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The Organ Trail: Express Versus Presumed Consent as Paths to Blaze in Solving a Critical Shortage

BY EMILY DENHAM MORRIS*

INTRODUCTION

The summer of 2001 yielded a great medical breakthrough. For the first time in history, doctors successfully completed a procedure to insert a self-contained artificial heart into a patient.¹ The recipient, a Kentucky man, had been expected to die within thirty days.² Since that time, there have been four successful artificial heart transplants in the United States.³ Although the first recipient recently died, the 151 days he lived far exceeded the original prediction for how long he could have lived without the implant.⁴ The maker of the device is seeking Food and Drug Administration approval for another ten artificial hearts.⁵

This technological advance, however, has not abated the need for organ donors. In fact, other breakthroughs, which have made natural organ transplants more successful, have increased the need. Sixteen people die every day waiting for an organ donation even though nearly four times that number receive an organ transplant each day.⁶ It follows, then, that the public health benefits of increasing the rate of organ and tissue donation are

* J.D. expected 2003, University of Kentucky. I would like to thank my family for their support, particularly my wonderful husband for his insightfulness and encouragement.

¹ John Antczak, Associate Press, *4th Self-Contained Heart Implanted* (Oct. 19, 2001), available at http://www.canoe.ca/Health0110/19_heart-ap.html.

² *Recipient of Artificial Heart Dies*, CHI. TRIB., Dec. 1, 2001, available at 2001 WL 30797352.

³ CNN, *Artificial-Heart Patient Suffers Stroke* (Nov. 14, 2001), at <http://www.cnn.com/2001/HEALTH/11/14/artificial.heart.stroke/index.html>.

⁴ *Recipient of Artificial Heart Dies*, *supra* note 2.

⁵ *Artificial-Heart Patient Suffers Stroke*, *supra* note 3.

⁶ U.S. Dep't of Health & Hum. Servs., *How to Become an Organ and Tissue Donor*, at <http://www.organdonor.gov> (last visited Mar. 4, 2002).

substantial. The number of medical breakthroughs using human tissues is advancing at a rapid rate. For example, today's technology has allowed a wider variety of organs and tissues to be transplanted (e.g., hand transplants) than ever before. To date, there have been two successful hand transplants in the United States.⁷ Promising medical breakthroughs such as this are all a product of organ and tissue donations. Tissue donations have also become very important to rehabilitation procedures, such as skin grafts and bone grafts,⁸ and to scientific research and development.

Tissue donations are distinguished from organ donations by their lengthier shelf life,⁹ in addition to a greater variety of types of tissue that may be procured.¹⁰ Procured tissue may be stored for future use¹¹ (as opposed to immediate transplantation in the recipient, as in the case of organs), so more tissue is actually available to be used. Also, because most anyone between the ages of zero and seventy-five can donate, a much wider pool of potential donors exists for tissue than it does for organs.¹² Tissue procurement organizations may exist independently or within organ procurement organizations,¹³ though the mechanisms of consent for tissue procurement are legally identical to those for organ procurement.¹⁴

There is a strong public policy towards encouraging both types of donations, but in the United States the ultimate decision about whether to become an organ and tissue donor still rests with the individual and/or his or her family.¹⁵ This system of producing organ donors has left a grave

⁷ *Hand Transplant: Recipient—Second in the Nation—Gains Feeling in His New Left Hand*, BLOOD WKLY., Sept. 20, 2001, at 17, available at 2001 WL 7493930.

⁸ See Ky. Organ Donor Affiliates, *Tissue Services*, at <http://www.kyorgandonor.org/tissueservices.html> (last visited Mar. 4, 2002).

⁹ *Id.*

¹⁰ See Am. Ass'n of Tissue Banks, *Facts About Organ & Tissue Donation*, at <http://www.aatb.org/aatbdon.htm> (last visited Mar. 4, 2001).

¹¹ Community Tissue Servs., *Introduction*, at <http://www.cbccts.org/tissue/default.htm> (last visited Mar. 4, 2002).

¹² *Id.*

¹³ See generally Am. Ass'n of Tissue Banks, *About the American Association of Tissue Banks*, at <http://www.aatb.org/aatbintr.htm> (last visited Mar. 4, 2002) (In some states eye tissue procurement is an exception to those within organ procurement organizations.).

¹⁴ *Id.*

¹⁵ See, e.g., KY. REV. STAT. ANN. [hereinafter K.R.S.] §§ 311.165 - .325 (Michie 2001). The Kentucky statutes are illustrative because they are heavily based on the Uniform Anatomical Gift Act of 1968, which has been adopted in some form by every state. Melissa N. Kurnit, Note, *Organ Donation in the United*

shortage. The United Network for Organ Sharing states that there are over 79,000 Americans registered with that organization who, as of February 8, 2002,¹⁶ were awaiting organ donations, and another name is added at an average rate of one every sixteen minutes.¹⁷

Organ and tissue donations are highly regulated by the federal and state governments.¹⁸ Since one organ and tissue donor could benefit more than fifty people,¹⁹ it is important that, in addition to regulating, the government also encouraged people to become organ donors so that the average life span and quality of life in this country will increase. There are many possible solutions to solving the deadly shortage.²⁰ Congress's answer is "the Uniform Anatomical Gift Act, which was designed to promote public awareness, health care provider education, and to prohibit the sale of most human organs."²¹ Some markets for human tissue have already developed in the United States around blood, tissue, and human reproductive cells, and at least one commentator believes a free market of vital organs, which are now banned from sale, could help alleviate the critical shortage.²²

This Note discusses the varying methods for encouraging organ donation in the United States and abroad. Part I explains the current approach to the law of organ donations in Kentucky as an example of the express consent method used in the United States.²³ Part II looks at the legal scheme set up in countries using the presumed consent method.²⁴ This model is likely the most successful approach worldwide to meet the needs of organ donation. It has been used with much success in Europe but has sometimes failed when the law has changed from volunteerism to presumed

States: Can We Learn from Successes Abroad?, 17 B.C. INT'L & COMP. L. REV. 405, 410 (1994).

¹⁶ United Network for Organ Sharing, *Critical Data*, at http://www.unos.org/Newsroom/critdata_main.htm (last visited Mar. 4, 2002).

¹⁷ Ky. Organ Donor Affiliates, *Important Facts*, at <http://www.kyorgandonor.org/donorinfo.html> (last visited Mar. 4, 2002).

¹⁸ See generally NORA MACHADO, *USING THE BODIES OF THE DEAD* 43 (1998) (discussing recent increases in regulatory activity).

¹⁹ Ky. Organ Donor Affiliates, *Donation and Those Who Will Benefit*, at <http://www.kyorgandonor.org/whobenefits.html> (last visited Mar. 7, 2002).

²⁰ Curtis E. Harris & Stephen P. Alcorn, *To Solve a Deadly Shortage: Economic Incentives for Human Organ Donation*, 16 ISSUES L. & MED. 213 (2001) (citing *Ellis v. Patterson*, 859 F.2d 52 (8th Cir. 1988)).

²¹ *Id.*; see *Todd v. Sorrell*, 841 F.2d 87 (4th Cir. 1988).

²² See Harris & Alcorn, *supra* note 20, at 213-14.

²³ See *infra* Part I.

²⁴ See *infra* Part II.

consent.²⁵ Part III examines the viability of the United States moving to a presumed consent approach and the potential legal and ethical barriers such a change could produce.²⁶ This Note concludes by advocating that the United States place a greater emphasis on organ donation by moving towards a variation of the presumed consent approach in an effort to benefit the public health.

I. EXPRESS CONSENT: THE UNITED STATES APPROACH

A. *Express Consent and Federal Regulation*

Organ donations, from procurement to distribution, are regulated by the federal and state governments,²⁷ but the job of educating the public on the importance of these donations is shared by private and public organizations.²⁸ The model in the United States for the procurement of organs is the express consent approach.²⁹ This method requires express written consent from the donor during life or express consent from the close family of the donor after death.³⁰ Distribution of organs is the responsibility of the United Network for Organ Sharing ("UNOS"), a non-profit corporation that maintains the national transplant waiting list.³¹ A federal regulation issued by former Secretary of Health and Human Services Donna Shalala in 1998 set up criteria aimed at allocating donated organs to patients with greatest medical need, relying less on geographical preferences.³² However, several states, including Kentucky, have adopted statutes that maintain geographical preference by giving the person with the greatest medical need in the county or state in which the organ was donated preference over persons outside the county or state.³³

²⁵ See *infra* Part II.

²⁶ See *infra* Part III.

²⁷ See generally Ky. Organ Donor Affiliates, *KODA History*, at <http://www.kyorgandonor.org/kodahistory.html> (last visited Mar. 4, 2002).

²⁸ See *id.*; see also U.S. Dep't of Health & Hum. Servs., *How to Become an Organ and Tissue Donor*, available at <http://www.organdonor.gov> (last visited Mar. 4, 2002).

²⁹ See, e.g., K.R.S. §§ 311.165 - .325 (Michie 2001).

³⁰ *Id.* §§ 311.175, .195.

³¹ See United Network for Organ Sharing, at http://www.unos.org/About/what_main.htm (last visited Mar. 7, 2002).

³² U.S. Dep't of Health & Hum. Servs., *HHS Rule Calls for Organ Allocation Based on Medical Criteria, Not Geography* (Mar. 26, 1998), at <http://www.hhs.gov/news/press/1998pres/980326a.html>.

³³ K.R.S. § 311.236 (Michie 2001); GA. CODE ANN. § 44-5-143 (2001); WIS. STAT. § 157.06 (2001).

Although organ distribution methods are often in controversy,³⁴ solving the deadly shortage poses the greatest public health problem for federal and state governments. In one of the earliest attempts to deal with the national organ shortage, Congress passed the National Organ Transplant Act ("NOTA").³⁵ This law, enacted in 1984, created the Task Force on Organ Transplantation in order to examine "the medical, legal, ethical, economic, and social issues presented by human organ procurement and transplantation."³⁶ NOTA also expressly forbids "any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation. . . ."³⁷ Thus, the Act prohibits the sale of human organs.³⁸ Most importantly, the Act also granted the Secretary of Health and Human Services the power to create the Organ Procurement and Transplantation Network ("OPTN").³⁹

Congress has contracted all administrative authority in the area of organ donation to the Health Resources and Services Administration ("HRSA"), which is a part of the Department of Health and Human Services.⁴⁰ HRSA is in charge of increasing public education and organ donation rates in the United States, and HRSA's Division of Transplantation oversees the Organ Procurement and Transplantation Network, which includes UNOS.⁴¹

B. *The Uniform Anatomical Gift Act*

Federal regulation and oversight is important so that there is an overarching system to solve this national public health problem, but each state must determine its own rules for organ procurement. Every state has codified laws that regulate how organ donations must be handled in

³⁴ One only needs to remember the controversy surrounding baseball great Mickey Mantle who got a liver for transplant after only being on the transplant list for two days. See Judy Foreman, *Transplant List Biggest Hurdle: Despite Age, Condition, Mantle Receives Liver*, BOSTON GLOBE, June 9, 1995, at 1.

³⁵ National Organ Transplant Act, Pub. L. No. 98-507, 98 Stat. 2339 (1984).

³⁶ *Id.* § 101.

³⁷ *Id.* § 301.

³⁸ *Id.*

³⁹ *Id.* § 201.

⁴⁰ *Oversight of Tissue Banking Industry*, 10 BIOMEDICAL MKT. NEWSL. 54, Dec. 31, 2000, 2000 WL 19818021.

⁴¹ Health Resources and Servs. Admin., *About the Division of Transplantation*, available at www.hrsa.gov/osp/dot/about.htm (last visited May 7, 2002).

accordance with the federal regulations.⁴² In the 1960s, however, it became clear that organ donation was a very important issue that needed to have some degree of consistency among states.⁴³ The National Conference of Commissioners on Uniform State Laws (“NCCUSL”), in 1968, endeavored to create a model framework for organ donation laws that, by 1973, all states would use for at least its basic principals.⁴⁴ Kentucky enacted its version of the Uniform Anatomical Gift Act (“UAGA”) in 1970.⁴⁵

NCCUSL undertook a major revision of the Uniform Anatomical Gift Act in 1987 (“UAGA of 1987”).⁴⁶ The major difference between the 1987 version and the original is that it no longer requires consent by the potential donor or his/her family. Instead, it replaces the prior method with a provision that effectively allows the person procuring the organs to take the organs after a reasonable effort has been made to find the decedent’s medical records and notify the next of kin.⁴⁷ There was, however, a similar residuary provision under the 1968 version of the UAGA.⁴⁸ The UAGA gave the power to decide whether or not to donate organs to any person authorized to dispose of the body if no next of kin or guardian was located.⁴⁹ This provision was called a “residuary authorization” by the drafters of UAGA of 1987.⁵⁰ The Comment to the UAGA of 1987 states, “[t]his residuary authorization in the original Act has been deleted in the proposed amendments and replaced by the more limited provisions of the new Section 4. It is a residuary authorization for transplant or therapeutic purposes only.”⁵¹ This Comment seeks to limit the importance of the residuary power vested by the UAGA of 1987 in medical personnel seeking

⁴² See, e.g., COLO. REV. STAT. ANN. §§ 12-34-101 to -209 (West 2001); 755 ILL. COMP. STAT. ANN. §§ 50/1 - 50/9 (West 2001); MO. ANN. STAT. §§ 194.210 - .350 (West 2001); OHIO REV. CODE ANN. §§ 2108.01 - .99 (West 2001); and VA. CODE ANN. §§ 32.1-289 to -297.1 (Michie 2001).

⁴³ Alexandra K. Glazier, “*The Brain Dead Patient Was Kept Alive*” and Other Disturbing Misconceptions; A Call for Amendments to the Uniform Anatomical Gift Act, 9 KAN. J.L. & PUB. POL’Y 640, 644-45 (2000).

⁴⁴ Laurel R. Siegel, Comment, *Re-engineering the Laws of Organ Transplantation*, 49 EMORY L.J. 917, 932 (2000).

⁴⁵ K.R.S. §§ 311.165 - .235 (Michie 2001).

⁴⁶ Glazier, *supra* note 43, at 645.

⁴⁷ UNIF. ANATOMICAL GIFT ACT § 4 (amended 1987).

⁴⁸ UNIF. ANATOMICAL GIFT ACT § 2 (1968).

⁴⁹ *Id.*

⁵⁰ UNIF. ANATOMICAL GIFT ACT § 4, cmt. (amended 1987).

⁵¹ *Id.*

to harvest organs.⁵² One commentator notes, however, that the residuary authority was largely ignored in practice.⁵³ Now, the UAGA of 1987, with its addition of Section 4, authoritatively allows the removal of a cadaver's organs as long as the doctor does not discover contrary intentions on the part of the family after a reasonable inquiry.

The purpose of the Uniform Anatomical Gift Act is to allow anyone over the age of eighteen to be able to donate his/her entire body, or any part thereof, for organ donation if he/she has given the requisite written consent.⁵⁴ The decedent's express wish to become an organ donor is followed under this provision without the consultation of any other person.⁵⁵ It has been noted, though, that in practice, "even if the decedent has signed a document of gift, and such a document is on his person at the time of death, hospitals and organ procurement organizations will almost never retrieve organs without the consent of a person in the highest priority class available"⁵⁶ (i.e., the closest relative).

The drafters of the Uniform Anatomical Gift Act of 1968 purposely did not mention any restriction on the commercial sale of organs.⁵⁷ It was the view of the NCCUSL that "[u]ntil the matter of payment becomes a problem of some dimensions, the matter should be left to the decency of intelligent human beings."⁵⁸ Many state legislatures, including Kentucky's, were unhappy with this omission and, when adopting the UAGA, added provisions prohibiting the sale of human organs.⁵⁹ Kentucky's statute does not interfere with the sale of tissues and body parts other than organs.⁶⁰

C. Kentucky Organ Donation Law and Relevant Statutory Interpretation of Other States

To supplement its version of the UAGA, Kentucky relies on the Kentucky Organ Donor Affiliates ("KODA") to provide the Bluegrass state, as well as southern Indiana and western West Virginia, with an organ

⁵² *Id.*

⁵³ DAVID PRICE, LEGAL AND ETHICAL ASPECTS OF ORGAN TRANSPLANTATION 99 n.67 (2000).

⁵⁴ UNIF. ANATOMICAL GIFT ACT §§ 1 - 4 (amended 1987).

⁵⁵ *Id.* § 2(b) (amended 1987).

⁵⁶ Glazier, *supra* note 43, at 645.

⁵⁷ Siegel, *supra* note 44, at 933.

⁵⁸ *Id.*

⁵⁹ *Id.*; K.R.S. § 311.171 (Michie 2001).

⁶⁰ K.R.S. § 311.171.

procurement network.⁶¹ KODA was founded on March 2, 1987, and provides educational as well as procurement services.⁶² KODA also lobbies the Kentucky General Assembly for favorable legislation and requests grants from the federal government and General Assembly so it can improve the services it offers.⁶³ The functions of organ procurement, distribution, and education on organ donation are divided between federal and state and public and private organizations that work together to meet the demand for transplantable organs through express consent.⁶⁴

Kentucky's law as codified in its statutes is almost identical to the 1968 Uniform Anatomical Gift Act.⁶⁵ It has not been revised in accordance with the 1987 modifications.⁶⁶ Kentucky's version of the UAGA provides several ways for a person over the age of eighteen to make a valid organ donation. First, a person can donate his/her tissue and organs by will, regardless of whether or not the will ever gets through probate.⁶⁷ Second, the donor can express his/her consent by signing a document other than a will, which must be signed by the donor and at least two witnesses.⁶⁸ Third, the donor can sign the back of his/her driver's license in the presence of two witnesses, who also sign.⁶⁹ This third method is not part of the 1968 UAGA.⁷⁰ Last, the statute allows close relatives to grant the requisite express consent, stating:

(1) Any individual of sound mind and eighteen (18) years of age or more may give all or any part of his body for any purpose specified in KRS 311.185, the gift to take effect upon death.

⁶¹ See Ky. Organ Donor Affiliates, *supra* note 27.

⁶² *Id.*

⁶³ Kidney Found. of Cent. Ky., *Education*, www.kfck.org/pages/KFCK_Education.htm (last visited May 7, 2002).

⁶⁴ *Id.*

⁶⁵ Compare K.R.S. §§ 311.165 - .235, with UNIF. ANATOMICAL GIFT ACT §§ 1 - 4 (1968).

⁶⁶ Compare K.R.S. §§ 311.165 - .235, with UNIF. ANATOMICAL GIFT ACT §§ 1 - 4 (amended 1987).

⁶⁷ K.R.S. § 311.195.

⁶⁸ *Id.*

⁶⁹ *Id.* Kentucky is one of many states that allows a person to become an organ donor while receiving or renewing a drivers license. In total, forty-two states and the District of Columbia allow it. Health Resources and Servs. Admin., *Analysis of National and State Actions Regarding Organ Donor Registries*, at www.organdonor.gov/analysisdonregistries%20.htm (Nov. 16, 2001).

⁷⁰ Compare K.R.S. § 311.195, with UNIF. ANATOMICAL GIFT ACT §§ 1 - 4 (1968).

(2) 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 in KRS 311.185:

- (a) The spouse,
- (b) An adult son or daughter,
- (c) Either parent,
- (d) An adult brother or sister,
- (e) A guardian of the person of the decedent at the time of his death,
- (f) Any other person authorized or under obligation to dispose of the body.

(3) If the donee has actual notice of contrary indications by the decedent or that a gift by a member of a class is opposed by a member of the same or a prior class, the donee shall not accept the gift. The persons authorized by subsection (2) of this section may make the gift after or immediately before death.⁷¹

Many people do not give express consent themselves, and thus the family's express consent is often implicated. This paradox is often *the* limiting factor in the number of organs available for transplantation. Kentucky has taken a leading role in dealing with this situation through the education of families in making an informed decision about whether or not to donate the organs of their loved ones.⁷² Kentucky's leadership role in this area is illustrated by the fact that it was "the fourth state to pass legislation requiring hospitals to offer the option of organ and tissue donation to families of potential donors."⁷³

Precedent under the UAGA is relatively sparse, as these provisions have been the subject of relatively little litigation nationwide. Several states do have case law construing the UAGA, though Kentucky is not one of them. *Mansaw v. Midwest Organ Bank* involved a constitutional challenge to the Missouri organ donor statute, which, like Kentucky's statute, is based on the Uniform Anatomical Gift Act.⁷⁴ In *Mansaw*, the father of a fifteen-year-old boy filed a civil rights claim under 42 U.S.C. § 1983 against an organ bank and a hospital that had removed the organs of his son after his

⁷¹ K.R.S. § 311.175.

⁷² See Ky. Organ Donor Affiliates, *supra* note 27.

⁷³ *Id.*

⁷⁴ *Mansaw v. Midwest Organ Bank*, 1998 WL 386327 (W.D. Mo. 1998).

ex-wife, the mother of the boy, gave her consent for the organ procurement.⁷⁵ The father claimed emotional distress due to the harvesting of the organs and seeing his son's disfigured body.⁷⁶ The court found that "the governmental function involved here is of major significance not only to those currently on waiting lists, but to all persons who may at any time find themselves or a close family member in desperate need of an organ. . . . [and] [p]laintiff's interest . . . is far less compelling."⁷⁷ Thus, one can see that courts recognize the important role of federal and state governments in encouraging organ donation to improve the public health of society as a whole.

Besides the constitutional challenge to the UAGA in *Mansaw*, the other primary classes of litigation concerning the UAGA involve cases where more organs or tissues were harvested than the family authorized or situations where an unauthorized person under the list provided in UAGA Section 2 consents to the organ donation.⁷⁸ The outcomes of these cases almost always favor the organ procurement group under the good faith immunity clause of the UAGA.⁷⁹ In *Nicoletta v. Rochester Eye & Human Parts Bank, Inc.*, a New York court stated that requiring the hospital to double check that the person who claimed to be the closest relative was in fact who they claimed to be "would not only impose an unreasonable duty upon the Hospital, but would also run afoul of public policy considerations, as such a decision would tend to jeopardize the whole process of organ donation by causing unnecessary delays, thereby frustrating the entire intent of the Uniform Anatomical Gift Act."⁸⁰ The court obviously

⁷⁵ *Id.* at *1.

⁷⁶ *Id.*

⁷⁷ *Id.* at *7-8. The father's rights were deemed to be a property interest which is considered to be "a low right on the constitutional totem pole." *Id.* at *8.

⁷⁸ See *Ramirez v. Health Partners of S. Ariz.*, 972 P.2d 658 (Ariz. Ct. App. 1998) (The family requested that bone of the deceased not be harvested, but due to a communication error it was removed.); *Hinze v. Baptist Mem'l Hosp.*, 1990 WL 121138 (Tenn. Ct. App. 1990) (Man purporting to be the deceased grandson gave permission for the donation of the deceased's eyes, but the man was in fact not related to the deceased.); *Nicoletta v. Rochester Eye & Human Parts Bank, Inc.*, 519 N.Y.S.2d 928 (N.Y. App. Div. 1987) (Woman, who claimed to be the wife of the deceased and who authorized the organ donation, was not the legal spouse of the deceased.).

⁷⁹ See UNIF. ANATOMICAL GIFT ACT § 7(c) (amended 1987). See also *Ramirez*, 972 P.2d at 658; *Hinze*, 1990 WL 121138, at *7; and *Nicoletta*, 519 N.Y.S.2d at 933 (All holding that there was not liability under the good faith immunity clause of the UAGA.).

⁸⁰ *Nicoletta*, 519 N.Y.S.2d at 932-33.

recognized the importance to the public health of this country of quickly obtaining consent so that organ procurement can occur while the organs are still viable. However, even with such pro-organ donation rulings by courts, the organ shortage continues.

II. PRESUMED CONSENT: THE EUROPEAN APPROACH

A. *The French Model of Presumed Consent*

Many European countries, and a few others around the world, have tried to increase organ donation rates by implementing a "presumed consent" or "opt-out" approach to organ donation.⁸¹ Although there are several varieties of the presumed consent model, the basic premise is that everyone is considered to be an organ donor unless they have opted out in a method prescribed by law.⁸² One of the first countries to successfully adopt this approach in an attempt to solve the problem of organ shortages was France.⁸³ On December 22, 1976, France passed the Caillavet Law, which states, in relevant part: "An organ to be used for therapeutic or scientific purposes may be removed from the cadaver of a person who has not during his lifetime made known his refusal of such procedure."⁸⁴ If, however, the cadaver is that of a minor or a mentally defective person, the person's legal representative must authorize any organ removal for transplantation.⁸⁵

This law left ambiguities in interpreting what a person who did not want to be an organ donor had to do to express his/her wishes.⁸⁶ This was

⁸¹ Based on the author's research, various countries have implemented presumed consent laws, including: France, Spain, Belgium, Austria, Italy, Switzerland, Greece, Finland, Bulgaria, Denmark, Latvia, Cyprus, Greece, Hungary, Portugal, Poland, Tunisia, Luxembourg, Singapore, Brazil, Norway, Sweden, Slovenia, Argentina, and Chile.

⁸² See PHILLIP G. WILLIAMS, *LIFE FROM DEATH: THE ORGAN AND TISSUE DONATION AND TRANSPLANTATION SOURCE BOOK WITH FORMS 7* (1989).

⁸³ See J.A. Farfor, *Organs for Transplant: Courageous Legislation*, BRIT. MED. J., Feb. 19, 1977, at 497-98. The first country to adopt a presumed consent approach was probably Norway, which passed similar legislation in 1967, but there, the family's wishes are still respected if the potential donor left no instructions. *Id.*

⁸⁴ *Id.* at 497.

⁸⁵ *Id.*

⁸⁶ See Melissa N. Kurnit, Note, *Organ Donation in the United States: Can We Learn from Successes Abroad?*, 17 B.C. INT'L & COMP. L. REV. 405, 421 (1994).

solved on March 31, 1978, when the Council of State, France's highest advisory and dispute-resolving body, issued a decree allowing the objection to be made "by any means" and requiring "in effect, that a reasonable effort be made to determine whether any objections have been registered. . . ."⁸⁷ The Ministry of Health and Social Security later narrowed this law to allow a third person, often a family member, to state if the potential donor had any objections.⁸⁸

This lenient standard for presumed consent has the practical effect of allowing the family to give express consent much like in the United States, except with an opposite underlying presumption of donation.⁸⁹ France has found some success in increasing organ donations because of this law, as France "now claims one of the top six rates of postmortem donors per million inhabitants among European countries."⁹⁰ Because of the Council of State's modification, which moved French law more toward an express consent approach, France still faces a critical shortage of organs.⁹¹ In 1998, France had a waiting list consisting of 4950 patients awaiting kidneys, hearts, livers, and lungs.⁹² Belgium changed to a presumed consent law similar to France's in 1986.⁹³ Only two percent of the population there has chosen to opt out, and organ donations rose fifty-five percent in the first five years after it changed the law.⁹⁴

B. Alternative Ways the Presumed Consent Model is Used in Other European Nations

Some European countries have had more success with more strict presumed consent laws. Austria has one of the strictest and most effective of these laws.⁹⁵ An Austrian citizen must object to being an organ donor in writing, and the doctor does not even have to make a "reasonable inquiry" to discover if the potential donor has opted out.⁹⁶ Therefore, unless the

⁸⁷ *Id.* at 421-22.

⁸⁸ *Id.* at 422.

⁸⁹ *See id.*

⁹⁰ David E. Jefferies, Note, *The Body as Commodity: The Use of Markets to Cure the Organ Deficit*, 5 *IND. J. GLOBAL LEGAL STUD.* 621, 636-37 (1998).

⁹¹ Harris & Alcorn, *supra* note 20, at 224.

⁹² *Id.*

⁹³ I. Kennedy et al., *The Case for "Presumed Consent" in Organ Donation*, 351 *LANCET* 1650, 1651 (1998).

⁹⁴ *Id.*

⁹⁵ *See* Jefferies, *supra* note 90, at 639.

⁹⁶ *Id.*

potential donor is a minor or a foreigner, the doctor does not discuss donation with the family, and the family can only object by raising the issue on its own.⁹⁷ Even if the family makes a written objection, the doctor is free to ignore it.⁹⁸ Austria still has an organ deficit due to the great differential in the supply and demand for organs, but its procurement rates are twice as high as those in the United States and most of Europe.⁹⁹ Even if presumed consent does not totally eliminate the organ deficit, the Austrian example provides evidence of the potential benefit to public health that occurs in countries that use presumed consent.

Spain is another country that has a high rate of organ donations.¹⁰⁰ In 2000, Spain had one of the highest organ donation rates in Europe with 1345 cadaveric donors, or 33.91 donors per million people.¹⁰¹ Although Spain has a presumed consent law, it is not strictly followed, so it is generally not considered the reason its donation rates are so high.¹⁰² In addition to its law, Spain has created an efficient system in which great respect is shown for potential donors and their families.¹⁰³ Spain has increased its organ donation rate by improving many different areas of the procurement process.¹⁰⁴ After adopting its presumed consent law, Spain created a system of financial incentives¹⁰⁵ and a large, effective, and very well-organized infrastructure for organ procurement and transport that is overseen by an incredibly popular coordinating committee that aids in all facets of organ donations in Spain.¹⁰⁶

Not all countries attempting to move from an express consent law to a presumed consent law have done so successfully. Brazil is a prime example. Prior to 1997, a person needed to give his written consent at a public office to become an organ donor in Brazil.¹⁰⁷ After the Brazilian

⁹⁷ Kurnit, *supra* note 86, at 423.

⁹⁸ Jefferies, *supra* note 90, at 639.

⁹⁹ *Id.*

¹⁰⁰ Organización Nacional de Trasplantes, *Donation and Transplantation Statistics: Donors by Country. Year 2000*, at http://www.msc.es/ont/ing/data/f_data.htm (last visited Apr. 1, 2002).

¹⁰¹ *Id.*

¹⁰² MACHADO, *supra* note 18, at 46-47.

¹⁰³ *Id.* at 47.

¹⁰⁴ *Id.*

¹⁰⁵ Kennedy et al., *supra* note 81, at 1650-51.

¹⁰⁶ Xavier Bosch, *Spain Celebrates Leading the World in Organ Donation*, 351 LANCET 1868 (1998).

¹⁰⁷ Cláudio Csillag, *Opting Out of Organ Donation in Brazil*, 347 LANCET 754 (1996).

Congress changed the consent law from express to presumed, a person then could give his/her written objection at a public office in order to opt out of becoming an organ donor.¹⁰⁸ The Brazilian Medical Association and the Federal Council of Medicine criticized this law, and “[m]ost doctors were unwilling to remove organs without family consent, even if the law demanded them to do so.”¹⁰⁹ In October of 1998, a little over a year after the law first changed, Brazil moved back to the express consent approach.¹¹⁰

Presumed consent can be an effective approach if the citizens of that country are prepared for it and if there is a good infrastructure such as an actively involved government agency that coordinates procedures for the removal, distribution, transportation, and transplantation of organs.¹¹¹ Although most of the presumed consent countries do not completely meet the demand for organs, their procurement rates are usually higher than those of countries without presumed consent laws.¹¹² Perhaps Spain’s approach of presumed consent, financial incentives and a governmental agency is the most effective means of increasing organ donation rates.¹¹³ For example, the rate of organ donation in the Italian province of Tuscany doubled in one year after adopting a law modeled on Spain’s.¹¹⁴ Results like this now have other countries currently considering presumed consent laws. Scotland, for instance, is attempting to increase its organ donation rate by twenty percent by moving to such an approach.¹¹⁵

According to UNOS, there were 22,953 total transplants in the United States in 2001.¹¹⁶ If presumed consent would increase the organ donation

¹⁰⁸ Cláudio Csillag, *Brazil’s Law on Organ Donation Passed*, 349 LANCET 482 (1998).

¹⁰⁹ Cláudio Csillag, *Brazil Abolishes “Presumed Consent” in Organ Donation*, 352 LANCET 1367 (1998).

¹¹⁰ *Id.*

¹¹¹ See, e.g., *supra* notes 100-06 and accompanying text. Spain has donation rates of 33.6 donors per million, compared to the United States, which has rates of 22 donors per million. Christopher Snowbeck, *Act II: Gay AIDS Activist and Liver Transplant Recipient Turns Attention to Raising Awareness of Need for Organ Donation*, PITTSBURGH POST-GAZETTE, Jan. 29, 2002, at F1.

¹¹² See Jefferies, *supra* note 90, at 639-40.

¹¹³ See Bosch, *supra* note 106, at 1868.

¹¹⁴ Bruno Simini, *Tuscany Doubles Organ-Donation Rates by Following Spanish Example*, 355 LANCET 476 (2000).

¹¹⁵ Kate Foster, *Opt-Out System for Organ Donations a Step Closer*, SCOTSMAN, Oct. 26, 2001, at 2.

¹¹⁶ United Network for Organ Sharing, *Critical Data: U.S. Facts About Transplantation*, at http://www.unos.org/Newsroom/critdata_main.htm (last visited Feb. 24, 2002).

rate by the conservative twenty percent Scotland predicts,¹¹⁷ then about 5000 additional transplants could be performed. However, many people in the United States will die waiting for an organ transplant before presumed consent becomes a reality in this country. There are substantial hurdles to overcome in the United States for a presumed consent system to ever take hold.

III. BARRIERS TO PRESUMED CONSENT IN THE UNITED STATES

There is no state in the U.S. that currently has a presumed consent law like those in Europe and elsewhere. However, portions of the presumed consent approach are present in some state laws.¹¹⁸ Although none of these laws has been declared unconstitutional, there is a question as to whether a state could, even if public opinion concerns were ignored, pass a law reversing the current presumption regarding organ donation because of concerns under the Due Process Clause of the Constitution¹¹⁹ and this country's conception of the body and its tissues as property.

A. *Give Me Back My Body: The Body as Property*

"But if I had suffered my mother's son to lie in death an unburied corpse, that would have grieved me. . . ." ¹²⁰—*Sophocles*

Does anyone have a property right in a dead body? When the United States abolished slavery with the Thirteenth Amendment to the Constitution, a person could no longer be the property of another.¹²¹ Does this concept change at death? Historically, a relative of the deceased did not have a property right in the corpse. At English common law, for example:

¹¹⁷ See Foster, *supra* note 115, at 2.

¹¹⁸ See, e.g., COLO. REV. STAT. § 30-10-621 (2001) (pituitary gland); CONN. GEN. STAT. § 19a-281 (2001) (cornea and pituitary gland); DEL. CODE ANN. tit. 29, § 4712 (2001) (cornea); FLA. STAT. ch. 732.9185 (2001) (cornea); GA. CODE ANN. § 31-23-6 (2001) (cornea); K.R.S. § 311.187 (cornea); M.D. CODE ANN., EST. & TRUSTS § 4-509.1 (2001) (cornea); MICH. COMP. LAWS § 333.2855 (2001) (pituitary gland); *id.* § 333.10202 (2001) (cornea); N.C. GEN. STAT. § 130A-391 (2001) (cornea); OHIO REV. CODE ANN. § 2108.60 (West 2001) (cornea).

¹¹⁹ U.S. CONST. amend. XIV, § 1.

¹²⁰ Sophocles, *Antigone*, in GREEK DRAMA 92 (Moses Hadas ed., Robert H. Webb trans., Bantam Books 1982) (1965).

¹²¹ U.S. CONST. amend. XIII.

no property right existed relative to a dead body, and matters concerning corpses were left to the ecclesiastical courts. "But though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any civil action against such as indecently, at least, if not impiously, violate and disturb their remains, when dead and buried."¹²²

The ecclesiastical courts were in charge of taking possession of the body and deciding any controversies surrounding who and where it should be interred.¹²³

Since America never had ecclesiastical courts, states had to make their own decisions as to whether the next of kin has any property right in a body.¹²⁴ States have split over this issue and either follow the traditional common law approach¹²⁵ or take a quasi-property view.¹²⁶ Both approaches recognize the fact that some rights exist in corpses, ensuring a decent burial for the deceased. Kentucky law has long followed the traditional common law rule, stating that "[t]he current of authority in this country is to the effect that there is not a property right to a dead body in a commercial sense, but there is a right to bury it which the courts of law will recognize and protect."¹²⁷ States that use this common law approach assume that there are some rights to corpses, just not property rights.

¹²² *Georgia Lions Eye Bank, Inc. v. Lavant*, 335 S.E.2d 127, 128 (Ga. 1985) (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES 429 (T. Cooley ed., 1899)).

¹²³ *Renihan v. Wright*, 25 N.E. 822, 824 (Ind. 1890).

¹²⁴ *Id.*

¹²⁵ See *State v. Powell*, 497 So. 2d 1188, 1192 (Fla. 1986) ("[T]he next of kin's right in a decedent's remains is based upon 'the personal right of the decedent's next of kin to bury the body rather than any property right in the body itself.'") (quoting *Jackson v. Rupp*, 228 So. 2d 916, 918 (Fla. Dist. Ct. App. 1969), *aff'd*, 238 So. 2d 86 (Fla. 1970)); *Tillman v. Detroit Receiving Hosp.*, 360 N.W.2d 275, 277 (Mich. Ct. App. 1984); *Lanigan v. Snowden*, 938 S.W.2d 330, 332 (Mo. Ct. App. 1997); *Everman v. Davis*, 561 N.E.2d 547, 550 (Ohio Ct. App. 1989) (holding that a body is not an "effect" of someone else and is not protected by the constitutional restrictions of search and seizure like property that is considered an "effect").

¹²⁶ See *Arnaud v. Odom*, 870 F.2d 304, 308 (5th Cir. 1989) ("Louisiana has indeed established a 'quasi-property' right of survivors in the remains of their deceased relatives."); *Renihan*, 25 N.E. at 824-25; *Teasley v. Thompson*, 165 S.W.2d 940, 942 (Ark. 1942).

¹²⁷ *Neighbors v. Neighbors*, 65 S.W. 607, 608 (Ky. 1901).

Conversely, many states developed a “quasi-property” right in corpses.¹²⁸ In discussing this “quasi-property” interest in a corpse, Dean Prosser comments,

In most of these cases the courts have talked of a somewhat dubious “property right” to the body, usually in the next of kin, which did not exist while the decedent was living, cannot be conveyed, can be used only for the one purpose of burial, and not only has no pecuniary value but is a source of liability for funeral expenses. It seems reasonably obvious that such “property” is something evolved out of thin air to meet the occasion, and that in reality the personal feelings of the survivors are being protected, under a fiction likely to deceive no one but a lawyer.¹²⁹

Black's Law Dictionary defines property as “[t]he right to possess, use, and enjoy a determinate thing. . . .”¹³⁰ Usually property is transferable from person to person, and in this sense, quasi-property states do not recognize a commercial market in human corpses and so cannot be said to confer a per se property right in corpses.¹³¹ No state allows a market for dead bodies.¹³² In fact, Georgia, which recognizes the quasi-property right in corpses, does not allow damages in most cases that are brought when organs are removed without proper consent because organs have no pecuniary value.¹³³

B. For Sale, Trade, or Lease: Human Tissues as Property

“And the Lord God caused a deep sleep to fall on Adam, and he slept; and He took one of his ribs, and closed up the flesh in its place. Then the rib

¹²⁸ See *supra* note 126.

¹²⁹ W.L. PROSSER & W.P. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 63 (5th ed. 1984) (citations omitted).

¹³⁰ BLACK'S LAW DICTIONARY 1232 (7th ed. 1999).

¹³¹ Herbert G. Feuerhake, BODY AS PROPERTY, 18 N.Y. JUR. 2D CEMETERIES AND DEAD BODIES § 72 (1999).

¹³² It is against federal law to knowingly sell human tissue and organs. See 42 U.S.C. § 274e(a) (2001).

¹³³ *Bauer v. N. Fulton Med. Ctr., Inc.*, 527 S.E.2d 240, 244-45 (Ga. Ct. App. 1999) (The deceased's corneas were removed without his wife's consent. Her claims of conversion, improper bailment, and breach of contract failed because damages could not be proven. The court found that it was not possible to place a value on Mr. Bauer's parts; however, it did allow Mrs. Bauer to recover for any additional funeral costs which occurred due to the removal of the eye tissue.).

which the Lord God had taken from man He made into a woman
...¹³⁴—*The Bible*

Modern medical technological advances have turned human bodies “from merely a source of labor, or food for worms, to a highly prized biological commodity.”¹³⁵ This technology has also opened up more questions concerning the exact legal status of tissue. In this respect, bodily tissues pose similar problems to corpses regarding whether they should be defined as property.

One of the best-known cases that ruled on the possible property interests in human tissue is *Moore v. Regents of the University of California*.¹³⁶ Moore’s doctors had taken some of his cells during the removal of his spleen, and because the cells were unique and potentially possessed scientific and commercial value, they used them to conduct research.¹³⁷ Without Moore’s consent, the doctors patented a very lucrative cell line from his cells for research purposes.¹³⁸ The California Supreme Court held that after removal, Moore owned neither his cells nor the cell lines produced outside of his body.¹³⁹ Other cases, however, have declared that blood and preembryonic cells may be bought, sold, donated, and devised by will,¹⁴⁰ all of which are characteristics traditionally embodied in property.

In dealing with these valuable human tissues, some state legislatures have enacted laws that have some limited presumed consent tendencies. Kentucky has such a provision in its version of the Uniform Anatomical

¹³⁴ *Genesis* 2:21-22 (New King James).

¹³⁵ Michael H. Scarmon, Brotherton v. Cleveland: *Property Rights in the Human Body—Are the Goods Oft Interred with Their Bones*, 37 S.D. L. REV. 429 (1992).

¹³⁶ *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479 (Cal. 1990).

¹³⁷ *Id.* at 481.

¹³⁸ *Id.* at 481-82.

¹³⁹ *Id.* at 487-88.

¹⁴⁰ *See, e.g., Hecht v. Super. Ct.*, 20 Cal. Rptr. 2d 275, 281 (Cal. Ct. App. 1993) (holding that the deceased’s frozen sperm constituted “property” and could be willed to his girlfriend); *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992) (holding that a divorcing couple had a quasi-property interest in preembryonic cells and could determine their disposition in the divorce); *Kass v. Kass*, 673 N.Y.S.2d 350 (N.Y. 1998) (couple could expressly contract regarding disposition of preembryos). *Cf. Miles, Inc. v. Scripps Clinic & Research Found.*, 810 F. Supp. 1091 (S.D. Cal. 1993) (holding plaintiff did not have a conversion claim in the “right to commercialize” a cell line).

Gift Act that deals with the removal of corneas.¹⁴¹ This statute allows the removal of a cadaver's corneas if an autopsy was ordered, the corneas are transplantable, the removal will not interfere with an investigation or alter the face, and "[n]o objection by the next of kin is known by the coroner or medical examiner."¹⁴² This statute does not require the coroner to make reasonable inquiry into whether the decedent had given consent or whether his/her family would grant express consent to this procedure. In the statute, the coroner is granted immunity from any cause of action by the next of kin for removing the corneas without consent.¹⁴³

C. If Not a Property Right, Then What is It?: A Constitutionally Protected Interest

"[M]ost of those who live in democratic countries are possessed of property; not only are they possessed of property, but they live in the condition where men set the greatest store upon their property."¹⁴⁴

—*Alexis de Tocqueville*

Even though there is no absolute right in the U.S. declaring that a dead body is property, it is clear that some interests are recognized in corpses.¹⁴⁵ Is this interest enough to create a constitutional barrier to prevent a presumed consent approach to organ donation from ever being a viable option in the United States? Under current law, courts have interpreted the right of a person or family to decide whether or not to donate organs as an interest sufficient to create some rights in the corpse of which a person cannot be deprived without due process of law.¹⁴⁶

In determining whether or not a property interest is sufficient to trigger the Due Process Clause of the Constitution, courts have discussed several

¹⁴¹ K.R.S. § 311.187.

¹⁴² *Id.* § 311.187(1).

¹⁴³ *Id.* § 311.187(2).

¹⁴⁴ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 264 (Richard D. Heffner ed., Penguin Books 1984) (1835).

¹⁴⁵ *See supra* Part III.A.

¹⁴⁶ *See Whaley v. Tuscola*, 58 F.3d 1111, 1117 (6th Cir. 1995) (holding that procedural due process rights of the decedent's next of kin were violated when the decedent's eyeballs were removed without the next of kin's authorization); *Brotherton v. Cleveland*, 923 F.2d 477, 482 (6th Cir. 1991) (holding that a widow had rights in her husband's corpse that rose to the level of a "legitimate claim of entitlement," thus his corneas could not be removed without her consent).

different attributes of property. In *Board of Regents v. Roth*, the United States Supreme Court stated:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . .

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . .¹⁴⁷

Courts have found that current state laws have created a property interest in the next of kin in connection with the body of the deceased, and as such, due process would be required before the next of kin could be deprived of this interest.¹⁴⁸

Two of the most important cases in defining a property interest in a relative's organs are *Brotherton v. Cleveland*¹⁴⁹ and the follow-up case of *Whaley v. Tuscola*.¹⁵⁰ In *Brotherton*, the Sixth Circuit ruled that Ohio state law recognized a property interest for the widow of a man whose corneas were removed pursuant to state law, so the removal of those corneas without due process violated her constitutional rights.¹⁵¹ The court noted that to make a successful due process claim, *Brotherton* must show: (1) deprivation, (2) of property, (3) under color of state law.¹⁵² The court found the deprivation and color of state law requirements were easily met, thus the central issue was whether *Brotherton* had a property interest in her husband's corneas.¹⁵³ According to the court, the state procedures that caused the corneas to be removed without the widow's consent were unconstitutional, depriving *Brotherton* of due process.¹⁵⁴ The court found that even though Ohio courts have avoided classifying corpses as quasi-property,¹⁵⁵ Ohio state law, in its

¹⁴⁷ *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

¹⁴⁸ See *Brotherton*, 923 F.2d at 481-82; *Mansaw v. Midwest Organ Bank*, 1998 WL 386327, at *3-4 (W.D. Mo. 1998).

¹⁴⁹ *Brotherton*, 923 F.2d at 477.

¹⁵⁰ *Whaley*, 58 F.3d at 1111.

¹⁵¹ *Brotherton*, 923 F.2d at 482.

¹⁵² *Id.* at 479.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 482.

¹⁵⁵ See *Everman v. Davis*, 561 N.E.2d 547, 550 (Ohio Ct. App. 1989); *Carney v. Knollwood Cemetery Ass'n*, 514 N.E.2d 430, 434-35 (Ohio Ct. App. 1986).

version of the UAGA,¹⁵⁶ expressly grants a property interest to the next of kin to control the disposal of the body of the deceased.¹⁵⁷ In addition to Ohio's version of the UAGA, the court used the "bundle of rights" theory, which, with respect to property, "include[s] the rights to possess, to use, to exclude, to profit, and to dispose."¹⁵⁸ The court concluded that "the aggregate of rights granted by the state of Ohio to Deborah Brotherton rises to the level of a 'legitimate claim of entitlement' in Steven Brotherton's body, including his corneas, protected by the due process clause of the fourteenth amendment."¹⁵⁹

Four years after *Brotherton*, the Sixth Circuit decided a similar case concerning an almost identical fact pattern under Michigan law and came to the same result.¹⁶⁰ In *Whaley v. Tuscola*, the court noted that Michigan law, unlike Ohio law, expressly states that the family can take possession of the body for burial even though Michigan law only provides for recovery in tort for infliction of emotional distress in connection with damage to a corpse.¹⁶¹ Michigan's version of the UAGA is almost identical to Ohio's, and it is this root in the statutory law that creates the constitutionally-protected property right.¹⁶² The court stated: "[I]f a woman's husband dies in a neighbor's yard, the neighbor cannot simply keep the body. In Michigan, he must either turn it over, or be liable. Just because the woman cannot technically 'replevin' her husband's body does not mean she has no legitimate claim of entitlement to it."¹⁶³

Cases such as *Brotherton* and *Whaley* seem to recognize that even a limited presumed consent of organ donations would be a violation of the due process clause.¹⁶⁴ Several other courts, however, have come to different conclusions. Deciding the question before *Brotherton*, the Florida Supreme Court held that the removal of corneas without the consent of the next of kin is authorized.¹⁶⁵ The Florida court noted that corneal removal is a small

¹⁵⁶ OHIO REV. CODE § 2108.02(B) (West 2002) (requiring the next of kin to provide consent for organ donation).

¹⁵⁷ *Brotherton*, 923 F.2d at 480-82.

¹⁵⁸ *Id.* at 481.

¹⁵⁹ *Id.* at 482.

¹⁶⁰ *Whaley v. Tuscola*, 58 F.3d 1111 (6th Cir. 1995).

¹⁶¹ *Id.* at 1115.

¹⁶² *Id.* at 1116.

¹⁶³ *Id.*

¹⁶⁴ See also *Mansaw v. Midwest Organ Bank*, 1998 WL 386327 (W.D. Mo. 1998) (following *Brotherton* and concluding that Missouri law is not substantially different from Ohio law).

¹⁶⁵ *State v. Powell*, 497 So. 2d 1188, 1191 (Fla. 1986).

intrusion on the body when compared to the large invasion of an autopsy.¹⁶⁶ The court found “no taking of private property by state action for a non-public purpose in violation of . . . the Florida Constitution.”¹⁶⁷

The Fifth Circuit has ruled that there was no liberty or property interest in the bodies of deceased children based on 42 U.S.C. § 1983.¹⁶⁸ The gruesome facts surrounding that case, *Arnaud v. Odom*, involve a coroner who performed a suspect experiment on the corpses of two babies who had died of Sudden Infant Death Syndrome.¹⁶⁹ Before performing the requisite autopsy, he dropped each of the babies on its head to examine the damage such a fall would do to an infant’s head.¹⁷⁰ He did this to gain evidence to clear his name from a previous lawsuit.¹⁷¹ The court decided that even though Louisiana recognized a “quasi-property” interest in a corpse, this did not create a property interest as required to activate the Due Process Clause of the Constitution.¹⁷²

Since one of the key factors triggering the Due Process Clause in *Brotherton* was the creation of a property interest by state law, there still exists the possibility that a state could take out the provisions of its law that allow families to consent to organ donation. If this were done, then it seems that due process would not be required, and a law allowing organs to be removed without consent could be valid.

Some state legislatures have already been faced with the option of moving to a system of presumed consent. Bills that would implement presumed consent have been introduced in Pennsylvania, Oregon, Minnesota, California, and Maryland, but so far, all have failed.¹⁷³ Currently, legislators in Texas are trying to pass a presumed consent law to govern anatomical gifts.¹⁷⁴ There is a large amount of opposition to such a law, though.¹⁷⁵ The United Network for Organ Sharing has stated: “[E]thically, presumed consent offers inadequate safeguards for protecting the individual autonomy of prospective donors. [It] too closely approxi-

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 1192.

¹⁶⁸ *Arnaud v. Odom*, 870 F.2d 304, 309 (5th Cir. 1989).

¹⁶⁹ *Id.* at 306.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 309.

¹⁷³ Todd Ackerman, *State’s Organ Shortfall Is Target of Plan; Texans Would Be Assumed Willing Donors After Death*, HOUSTON CHRON., Jan. 8, 2001, at A11.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

mates 'routine salvaging' in practice, although in rhetoric it pays homage to the value of individualism inherent in the consent model.¹⁷⁶

It is too early to tell if Texas will become the first American state to move to presumed consent. If it does, there will certainly be litigation regarding the deprivation of property. If it passes constitutional muster, there is a good chance that more states will move to the presumed consent model. Because of the opposition such a change faces just in becoming law¹⁷⁷ as well as the litigation a move to presumed consent would bring, such a change does not seem likely for years and perhaps decades to come.

CONCLUSION

Advances in medical technology may one day make the need for human organ donors obsolete. Current technology is focusing on porcine organ transplants¹⁷⁸ and human cloning to grow spare organs for transplantation.¹⁷⁹ These technologies are years down the line, and until then, tens of thousands of people worldwide will die waiting for life-saving transplants. Education and public awareness campaigns addressing the need for organ donors can only go so far. These public health concerns should force legislatures in the United States to discover ways to facilitate organ donation.

One place for the legislatures to look is at successes abroad. There are many models for different types of consent around the world. China, for example, procures the organs of executed prisoners, a practice known as organ conscription.¹⁸⁰ There are also many other approaches that countries have adopted to meet the demand for organs short of mandatory procurement. Discussing the varieties of organ donation schemes, one commentator has noted:

The available laws can be grouped along a spectrum based on the level of consent needed. At one end of the spectrum, reflecting a universal custom and heritage, the surviving family has controlling authority to donate a loved one's organ and tissues. At the other, unless an objection is

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *CBS Evening News: Concerns About Animal to Human Transplants* (CBS television broadcast, Feb. 13, 2002), available at 2002 WL 6516535.

¹⁷⁹ Aaron Zitner, *States Hurry to Block Plans to Clone Humans*, L.A. TIMES, Jan. 17, 2002, at A14.

¹⁸⁰ PRICE, *supra* note 53, at 83.

registered prior to death, organs and tissues are routinely removed as needed. Geographically, culturally and philosophically, Asian and Latin American countries are overwhelmingly concentrated in the former group whilst continental European nations constitute most of the presumed consent. Countries with a strong English or American legal heritage tend to a more middle course.¹⁸¹

The trend of Anglo-American law striking a middle ground in regulating organ donation no doubt has something to do with the conflicting notions in this field which require the balancing of personal property rights with the societal benefit of improving the lives of others. American courts often favor organ procurement agencies in lawsuits in order to facilitate organ donations.¹⁸² To benefit the public health, laws need to be written which would de-emphasize the next of kin's property interest in the deceased corpse while still allowing a burial in accordance with the family's wishes. Bodies now have a utility after death that they never had before: they possess the ability to save lives. Public health laws need to be rewritten to reflect that change.

The gap between organs needed and organs collected under the express consent approach keeps widening at an astounding rate resulting in a negative impact on the health of the population. While the presumed consent approach, in all its different forms, does not completely meet demand, it comes closer to meeting demand than does express consent. A hybrid of presumed consent and greater education and infrastructure in handling organ donations, like that of Spain, would help close the gap between the supply and demand of organ donors and would have a positive impact on public health in general.¹⁸³ The law in America must respond to the deadly gap by creating a system utilizing methods that have helped to alleviate the chronic shortage of organs in other countries around the world while staying within the constitutional framework and acknowledging the value of a person's property, whether a dead body is deemed to be property or not.

¹⁸¹ *Id.* at 86 n.14 (quoting Lee, *Worldwide Legal Requirements for Obtaining Corneas*, 11 CORNEA 102, 105 (1992)).

¹⁸² See *Ramirez v. Health Partners of S. Ariz.*, 972 P.2d 658, 666-67 (Ariz. Ct. App. 1998); see also *Hinze v. Baptist Mem'l Hosp.*, 1990 WL 121138 (Tenn. Ct. App. 1990); *Bauer v. N. Fulton Med. Ctr., Inc.*, 527 S.E.2d 240 (Ga. Ct. App. 1999); *Nicoletta v. Rochester Eye and Human Parts Bank, Inc.*, 519 N.Y.S.2d 928 (N.Y. App. Div. 1987).

¹⁸³ See *supra* notes 100-06 and accompanying text.

Future schemes addressing ways to solve the shortage of organ donations must be cognizant of the rapid increase in new technologies, which create the need for compatible laws. One problem with most of the regulations passed and common law rules set out by courts regarding organ and tissue donation has been short-sightedness when dealing with future technological advances. While courts do not have crystal balls that can predict the future, the old common law views of property are often not practicable when dealing with biotechnology, and these laws produce haphazard results, like the views taken in deciding if the human body is indeed property. With different states following different rules as to whether the body is property, residents of one state could be at more or less of an advantage for receiving an organ donation depending on what that state's courts have decided.

Some commentators have advocated a market approach for organ donations.¹⁸⁴ After all, when the selling of blood and preembryonic tissue is allowed, the market thrives and the demand is met.¹⁸⁵ The idea of vital organs going to the highest bidder is repugnant to most people though. Spain has effectively coupled a presumed consent model with financial incentives, which has helped to alleviate the shortage of organs.¹⁸⁶ Pennsylvania has proposed an incentive program whereby partial funeral expenses of an organ donor would be paid to that person's family.¹⁸⁷ Although this could be an important step in increasing the number of organ donations, if it were coupled with the presumed consent model there would be an even greater incentive to donate. Ethical problems exist with this financial incentive as with any financial incentive for organ donations since financial matters might override the morals and ethics of people who are in financial need.

Lawyers who handle estate planning could be in a unique position to explain the advantages and disadvantages of organ donations to their clients.¹⁸⁸ Lawyers can dispel myths and help gain a person's consent before death so that their last wishes for their body will be carried out.¹⁸⁹ Under the current laws in the United States, the lawyer is possibly in the best position to educate and help increase the number of organ donations.

¹⁸⁴ Harris & Alcorn, *supra* note 20, at 213.

¹⁸⁵ *Id.*

¹⁸⁶ Kennedy, *supra* note 93, at 1651.

¹⁸⁷ Siegel, *supra* note 44, at 917.

¹⁸⁸ Sandra Vinik & Jack Carney, *Organ Donation: Lawyers Can Save Lives Without Going to Medical School*, 61 ALA. LAW. 379 (2000).

¹⁸⁹ *Id.*

Lawyers cannot reach most of the populace, however. The overall health of Americans would increase with more organ donations, as less people would die while waiting on the organ transplant list. The approach the United States takes towards organ procurement is currently leaving a huge gap between supply and demand. Every nation struggles with this problem. Some have more effective systems than others. The United States is by far the world's leader in medical advances; perhaps it is time for the United States to take a leading role in solving the deadly organ shortage so that this technology can be used to save more lives. Clearly, until legislative action is taken to increase organ donation, more people will die . . . waiting.