases illustrates the problems inherent in analyzing the ramifications of presumed consent organ harvesting within a restrictive property framework. First, it demeans human dignity to treat a person's body as a sack of flesh and bone awaiting assignment to an owner. Surely the family members do not view their deceased loved one as a mere piece of property, no different from a house or car. Second, as in *Brotherton*, courts often must resort to a liberal construction of contrary precedent and/or unwarranted extrapolations from procedural law in order to manipulate a dead body case to fit within the legal constructions of property.²⁷⁷ Moreover, courts seeking to compensate decedent's relatives for the pain and anguish of unau-

271. *Id.*

272. *Id.* at 785-87.

273. James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 31 (1995).

274. *Id.* at 36.

275. *Id.* at 32-33.

276. *Supra* Part I.B.2.a.

277. *Brotherton v. Cleveland*, 923 F.2d 477, 483-84 (6th Cir. 1991) (Joiner, J., dissenting).

thorized organ harvesting must at least address the grotesque and farcical practice of placing a dollar amount on the human body. In the end, as shown by *Bauer's* nominal award for extra burial costs, even when a court recognizes that presumed consent harvesting has infringed upon a quasi-property right in the dead body, it can only provide a very limited and ultimately unsatisfactory remedy to compensate damages.²⁷⁸ Therefore, recognizing the artificial restrictions of the property context, this Note analyzes presumed consent organ donation laws within the constitutional framework of individual and family-based privacy, autonomy, and liberty, with the goal of providing a more reasonable resolution to this problem.

A. Individual Rights

Because viable organ removal requires a living, breathing donor with a beating heart, presumed consent organ donation implicates the donor's constitutional rights, despite the *Powell* court's contrary conclusion.²⁷⁹ This Note analyzes individual rights by utilizing Judith Wagner Decew's broad definition of privacy as an unjustified interference into a person's activities, rather than as a limited protection of information.²⁸⁰ Wagner Decew's definition is most consistent with the Court's privacy decisions, which have included such non-informational subjects as abortion and contraception. Moreover, Wagner Decew's definition provides a helpful construct for applying privacy decisions made in other contexts to the presumed consent organ donation debate.

In identifying privacy violations, Wagner Decew uses a reasonable person standard and examines the potential problems arising from external scrutiny into the private realm.²⁸¹ In the case of presumed consent organ harvesting, a reasonable person would likely find organ and tissue removal to be a deeply personal matter, simply based on the government's limited right of access to a person's body. For example, the *Casey* opinion expressly states that the protections of liberty encompass bodily integrity,²⁸² expanding upon prior Court decisions that guarded against particularly violent governmental intrusions into the body. The unauthorized harvesting of organs and tissues is highly invasive, as it requires the

278. *But cf.* *Whaley v. County of Tuscola*, 58 F.3d 1111, 1116 (6th Cir. 1995) (stating that the nature of the constitutionally protected property right in a relative's dead body is not determined by the manner in which damages are assessed).

279. *Supra* Part I.B.2.b.

280. Wagner Decew, *supra* note 265, at 726.

281. *Id.*

282. 505 U.S. 833, 847 (1992).

state to enter the person's body and physically remove the machinery of human life. Even corneal removal, hailed as minimally invasive by the *Powell* court,²⁸³ still involves an external intrusion upon the body and the forcible removal of tissue. Harvesting is thus different from the mandatory smallpox vaccinations that were upheld in the *Jacobsen* decision, because vaccinations only require a quick prick of the skin rather than the physical extraction of human body parts.

Furthermore, the *Jacobsen* opinion could at least be justified by a real health emergency, namely, the need to protect others from the deadly contagion of smallpox. Using John Stuart Mill's thesis of self-regarding actions,²⁸⁴ the smallpox vaccinations were permissible state interferences into liberty, because they were necessary to prevent a distinct harm to others. Specifically, during a smallpox epidemic, an unvaccinated person likely will spread a highly contagious virus, causing illness and death to others, unless the state acts to protect its citizens. Presumed consent organ donation, on the other hand, is not a preventative measure designed to ensure that the affected individual refrains from injuring others. Rather, presumed consent harvesting, like Gerald Dworkin's concept of impure paternalism,²⁸⁵ involves the state's affirmative removal of one person's body part to benefit some unknown other person. Although such altruism, when voluntary, is to be commended, it is certainly not required in a democratic society. Of course, Mill writes that a society that engages in such compulsion is not truly free.²⁸⁶

Returning to Wagner Decew's definition of privacy, she next argues that state intrusions into the personal realm are unjustified when there is a threat of external scrutiny and its corresponding problems.²⁸⁷ With presumed consent harvesting, the danger lies in its violation of personal autonomy. In *Casey*, the Supreme Court clarified its prior privacy decisions as creating a sphere of individual autonomy within which a person can make fundamental life decisions, including the right to define his or her own existence.²⁸⁸ The Court's conception of the autonomy right is thus consistent with Mill's belief that liberty includes the right to idiosyncratically

283. 497 So. 2d 1188, 1191 (Fla. 1986).

284. Mill, *supra* note 249, at 259.

285. Dworkin, *supra* note 256, at 273.

286. Mill, *supra* note 249, at 260.

287. Wagner Decew, *supra* note 265, at 726.

288. 505 U.S. 833, 851 (1992).

plan one's life, as well as James E. Fleming's notion of deliberative autonomy as the right of self-governance.

While the Court's privacy/autonomy decisions have dealt with contraception and abortion, one can see parallels to presumed consent organ donation. First, there is obvious similarity in the right of bodily integrity, as discussed above.²⁸⁹ Second, the decision to have children, implicated by both contraception and abortion, involves the right to set individual priorities and determine when, how, and even *if* one wants to become a parent. The Court has emphatically stated that this choice belongs to the individual. Organ donation involves a similar decision to set individual priorities (religion, altruism) and determine when (brain death, certain types of injuries), how (visceral organs, corneas), and even *if* (no donation at all) one wants to become a donor. Thus, both decisions encompass a personal choice to control one's body and determine one's own course of existence.

Moreover, the state cannot assume organ donation decision making as an insurance policy against ill-advised and far-reaching decisions, as Dworkin argues.²⁹⁰ The donation decision will always be a far-reaching one, as the time and place of death is inevitably uncertain. Furthermore, although society would clearly benefit from increased donations, an individual who disagrees with organ donation has made a personal decision, based on his or her own values and priorities. As there are no guidelines for the exercise of personal autonomy, the state cannot deem one's choice irrational simply because it runs contrary to society's expressed interests.

In sum, presumed consent organ donation, in which the state assumes control over an otherwise privately made decision, infringes upon the Constitution's guarantee of personal privacy. In addition, the so-called safeguards of presumed consent laws, including organ request, reasonable search, and lack of knowledge of objection,²⁹¹ are inadequate measures of due process. As the Arthur Forge Jr. incident demonstrates, there is some question as to the degree of diligence used in searching for the records of unidentified, presumably homeless people.²⁹² Certainly, in Forge's case, his fingerprints and missing persons report were on file for all to see, yet neither was found until after the organ harvesting. Even with the best of

289. *Infra* Part III.

290. Dworkin, *supra* note 256, at 278-79.

291. See UNIF. ANATOMICAL GIFT ACT, § 4, 8A U.L.A. 43 (1993).

292. *Supra* Introduction.

intentions, the overriding goal of expedience²⁹³ seems to cut against a diligent, and thus time-consuming, search.

It is also important to remember that the United States currently employs an opt-in organ procurement system, under which people generally record, or otherwise make known, their decision to donate organs. Thus, unlike the European presumed consent or opt-out systems,²⁹⁴ a person is under no obligation to register an organ donation objection. Moreover, the European models show that true opt-out systems require widespread public education and motivation to ensure a general understanding of the consequences of inaction;²⁹⁵ no such protections are in place in the United States. Finally, the fact that most Americans claim to support organ donation is irrelevant when analyzing presumed consent, for, as John Stuart Mill notes, laws based on public opinion are quite likely to be wrong when applied to the individual.²⁹⁶ Therefore, there is not necessarily a correlation between strong public support and personal choice.

B. Family Rights

As many of the arguments discussed above are also applicable to the family, this Note only briefly analyzes the separate effect of presumed consent laws on the family's rights. The Supreme Court has protected the choice to marry and have children, as well as the right to make judgments about child rearing, education, and living arrangements.²⁹⁷ Similarly, organ donation is an important family decision that involves the right of family autonomy. After all, it is the family that suffers the personal loss when a relative dies. Moreover, the Uniform Anatomical Gift Act expressly recognizes the family's role in the organ donation decision-making process. Both versions of the Act contain priority schemes under which next of kin can donate their relative's organs,²⁹⁸ placing responsibility for the donation decision firmly within the family's hands. Furthermore, the family's ultimate decision to make or withhold an anatomical gift will affect the way in which a relative is remembered by those whom he or she cherished the most, that is,

293. 8A U.L.A. 44-45, § 4 cmt.

294. *Supra* Part I.A.

295. *Supra* Part I.A.

296. Mill, *supra* note 249, at 265.

297. *Supra* Part II.A.2.

298. *Supra* Part I.B.1.a.,b.

the family members themselves. Therefore, the decision has a profound psychological and emotional effect on the family.

The priority scheme thus inherently recognizes that family members are best able to respect and honor their loved one's unexpressed wishes regarding organ donation. However, when an unidentified person's relatives cannot be found quickly enough, the state is given power to make this decision. As presumed consent laws implicitly require the acting official to have no knowledge of the donor's actual values or beliefs,²⁹⁹ the state's decision is made with no regard as to how the individual would have responded to the situation. Therefore, presumed consent allows the state to standardize an individual's anatomical gift decision by consistently opting to donate the person's organs, regardless of individual dissension. According to Jed Rubenfeld, such despotic actions by the government violate the Court's anti-totalitarian protections, which specifically guard against a dominating and normalizing state.³⁰⁰

In addition, although the donation decision impacts others, it still primarily involves the family. In particular, the decision to make an anatomical gift will obviously benefit waiting-list patients who need new organs to survive. The recipient's family and friends also will gain from having their loved one restored to health. However, these external benefits do not detract from the family-oriented nature of the donation decision. To analogize, the Court has protected a parent's autonomy in directing the upbringing of a child,³⁰¹ even though that child's character, personality, and intelligence will eventually affect society in myriad ways. Thus, external effects do not transform a family decision about the structure and course of family life into a societal one.

In choosing to make an anatomical gift, family members assume decision-making power for their incompetent loved one. Similarly, the Court has protected parental choices made on behalf of young children who, because of age and sophistication, cannot make their own informed decisions about education and religion.³⁰² Both scenarios respect the family members' right to make these determinations, based on their familiarity with and love for the affected individual. As noted above, presumed consent organ donation instead gives this responsibility to the state, which has no personal

299. *Id.*

300. Rubenfeld, *supra* note 270, at 784.

301. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

302. *See id.*

attachment to or affection for the incompetent person. In sum, organ donation is an autonomous family decision, much like other family choices already protected by the Supreme Court. Presumed consent laws, which usurp the family's authority, violate the Constitution's protections of privacy, autonomy, and liberty.

The state cannot justify the paternalistic intervention of presumed consent laws by claiming to act as Gerald Dworkin's insurance policy, protecting against decisions made under extreme pressure.³⁰³ Because organ donation typically requires a generally healthy body and a dead brain, potential donors are often the victims of sudden and extreme trauma. Therefore, the family's decision to make an anatomical gift will inevitably be made within a maelstrom of emotion, as a beloved family member unexpectedly lies dying. The nature and circumstances of the decision, which make the psychological pressure unavoidable, thus are not sufficient reason to confer donation power upon the state. Otherwise, the state could donate organs in every sudden death situation, simply because the family is upset.

Finally, although Gerald Dworkin believes that paternalistic laws are permissible in some situations, he nevertheless feels that the state bears a heavy justification burden and must first utilize any available alternative means, regardless of cost or inconvenience.³⁰⁴ Using Dworkin's own analysis, the paternalism of presumed consent should be the last available option, and not just a mere expedient one.

CONCLUSION

Until the government either improves our current opt-in organ procurement system or fully adopts an opt-out model, with its concomitant expenditure of resources, it is not justified in using presumed consent to harvest organs from unidentified persons. The viable alternatives to presumed consent organ harvesting have not yet been exhausted. As it remains, presumed consent organ donation laws intrude upon constitutionally protected individual and family-based rights, allowing an increasingly dominant state to commandeer personal decisions and invade private bodies. By paternalistically "snatching bodies" according to its whims, the government has usurped people's autonomy in a wholesale disregard for their constitutional rights. Because organ donation decisions

303. Dworkin, *supra* note 256, at 278-79.

304. *Id.* at 280.

belong to the individual and the family, and not the state, presumed consent laws are both unethical and unconstitutional.

