Nudging People to Become Organ Donors: An Opt-Out System That Does Not Presume Anyone’s Consent

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ABSTRACT: Faced with a dire organ shortage, many state legislatures have recently explored alternatives to the current system of registering organ donors. One promising proposed alternative is to switch from an “opt-in” to an “opt-out” model of recording organ donation preferences on forms administered in connection to state-regulated task, such as obtaining a driver’s license or identification card. Unfortunately, these proposed “opt-out” models garnered little support as they were largely misunderstood and improperly likened to the archetypal presumed consent systems in Europe. Crucially, this paper distinguishes the proposed “opt-out” model from presumed consent systems in key ways, thus demonstrating that the “opt-out” model would be legal, ethical, and ultimately effective in raising organ donations.

Currently over 112,000 people are awaiting organ donation in the United States; each day 18 of these people die, yet the waitlist continues to grow. In response to this organ shortage, several states have considered changing their donations laws from an opt-in system to some form of an opt-out system, taking cue from many European countries with presumed consent and high deceased organ donation rates. Under a presumed consent system, all adult individuals are presumptively considered donors unless they elect not to be a donor. A failure to opt-out results in the legal authority to recover organs from an individual after death, as the individual is presumed to have consented.

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3 Alberto Abadie & Sebastien Gay, The Impact of Presumed Consent Legislation on Cadaveric Organ Donation: A Cross-Country Study, 25 J. OF HEALTH ECON. 599, 599, 607 (2006). It is important to distinguish between deceased donation rates and living donation rates when making cross-country comparisons as using an aggregate rate that combines both can be misleading. For example, one country may have high deceased rate with a very low living donation rate, and thus, have an aggregate lower than a country with average rates in both categories. This may lead to a false conclusion that the second country has the preferable organ donation system. Whether a country has an opt-in or opt-out organ donation system directly affects the deceased donation rate, and not the living donation rate. Hence, the label “presumed consent,” as opposed to the current “express consent” or opt-in system.
rejected or, euphemistically, “sent to committee.” The failure of these proposals is not surprising—the idea of presumed consent remains unpopular and controversial in the United States.6,7

But an opt-out system is not necessarily the same as a presumed consent system, though the terms are sometimes used interchangeably in a dangerous way. Indeed, the propose New York opt-out system, the adoption of which this paper advocates, differs from “true” presumed consent in key ways, though was largely characterized as “presumed consent” in the media.8

Under the system proposed in New York and advocated for in this paper, people would enter the donor registry by not checking an opt-out box when they apply to renew or first receive a driver’s license or state identification card. Thus, the system would only affect individuals who have the option in front of them and who would be able to rebut the default presumption in favor of donation simply by checking the box. The state would not make anyone’s decision for them. People who do not go to the DMV will not automatically be entered into the donor registry, unless they take affirmative steps to join a registry, just as they can in the current opt-in system.

Accordingly, the proposed model would most accurately be described simply as “opt-out” or “default to registration,” rather than “presumed consent.” Like a true presumed consent

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7 GALLUP ORGANIZATION, NATIONAL SURVEY OF ORGAN AND TISSUE DONATION ATTITUDES AND BEHAVIORS 21 (2005), available at ftp://ftp.hrsa.gov/organdonor/survey2005.pdf. While the poll shows that 78.2% of the population was likely to donate their organ, 56.8% opposed a presumed consent system. Presumed consent may evoke fears that the system is coercive, violates autonomy, and is a step toward mandatory organ donation (i.e., conscription). People may also fear that a presumed consent system will result in doctors or paramedics working less diligently to save lives, or worse, may even hasten one’s death.
8 See, e.g., Gormley supra note 2 (; Matthews, supra note 6.)
system, the default option is registration. But unlike presumed consent systems, which would register everyone who fails to take affirmative action to opt-out, literally presuming their consent, the proposed opt-out system is dependent on the conscious and affirmative choice of individuals actually faced with the option. Thus, the proposed opt-out system does not actually presume anyone’s consent. It simply presents the question with a default option and records the individual’s express organ donation preference. Accordingly, just as in the current opt-in system, a deceased person’s family members would not be override his or her affirmatively expressed desire to donate.

Due to these important differences from presumed consent, the proposed opt-out system fares well against the constitutional and ethical challenges that make presumed consent nonviable in the United States. This paper will discuss these legal and ethical barriers to implementing presumed consent then illustrate how the proposed opt-out system design avoids raising the concerns associated with presumed consent.

But whether the proposed opt-out system would be effective in raising donation rates is a question apart from its constitutionality and ethical concerns. Undeniably the organ shortage is a complex problem without an easy answer; there is no singular “silver bullet” solution. Moreover, data on presumed consent’s effect on organ donation rates is sparse, conflicting, and arguably inconclusive. Nonetheless, switching from the current opt-in system to the proposed opt-out system could potentially be one appropriate step in the direction of increasing organ donation rates. The small difference of changing the DMV form from an opt-in box to an opt-out box could have a profound positive effect on the number of registrations.

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9 See infra Section V & VI.
10 See infra Section VI, Part 1 & 2.
Section I of this paper will set out the important background of presumed consent to organ donation in the United States necessary to understand the legal and ethical challenges mounted against it. Section II discusses the constitutional challenges that limited presumed consent has faced previously in the context of tissue donation and hypothesizes how these same legal claims would be resolved in the context of a full-organ opt-out system. Section III explores whether presumed consent or the proposed opt-out system can exist consistently with gift-law principals. Section IV considers the ethical quandaries posed by adopting an opt-out system to organ donation. Section V is an inquiry into whether switching to such a system would be effective in increasing donation rates. Section VI will further explain the New York proposal to implement an opt-out system design and will discuss how such a model would be successful in minimizing public opposition while maximizing ethical and legal soundness. In conclusion, Section VII will reiterate that such a design change would be but one step of a multi-step solution to addressing the organ shortage and briefly suggest additional measures that could further that goal.

I. Background and History of Presumed Consent Here and Abroad

Presumed consent organ donation has been widely adopted in continental Europe.11 Wales may soon join the list, the first within the UK, though the possible transition has sparked some contention.12 Outside of Europe, a culturally sensitive form of presumed consent has been successfully adopted in Singapore.13 Brazil attempted a presumed consent system, but soon

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11 France, Italy, Belgium, Finland, Greece, Norway, Sweden, Poland, Portugal, and Austria all have some form of presumed consent. See DAVID L KASERMAN & A.H. BARNETT, THE U.S. ORGAN PROCUREMENT SYSTEM, A PRESCRIPTION FOR REFORM 46 (2002).
abandoned it due to public disapproval. While each country with presumed consent has its own standards, the shared thread among them is the basic premise that a decedent is presumed to be an organ donor unless he or she expressed an objection while alive.

Historically, the United States, too, has embraced various degrees of presumed consent, despite the aversion to it today. Starting in the late 1960s, many states implemented limited forms of presumed consent to address cornea shortages by authorizing coroners and medical examiners to retrieve the corneas and pituitary glands of any cadaver in their possession, as long as the coroner or medical examiner “[was] not aware of an objection by the person or a family member.”

In 1987, Uniform Commissioners revised the principal model act law on organ donation, the Uniform Anatomical Gift Act (“UAGA”), and included in the revision a ratification of the coroner release statute. All fifty states had adopted the 1987 Revised UAGA, with some

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14 JAMES CHILDRESS & CATHARYN LIVERMAN, COMMITTEE ON INCREASING RATES OF ORGAN DONATION, ORGAN DONATION: OPPORTUNITIES FOR ACTION 29 (2006).
15 E.g., France is more respectful of family wishes, Austria is stricter and does not consult family, and Singapore is limited to certain circumstances of death and has built-in exemptions for religion. See Abena Richards, Don’t Take Your Organs to Heaven .... Heaven Knows We Need Them Here: Another Look at the Required Response System, 26 N. ILL. U. L. REV. 365, 389 (2006).
16 Id.
17 Statutes regulating the disposition of unclaimed bodies arose in the United States in 1831 as a means of putting an end to the cadaver trade (i.e., body snatching). Essentially, when a corpse went unclaimed, the state deemed the decedent to have donated his body for scientific advancement. This illustrated an early, though somewhat attenuated notion of presumed consent. See Denay L. Wilding Knope, Over My Dead Body: How the Albrechy Decisions Complicate the Constitutional Dilemma of Due Process & the Dead, 41 U. TOL. L. REV. 169, 183 (2009).
18 David Orentlicher, Presumed Consent to Organ Donation: Its Rise and Fall in the United States, 61 RUTGERS L. REV. 295, 299 (2009). This “residual authority” in the coroner derived from the 1968 Uniform Anatomical Gift Act. “[A]ny other person authorized or under obligation to dispose of the body,” is last in the hierarchy of who “in the absence of actual notice of contrary indications by the decedent or opposition by a family member of the same of a prior class, may give all or any part of the decedent’s body.” UNIF. ANATOMICAL GIFT ACT, § 2 (1968). Thus, when the next of kin are not available, the 1968 Act gave the coroner the authority “make the gift.”
19 UNIF. ANATOMICAL GIFT ACT §4(a) (1987). The 1987 UAGA removed the coroner from the “who may make a gift” hierarchy and enshrined the practice of corneal removal in a new section. Id. The act also added a requirement that the coroner make “a reasonable effort” to review the decedent’s medical record and contact family members to ascertain any objection to donation before presuming consent and retrieving the corneas. Id. The reasonable search requirement obviously weakened the presumption of consent. But because the default was still “donation,” even with the reasonable search requirement, the coroner release statutes were soft- or pseudo-presumed consent systems. Moreover, not all states adopted the search requirement. See Orentlicher supra note 18, at 303-04.
variance among them in specific provisions, and by the early 1990s, over half the states had embraced some form of this explicit, albeit limited, presumed consent statute for corneas.

Because coroners were permitted to extract corneas with minimal investigation or correspondence with relatives, the practice authorized by the coroner release laws seemed to go by largely unnoticed by the public. When families began to discover that their deceased’s corneas had been removed, the result was outrage, lawsuits, and eye-opening publicity. In the wake of legal challenges and the escalating unpopularity of presumed consent, the 2006 UAGA revision removed the language authorizing the coroner to retrieve corneas or other organs.

Following the UAGA’s lead, today all but three states have repealed their coroner release statutes.

II. Constitutional Due Process Challenges to Presumed Consent

Despite their success in raising transplant rates, the coroner release statutes faced constitutional challenges starting in the mid 1980s from families who were upset after discovering that their relative’s corneas or organs had been taken without consent. The most salient challenge was that the state’s removal of the decedent’s corneas deprived the families’ of their property interest in the dead body without providing due process, thus violating the 14th

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20 See Brian Morris, You’ve Got to be Kidneying Me!, 74 BROOK L. REV. 534, 548-552 (2009).
23 Id.
24 REV. UNIF. ANATOMICAL GIFT ACT 2006, Prefatory Note, at 9 (“In light of a series of Section 1983 lawsuit in which the [coroner’s] actions were held to violate the property rights of the surviving family members, the authority of the [coroner] to make anatomical gifts was deleted from this act.” (citing Brotherton v. Cleveland, 923 F.2d 477 (6th Cir. 1991)); REV. UNIF. ANATOMICAL GIFT ACT 2006, § 22 cmt (“Unlike prior law, this section does not empower [coroners] [medical examiners] to make an anatomical gift of the body or parts of a decedent.”)).
26 Goodwin, supra note 22, at 4, 13, 22, 36.
27 Orentlicher, supra note 18, at 305-10.
Amendment.\textsuperscript{28} Earlier state courts to consider this argument flatly rejected the suggestion that family members could have a constitutional property interest in a corpse,\textsuperscript{29} but the argument eventually gained traction in two federal circuit courts, which found the coroner release statutes unconstitutional.\textsuperscript{30}

While the pseudo-presumed consent coroner statutes that the U.S. abandoned were markedly different from the contemporary European models and this paper’s proposal,\textsuperscript{31} any form of presumed consent in an opt-out organ donation system, if adopted, could conceivably face similar due process challenges as the previous statutes. As discussed below, however, due to the factual differences between the systems, the constitutional challenges that prevailed against the coroner release statutes are much weaker against the opt-out system proposed in this paper.

The Fourteenth Amendment ensures that “[n]o State shall . . . deprive any person of life, liberty, or property without due process of law.”\textsuperscript{32} Thus, to prevail, a plaintiff must show four elements: that they (1) had a protected interest (2) of which they were deprived (3) by the state (4) without adequate due process.\textsuperscript{33} In a claim against an opt-out system, each of these elements is arguably lacking. Nonetheless, the mere possibility of a legal challenge being brought, no

\textsuperscript{28} See, e.g., Brotherton v. Cleveland, 923 F.2d 477 (6th Cir. 1991) (finding that the family had a constitutionally protected property interest in the corneas of a deceased relative and were deprived of that interest without due process when the coroner extracted the corneas pursuant to the authorizing state coroner release statute).
\textsuperscript{30} Orentlicher, supra note 18, at 305-308; see, e.g., Newman v. Sathyavagiswaran, 287 F.3d 786, 796-97 (9th Cir. 2002); Brotherton, 923 F.2d at 482.
\textsuperscript{31} A “full” presumed consent system would not be limited to cadavers under coroner custody, but would encompass all organs, would require no reasonable search, and would not provide the family a statutory right to override the anatomical gift. However, like France and some other European countries with presumed consent, familial consent will still be sought and donations will not proceed over familial objection, in order to maintain a positive relationship between the organ donation community and the public.
\textsuperscript{32} U.S. Const. amend. XIV, § 1.
\textsuperscript{33} Id.; Albrecht v. Treon, 617 F.3d 890, 894 (6th Cir. 2010) cert. denied, 131 S. Ct. 1047 (2011).
matter how frivolous, could be devastating to the continued success of the system, the integrity of the community, and the lives of donees.34

1. **Property Interest**

The foremost task is identifying whether there can be a constitutionally protected due process interest (life, liberty, or property) in the body and organs of a deceased relative that implicates the due process clause.35 Due process property interests “are created and their dimensions are defined by . . . state law.”36 Specifically, “state law establishes the property interest while federal constitutional law determines whether the state law property interest rises to a constitutionally protected property interest.”37 Thus, the “sufficiency of the claim of entitlement must be decided by reference to state law.”38

State common-law has unambiguously held that dead bodies are not property and cannot be owned per se. This stance weighs against a constitutionally protected property interest in dead bodies.39 This view, following a long tradition of state common-law finding no property in a dead body,40 guided state appellate courts to uphold the coroner release statutes in early challenges.41 The early court decisions acknowledged that state law granted the surviving family “quasi-property rights” in the dead body, but noted that any “[r]ights in a dead body exist

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34 See infra Section V.
36 Board of Regents v. Roth, 408 U.S. 564, 577 (1972).
39 Knope, supra note 16, at 174-78; see, e.g., State v. Powell, 497 So. 2d 627, 630 (Fla. 1986) (finding that because there is no property in dead bodies under Florida common-law, nor can there be a due process property interest).
40 See, e.g., Louisville & N.R. Co. v. Wilson, 51 S.E. 24, 25 (Ga. 1905) (“[T]hough the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes.” (quoting Blackstone, 2 Bl. Com. 429 (Hammond’s edition 651))).
41 See supra note 29 and accompanying text.
ordinarily only for the purposes of burial,” and thus did not amount to a constitutionally protected interest.42

Indeed, the term “quasi-property right” is a dangerous misnomer for what are, in reality, either “burial duties imposed by law on the next of kin”43 via statute, or a legal fiction “evolved out of thin air to meet the occasion [of protecting] the personal feelings of the survivors” in the context of common-law tort actions.44 Acknowledging this reality, “it is important to note that the use of the word ‘property’ is for convenience rather than assignment of broad rights.”45 These misnamed “quasi-property rights” do not arise out of any interest in the body as a physical thing, but rather out of external practicalities and social need to facilitate corpse disposal and protect families from the emotional harm of mishandling corpses.46 Accordingly, the burial duties and tort claims that a family has with regard to a dead body should not be considered to rise to the level of a constitutionally protected “property” interest in the corpse in any meaningful sense of the word.47

Statutory law on anatomical gifts also informs the due process analysis of what substantive property rights in a body state law grants the next of kin.48 The Brotherton and Newman courts noted that state statutes allowed the family to object to the removal of the

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43 See Remigius N. Nwabueze, The Concept of Sepulchral Rights in Canada and the U.S. in the Age of Genomics: Hints from Iceland, 31 RUTGERS COMPUTER & TECH. L.J. 217, 243 (2005); see also Newman v. Sathyavagiswaran, 287 F.3d 786, 800-01 (9th Cir. 2002) (Fernandez, J., dissenting) (distinguishing the burial duties that the state imposes on a family with actual property rights).
45 Id. (illustrating how burial duties in a body fall outside the traditional notion of property rights by describing such duties as “[a] ‘property right’ . . . which did not exist while the decedent was living, cannot by 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.”).
46 That is, the “right” to be the exclusive person charged with the task of burying the body and the “right” not to suffer a willful tort involving the corpse of a relative.
47 See Riley v. St. Louis County, 153 F.3d 627, 630 (8th Cir.1998), cert. denied, 525 U.S. 1178 (1999). To find that these common-law “rights” support recognition of a property interest in the corpse would conflates state regulation of conduct that merely relates to a corpse, with exclusive legal rights in the corpse itself.
48 Board of Regents v. Roth, 408 U.S. 564, 577 (1972).
corneas and also to make other anatomical gifts on the decedent’s behalf. The courts considered these statutory rights of the family to control the transfer of tissue and organs to be a property-like interest in the body, which supported finding a constitutionally protected property interest. While the analysis and outcome in those cases have been the subject of much criticism, it is clear that these statutory gift rights weighing in favor that outcome would be lacking in a full-organ opt-out system. That is, in such an opt-out system, there would be no such statutory allowance for a family to either make or refuse an anatomical gift on behalf of the deceased because the law would place the onus of deciding to make an anatomical gift exclusively on the individual. Thus, in a challenge to a full-organ presumed consent system, this statutory law would not favor a finding of a constitutionally protected property interest, but rather would weigh against such a finding. Thus, neither the misnomer “quasi-property rights” at common-law nor statutory law would amount to a property interest of the family in the dead body of a relative who chose to donate.

Beyond the lack of a property interest in dead bodies in substantive terms, federalism concerns also warrant the same conclusion. Given that state law is the guiding beacon in determining the existence of a property interest, finding a property interest in dead bodies would ignore state law that clearly sets forth the “no property rule” in dead bodies. For a

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49 Newman v. Sathyavaglswaran, 287 F.3d 786, 792-94 (9th Cir. 2002); Brotherton v. Cleveland, 923 F.2d 477, 482 (6th Cir. 1991).
50 Id.
52 See, e.g., Picon v. County of San Mateo, C-08-766 SC, 2008 WL 2705576 (N.D. Cal. July 10, 2008) (“Unlike the provision governing corneas in Newman, this statute vests sole discretion with the coroner [to retain parts of the body for autopsy purposes], with no allowance for [family] objection. Newman only found a property interest because of the allowance for objection; as such allowance is not present here, this statute cannot be said to confer a property right.”).
53 See Board of Regents v. Roth, 408 U.S. 564, 577 (1972).
54 Brotherton, 923 F.2d at 482-84 (Joiner, J., dissenting) (noting that Ohio law “has made it very clear that there is no property right in a dead person’s body” and asserting “thus, the court is wrong in its holding that the procedural
federal court to improperly supplant state classifications of property with a subjective notion of what it thinks must inescapably fall within the core concept of property, regardless of those state classifications, would stray from the federal due process jurisprudence that has always deferred to state law as the source of property interests.\(^{55}\) Yet such a misapplication of due process analysis is exactly what the 9th Circuit did in *Newman*, saying that “because the property interests of next of kin to dead bodies are firmly entrenched in the ‘background principles of property law,’ based on values and understandings contained in our legal history dating from the Roman Empire, California may not be free to alter them.”\(^{56}\) To the contrary, California *is* free to alter them and can define property however it wants (Roman Empire be damned) because for due process purposes, federal courts must defer to those substantive definitions.\(^{57}\) As explained by the California Court of Appeals, criticizing the *Newman* court’s analysis, “[t]o find a [due process] violation, the federal court is supposed to *apply* state law, not *rewrite* it.”\(^{58}\)

Like the fabricated “quasi-property rights” in the tort context, a constitutional property interest in a dead body would also be “evolved out of thin air” to protect the family’s personal feelings.\(^{59}\) But to the extent that the family’s feelings are harmed and need protection, state tort remedies already provide such protection, and therefore federal courts ought not “federalize” the law of torts by “turning every alleged injury . . . into a violation cognizable by the Fourteenth Amendment.”\(^{60}\) While, “[n]obody who has had the misfortune of having his loved ones die can...

\(^{55}\) See Roth, 408 U.S. at 577.

\(^{56}\) See, e.g., Newman v. Sathyavagilswaran, 287 F.3d 786, 797 (9th Cir. 2002).

\(^{57}\) Roth, 408 U.S. at 577.

\(^{58}\) Perryman v. County of Los Angeles, 63 Cal. Rptr. 3d 732, 740 (2007) (declining to accept the *Newman* court’s finding of a property interest) (emphasis in original).


\(^{60}\) Paul v. Davis, 424 U.S. 693, 701 (1976) (advising that courts ought not “make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States”); see Arnaud v. Odom, 870 F.2d 304, 308 (5th Cir. 1989) (declining to find a constitutionally protected quasi-property interest in...
fail to be moved by the prospect that somebody else will treat the loved one’s former earthly vessel with disrespect[,] [t]hat feeling does not, however, demonstrate that [the state] has conferred a constitutionally protected property right upon family members.”

_Brotherton and its Progeny_62

Notwithstanding the substantive and federalism reasons against finding a property interest in dead bodies, two federal courts have done just that. The Sixth Circuit’s decisions in _Brotherton_ and _Whaley_ and the Ninth Circuit’s in _Newman_ led to the demise of the consent coroner release statutes and continue to raise unease about the constitutionality of presumed consent generally.63 Their due process analysis, however, is highly problematic and thus should be confined narrowly to the “peculiar context” of the coroner release statutes, not as broadly establishing property interests in corpses.64 Indeed, the opinions read as somewhat outcome-oriented and desperate “tautological mission[s]” to vindicate the sympathetic family members against apparent wrongdoing of coroners,66 disregarding along the way the careful balance of state-federal law contemplated by due process jurisprudence.

At their hearts, the cases were about punishing coroners for “infring[ing] the dignity of the bodies . . . without consent from the parents,” and thus, were tacit reprobation of the coroner

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61 Newman v. Sathyavaglswaran, 287 F.3d 786, 801 (9th Cir. 2002) (Fernandez, J., dissenting).
62 After _Brotherton_ the Sixth Circuit decided a nearly identical case, _Whaley v. Tuscola County_, 58 F.2d 1111 (6th Cir. 1995), consistent with _Brotherton_. In the wake of these cases, some lower courts began to expand _Brotherton_’s holding that there can be a constitutional property interest in dead bodies generally, see, e.g., _Hainey v. Parrott_, 2005 WL 2397704 (S.D Ohio Sept. 28, 2005), but the Ohio Supreme Court and Sixth Circuit later addresses these expansions, holding them improper. _See Albrecht v. Treon_, 617 F.3d 890, 898 (6th Cir. 2010); _Albrecht v. Treon_, 118 Ohio St. 3d 348, 355 (2008).
63 _See supra_ note 24 and accompanying text.
64 Bonnie, et. al, _supra_ note 51, at 746-48.
65 Crothers, _supra_ note 51, at 652-53.
66 In these case the coroners’ conduct was arguably egregious or disrespectful—routinely removing corneas without first consulting the decedent’s medical record or without making any effort to determine if either the decedent or the family objects. _Newman_, 287 F.3d at 788; _Brotherton v. Cleveland_, 923 F.2d 477, 478-79 (6th Cir. 1991).
release statutes themselves as bad public policy. Yet since judges are hesitant to overtly “legislate from the bench” and overturn laws simply because they find the public policy implications unwise, the Sixth and Ninth Circuit courts stretched concepts of due process property interests, straying from the state-deferential due process jurisprudence, as the inappropriate means to achieve this end. In light of the clunky application of due process property interest analysis to non-property objects, the cases really sound more in tort actions for emotional distress than they do of civil rights claims for the deprivation of property.

Arguably the coroner release statutes were bad policy—but they were bad policy because they were non-transparent, appeared secretive and dishonest, and ultimately caused people emotional trauma, not because they deprived people of a valuable property interest. That is, the offense was not that corneas were taken per se (as the family really has no interest in the corneas themselves) but rather was an emotional affront to the family because the corneas were taken inconsiderately and insensitively. Moreover the corneas were taken without any credible conception of consent: people generally did not know about the coroner release statutes and thus did not know that they needed to opt-out while alive if they did not want to donate their corneas. In essence, the coroners’ conduct was viewed as malfeasance and the harm was emotional in nature, identical to that typically remedied under tort claims for mishandling.

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67 Newman, 287 F.3d at 798; see Brotherton, 923 F.2d at 482.
68 See F.C.C. v. Beach Communications, 508 U.S. 307, 313 (1993) (“Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. . . . This standard of review is a paradigm of judicial restraint. The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.” (citation omitted)).
69 See Board of Regents v. Roth, 408 U.S. 564, 577 (1972).
70 See, e.g., Brotherton v. Cleveland, 141 F. Supp. 2d 894, 902 (S.D. Ohio 2001) (approving settlement of “fair and reasonable compensation to be paid to claimants based on a number of factors, including . . . any emotional distress caused by learning of the taking of the corneas”).
71 See Goodwin, supra note 22, at 2, 4, 13, 22, 36.
72 See e.g., Brotherton, 141 F. Supp. 2d 894.
73 See Goodwin, supra note 22, at 2, 4, 13, 22, 36.
Thus, the coroner release statutes suffered from a lack of pre-extraction procedures that would have been respectful to the family. The courts then conflated this lack of process to respect the family’s emotional interest with a constitutional requirement of due process, and to fit the analysis, creatively stretched the definition of a constitutionally property interest to include dead bodies. The challenges to the coroner release statutes in Brotherton and Newman were tort claims dressed up as a section 1983 claims, and the courts went along with it.

Because, however, a full-organ presumed consent system would have substantially more procedure built into it than the coroner release statutes, this nuanced context of the claim should not arise. Similarly, doctors acting respectfully and responsibly under an opt-out system, that is, following the known donation preference of the decedent, would not illicit the same feeling of malfeasance and contempt that arguably compelled the courts to let their empathy guide their judgment rather than the law. Moreover, in an opt-out system with a strong conception of actual, albeit tacit consent to become an organ donor, it becomes very difficult for the family to claim a property interest in organs that the decedent had already decided to gift upon his or her death.

Therefore, even though two circuit courts have wrongly found a property interest in a dead body in the context of coroner release statutes, both the statutory law and the factual circumstance would be very different if a similar claim were brought in the context of a full-organ opt-out system. Both state and federal courts continue to struggle with the question of

74 See Arnaud v. Odom, 870 F.2d 304, 308 (5th Cir. 1989) (recognizing that the emotional harm suffered by the family members of a deceased whose body was mistreated by a coroner resembles harms that are remediably by state tort action); Fuller v. Marx, 724 F.2d 717, 719 (8th Cir. 1984) (same).
75 See infra Section VI.
76 See supra note 66, and accompanying text.
77 See infra Section IV, Part 2 & Section VI.
whether and in what contexts a due process interest may exist in dead bodies, but the latest cases reject a broad reading of Brotherton and appear reluctant to find a constitutionally protected property interest in the bodies of deceased relatives. Thus, if a due process claim were brought against the opt-out system proposed herein, it is unlikely a court would find that the family had a property interest in the organs of the dead body.

2. Deprivation

Furthermore, even if there were a property interest in the dead body, it is debatable that the removal of organs would necessarily constitute a true deprivation of that property interest. In the proposed opt-out system any existing property interest in the dead body would have to derive from the family’s burial duties because the family would have no statutory gift-law rights in the dead body. Thus, arguably the removal of organs would not technically interfere with the family’s ability to bury the body. The question then becomes whether the family’s burial right is construed as the right to bury the body whole and intact. Since burial “rights” are actually

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78 This is largely seen in the Albrecht and Waeschle line of cases, which retreat from Brotherton. Both cases confine Brotherton’s analysis to the context of the state’s anatomical gift laws, and find that the next of kin has no constitutional property interest in organs removed during an autopsy. See Waeschle v. Dragovic, 576 F.3d 539, 549-50 (6th Cir. 2009); Albrecht v. Treon, 617 F.3d 890, 896-97 (6th Cir. 2010) cert. denied, 131 S. Ct. 1047 (2011); Albrecht v. Treon, 118 Ohio St. 3d 348, (Ohio 2008).

79 Albrecht, 617 F.3d at 894. (“At issue in Brotherton, however, was part of Ohio's adoption of the Uniform Anatomical Gift Act, which expressly granted next of kin the right to dispose of a relative's remains. There is no similar statute at issue in this case. . . . Furthermore, this Court and the Supreme Court of Ohio agree that Brotherton applies only in the narrow circumstance of unauthorized removal of body parts for donations, and should not be expanded to include claims by next of kin for bodily tissues retained by a government official for legitimate criminal investigations.”) (emphasis added) This language suggests that authorized removal of body parts, that is, conscious decisions to donate, are beyond the reach of Brotherton.

80 Without statutory rights to make or refuse anatomical gifts, any finding of a property interest in a dead body would only find support in common-law rights and duties related to the dead bodies (e.g., burial duties, tort claims). See supra Section 2, Part 1, at 9; see also Brotherton, 923 F.2d at 481; Newman, 287. F.3d at 793.

81 Post-Brotherton and Newman, courts have held that whatever property interest families have in a dead body, the unauthorized removal of organs for legitimate reasons such as an autopsy does not violate that property interest. See Albrecht, 617 F.3d at 894 (finding that the family had no constitutional property interest in any organs retained by the coroner for additional forensic testing).
state-imposed duties that the family bears, this question is debatable. The state imposes the duty of burial on the surviving family because it lacks the practical resources to dispose each citizen’s bodies itself. Since the state imposes this duty, or, phrased different, exclusive right to fulfill that duty, what would prevent the state from modifying the duty to disposing of the body only after the state has removed vital organs needed by other members of society? Admittedly this view embraces a very communitarian view of the human body, and is likely to be met with emotional and ethical objection. But in light of how “burial duties” emerged as part of the social contract with the government, it is not absurd to suggest that those burial duties be contingent on how the state chooses to define them. Thus, if nothing in one’s custodial right to exclusively fulfill their burial duty stipulates that the body must be whole, taking organs from the body would not interfere with the narrow property interest in a dead body and thus would not amount to a deprivation. Thus, a procedural due process claim might also fail for lack of a deprivation.

A related but separate legal challenge is that there exists a fundamental right to burial that is so implicit to our systems sense of liberty that it would be protected by the due process clause under substantive due process analysis. No case law supports this claim. The few cases to address the possibility of a fundamental burial right conclude that it does not exist. Moreover, an extremely cautious jurisprudence with regard to expanding substantive due process liberties also weighs against such an argument. The Constitution does not prohibit every government

82 Nwabueze, supra note 43, at 240-45.
83 Id.
84 Id.
85 See State v. Powell, 497 So. 2d 1188, 1193 (Fla. 1986) (“We find that the right of the next of kin to a tort claim for interference with burial . . . does not rise to the constitutional dimension of a fundamental right traditionally protected under either the United States or Florida Constitution”); see also Arnaud v. Odom, 870 F.2d 304, 311 (5th Cir. 1989) (“As intimate as the right is of next of kin to possess the body of a loved one in the same condition as the body was at death, we are unable to extend over that right the constitutional umbrella of substantive due process on the facts of the instant case.”); cf. LaCava v. Lucander, 58 Mass. App. Ct. 527, 532-33 (2003) (finding no fundamental right to be buried in a cemetery of one’s choosing).
86 Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) (“As a general matter, the [U.S. Supreme] Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible
intrusion into one’s private life, especially when the intruding statute addresses public health initiatives.87 As the court notes in Powell, the objection to removal of organs for human transplant was not based on any “fundamental tenets of their religious beliefs.”88 Indeed, most mainstream religions endorse organ donation.89 Thus, in the absence of a fundamental right, “the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.”90

3. State Actor

Even if there were a property interest and deprivation, it is unclear that the actions of hospitals and organ procurement organizations (“OPO”)91 in procuring organs for donation would necessarily constitute “state action,” necessary for protection under the due process clause.92 Whereas the due process claims in Brotherton and Newman were against the medical examiner’s office,93 an obvious state entity, the challenged conduct of a full-organ presumed consent system would often result from the actions of non-state entities. While government owned public hospitals would meet the criteria of state actor, private hospitals, OPOs, and

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87 Powell, 497 So. 2d at 1193.
88 Id. (citing Wisconsin v. Yoder, 406 U.S. 205, 218 (1972)).
93 Newman v. Sathyavagiswaran, 287 F.3d 786, 786-87 (9th Cir. 2002); Brotherton v. Cleveland, 923 F.2d 477, 478-80 (6th Cir. 1991).
private physicians may be beyond the reach of the 14th Amendment, which “erects no shield against merely private conduct.”

Although the OPOs would be engaging in conduct permitted by the state statute regulating organ donation and establishing the opt-out system, the government itself would still be completely removed from the specific decision-making behind the actual challenged conduct of organ procurement. That is, there would be no “close nexus” such that “it can be said that the State is responsible for the specific conduct of which the plaintiff complains.” Mere approval by the state of the actions of private parties “is not sufficient to justify holding the State responsible for those initiatives under the terms of the fourteenth amendment.” Although the state provided the legal framework for which organ procurement is facilitated, the challenged “decisions ultimately turn on medical judgments made by private parties according to professional standards . . . rather than dictated by any rule of conduct imposed by the State.”

When the state merely sets up the statutory machinery, a private party’s use of that machinery, “without the overt, significant assistance of state officials,” cannot transform private action into state action. Thus, while the state laws authorize organ removal and have structured how individuals can record their preference on donating their organs, the challenged conduct would be the result of decisions by private parties—the individuals, the doctors, and the OPO’s.

Indeed, applying Blum in the context of private doctors and hospitals, all circuit courts have declined to consider them state actors merely because they receive state funding and

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94 Blum, 457 U.S. at 1002.
95 Id.
96 Id. (holding that decisions by private physicians and nurses not state actions, even though nursing homes are regulated and partially funded by the state).
97 Id.
operate under heavy state regulation. Any more extensive discussion of the state actor analysis is beyond the scope of this paper, for which purposes it suffices to point out that the element of state action required for a section 1983 claim is also lacking, at least in regard to private hospitals.

4. **Without Due Process**

Lastly, a full-organ presumed consent or opt-out system would already have substantial “due process” built into it, unlike the coroner release statutes, which had minimal procedural safeguards. Indeed, it seems that the lack of respectful procedure was more troubling to the courts in *Brotherton* and *Newman* than the actual taking of the corneas. Due process, however, is a “flexible concept that varies with the situation,” and whether an existing procedure is adequate will depend on: (1) the private interest affected by the official action, (2) the risk of an erroneous deprivation through the procedures used and the probable value of additional safeguard procedure, (3) and the state’s interest.

Because the proposed opt-out organ donation system would have substantial procedures built-in, it seems unlikely that due process would require anything more. Unlike the context of the coroner release statutes repudiated in *Newman* and *Brotherton*, the proposed system would be open and transparent. People would be aware of the system and of the opportunity to opt-out; thus there would be a clear and convincing notion of consent, since individuals will have entered

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100 See *Newman v. Sathyavaglswaran*, 287 F.3d 786, 798 (9th Cir. 2002); *Brotherton v. Cleveland*, 923 F.2d 477, 478 (6th Cir. 1991).


the donor pool only by conscious choice. Whereas the risk of erroneous (nonconsensual) deprivations of corneas was high under the coroner release laws, it would be conceivably be very low in a soft opt-out organ donation system.

Accordingly, more procedure would do nothing to reduce errors further. Moreover, to decide whether an existing due process procedure is adequate, the court would assess the government’s interest and would likely recognize the significant beneficial role of the full-organ presumed consent system in providing people with much-needed transplants.  

III. UAGA and Gift-Law Principles

In addition to being constitutional, an opt-out system would also be consistent with the values embodied in the UAGA and gift law’s principles. Indeed, the proposed opt-out system could exist concurrent with the UAGA; the New York proposal would accomplish the transition from opt-in to opt-out simply by passing two laws that would function in tandem with the current donation laws, which would be left intact. Accordingly, the new system would still further the UAGA’s goals of respecting the donor’s wishes and maximizing organ procurement. It would continue to embody the importance of respecting a decedent’s wishes to make, amend, or refuse a gift. The change in design of recording the donation preference would be formalistic, not substantive.

104 Indeed, § 20 of the 2006 UAGA simply provides that “the [state department of motor vehicles] shall cooperate” with the state’s donor registry and § 19 provides that a gift is valid if executed in accordance with “the laws of the state . . . where it was executed.” The UAGA affords states discretion in setting up their own legal system for how the DMV is to record donation preferences in cooperation with the registry. See Rev. Unif. Anatomical Gift Act 2006 §§ 19-20.
105 The first changing the DMV form’s check-box to “opt-out,” the second prohibiting family members from overriding donation decision’s recorded through these forms. See supra note 5.
An opt-out system could also be consistent with the gift-law tenet of donative intent. Rather than being an affirmative action of opting-in, the donative intent would result from the donor’s inaction of not opting-out. The circumstances of the inaction are obviously very important: Whether the person has awareness and understanding of the option to opt-out, as well as actual ability to exercise the option are key in determining whether the individual failed to act or consciously decided not to act, and thus whether the inaction was a manifestation of donative intent. As discussed below, the proposed opt-out system differs from presumed consent in a key way by manifesting donative intent much more convincingly.

In a “wide” presumed consent system that would register everyone who does not affirmatively express an objection to donating, conceivably some individuals would die without ever considering whether to opt-out. Thus their indifference to or ignorance of the system would be mischaracterized as donative intent. In these instances, any notion of donative intent is not at all clear. Arguably, one can infer a person’s donative intent by his or her failure to act, just as any other type of legal intent can be inferred from circumstantial evidence. But the inference needs to be based on something more than the mere fact that the individual did not opt out. One could argue that popular consensus in favor of donation supports the inference, arguing that: most people want to donate their organs, and the people who want to donate do not opt-out, therefore if someone does not opt-out, they wanted to donate their organs. But the syllogistic fallacy is evident: clearly some people who fail to opt-out might not want to become donor. Such

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106 Presumed consent would also be consistent with the gift-law requirements of transference and acceptance, which pose no real problems.
107 See CHILDRESS & LIVERMAN, supra note 13, at 208-11.
108 See Orentlicher, supra note 18, at 317 (“Without a reliable method of opting out of presumed consent, presumed consent could easily operate to the particular disadvantage of vulnerable populations.”).
109 See, e.g., Derr v. Derr, 696 N.W.2d 170, 183 (Wis. App. Ct. 2005) (“Although donative intent is a question of subjective donative intent, ostensibly requiring factual resolution of the owning party's conscious subjective intent to make a gift, in most cases . . . we have resolved donative intent questions by means of legal inference.”).
110 See GALLUP, supra note 7, at 6.
a logical non sequitur is certainly not an intellectually satisfying proof of donative intent for all people who have not opted-out. Of course, hypothetically, in a system with perfect awareness and opportunity and no apathy to overcome, one could always infer donative intent confidently from the mere fact that someone did not opt-out. But that is an impossible system: we cannot know if someone decided not to act or failed to act for whatever myriad of external reasons. Thus, based on the mere fact that someone has not opted-out, without knowing if they consciously chose not to opt-out, it is difficult to satisfyingly conclude that he or she had donative intent. Therefore, it seems difficult to square the gift-law principle of donative intent with at least some presumed consent systems that are “wide.”

This is not to say, however, that donative intent can never be manifested by inaction. When we know with confidence that the decision not to opt-out was consciously made, actual donative intent is clearly manifested, although tacitly, by the inaction. A convincing conception of donative intent based on inaction thus necessarily depends on the population’s knowledge and understanding of the option to opt-out and actual opportunity to do so—proof that the individual consciously chose not to opt-out. A conscious decision not to opt-out is as much a manifestation of donative intent as is a conscious decision to opt-in to the current system. It is the clear volition in each instance that solidifies the individual’s desire, making it known to others. Thus, to satisfyingly embody the gift-law principal of donative intent, an opt-out system must function in a way that ensures the individual consciously chose not to opt-out, obviating any need for inference.

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111 Many of the European presumed consent systems fall into this category because they are “wide,” in the sense that they apply to everyone, not just those who are directly presented with the option. One could, of course, question the soundness of basing the United States’ donation system on gift law. That, however, is beyond the scope of this note.
113 See CHILDRESS & LIVERMAN, supra note 14, at 209-10 (detailing under what conditions tacit consent can be ethically valid).
114 Saunders, supra note 113, at 70.
Accordingly, under the proposed opt-out system, people would only enter the donor pool by consciously choosing not to opt-out when that choice is directly in front of them on a state-regulated form.\textsuperscript{115} In such a system, one’s consent itself is never actually “presumed,” but rather is actually conveyed; the only presumption is that the rebuttable default is donation rather than of no-donation, which accurately reflects positive public attitudes on organ donation.\textsuperscript{116} The question of donative intent and consent, however, raises some similar ethical concerns about individual autonomy and the role of families in donation decisions.

IV. Presumed Consent Would Be Ethical

Although an opt-out system could be constitutional and consistent with gift-law principles, ethical concerns may also pose a challenge to its implementation. Yet an opt-out system could be ethical and in some instances may even better capture individual altruism than the current opt-in system. The main ethical concern with opt-out systems generally is the possibility that someone is either unaware of or indifferent to the option to opt-out and thus becomes “inadvertent donors” upon their death, potentially against their actual wishes.\textsuperscript{117}

1. Individual Autonomy

For the same reasons discussed above concerning donative intent, a “wide” opt-out system that applies to everyone, and not just those who are presented with the option to opt-out, faces ethical issues.\textsuperscript{118} The concern in a wide opt-out system is that some of the people who entered the donor pool did not actually have altruistic desire to donate, but failed to opt-out due to apathy, inconvenience, or some other reason. Polling may mitigate the likelihood of these

\textsuperscript{115} See infra Section VI. Also, if the choice is never in front of them, they could always take affirmative actions to opt-in by joining a registry.
\textsuperscript{116} See GALLUP, supra note 7, at 6.
\textsuperscript{117} As opposed to those who did not want to donate and opted-out (non-donors) and those who wanted to donate, and consciously chose not to opt-out (willful donors). See CHILDRESS & LIVERMAN, supra note 14, at 218-19.
\textsuperscript{118} See supra Section V.
erroneous donations, given that roughly 78% of the population responded that they were “somewhat” or “very likely” to donate and roughly 30% said they would opt out in a presumed consent system.\textsuperscript{119} Thus, it seems that the people who truly do not want to donate would opt-out and those that remain in the donor-pool likely would have wanted to donate.\textsuperscript{120} Also, given that 78% of those polled expressed a wish to donate, only 53% were currently registered to do so,\textsuperscript{121} the presumed consent system may actually better realize individual autonomy in some instances by capturing the altruistic intentions of these people who have a desire to donate but have not registered due to apathy or psychological reasons.\textsuperscript{122} Even acknowledging that occasionally an inadvertent donor actually did not want to donate, presumed consent may still be justified if the frequency and harm of these “false-positives” (donations without altruistic desire) are likely to be outweighed by the frequency and harm of the “false-negatives” (non-donations despite existing altruistic desire) under the current system.\textsuperscript{123}

In contrast to a “wide” presumed consent system, the proposed opt-out system would only apply to those individuals who were presented with the actual opportunity to opt out, and thus, there theoretically should be zero false-positive donations.\textsuperscript{124} By ensuring that people enter the donor pool by conscious choice, the state respects individual autonomy and honors the recorded preference. Contrarily, the current system potentially misses the altruistic desire to donate of up to 25% of the population who wish to donate but are not registered and therefore

\textsuperscript{119} See GALLUP, supra note 7, at 20-21.
\textsuperscript{120} And this would make sense given a reasonable expectation that the people most opposed to becoming a donor would also be the people most likely to be aware of the organ donation system, and thus, the most likely to opt-out. Orentlicher, supra note 18, at 315-16 (“[W]e might expect those who oppose donation to be more scrupulous than those who desire donation about expressing their wishes.”).
\textsuperscript{121} See GALLUP, supra note 7, at 20-21
\textsuperscript{122} Some of these people might become donors if their family decided to make a gift on their behalf, in which case their altruistic desire would be realized. Because, however, families’ do not always make gifts, there are likely still people whose un-stated desire to donate goes unrealized in the current opt-in system.
\textsuperscript{123} See Orentlicher, supra note 18, at 314-15; CHILDRESS & LIVERMAN, supra note 14, at 218-29; Michael B. Gill, Presumed Consent, Autonomy, and Organ Donation, 29 J. OF MED. & PHIL. 37, 40-44 (2004).
\textsuperscript{124} See supra Section III; infra Section VI.
might not ever become a donor. In terms of risked harm, a mistaken removal of organs (false positive) would violate the autonomy of the individual, but save lives; whereas the mistaken non-removal of organs (false negative) would violate the autonomy of the individual, and would not save lives. Since a violation of individual autonomy is inevitable in either system, the system with the greater social utility is preferable. Given an opt-out system’s much lower likelihood of autonomy violations (mistakes) and lesser harm when a mistake does occur, it is the better policy for protecting individual autonomy, erstwhile potentially increasing donation.

Moreover, merely shifting the rebuttable presumption in favor of donation would be ethically justified as an act of libertarian welfarism—the opt-out system encourages or “nudges” individuals to act in ways that benefits the overall social welfare, even when it may have no direct impact on their own utility. Setting the rebuttable presumption to donate is supported by polling, which in 2005 showed that over three-quarters of the population expressed a desire to donate their organs. And since anyone could easily rebut the presumption by checking the box, and since the majority of people express a desire to donate, efficiency would dictate that an opt-out system is preferred. The no-action default is a mere predication (presumption) of what the person is likely to respond that they want, but the person is free to indicate to the contrary. Changing the default rule from “no-donation” to “donation” could potentially increase organ donation, yielding large positive externalities benefiting social welfare that would outweigh

125 See GALLUP, supra note 7, at 20-21
126 See Gill, supra note 122, at 51 (“Respect for autonomy . . . does not imply that the duty to fulfill someone’s wishes not to be an organ donor is more important than the duty to fulfill someone’s wishes to be an organ donor; it implies, rather, that the two duties are the same.”).
127 See infra Section VI.
128 Russel Korobkin, Libertarian Welfarism, 97 CALIF. L. REV. 1651, 1677-80 (2009) (“[A] libertarian welfarist will choose default rules that encourage individuals to act in the best interests of society in general by minimizing negative externalities and maximizing positive externalities.”).
129 See GALLUP, supra note 7, at 6.
130 See CHILDRESS & LIVERMAN, supra note 14, at 210.
131 See infra Section V & VI, Part 2 & 3.
the detriment to any few individuals who may lack altruistic desire to donate but for some reason fail to opt-out of the system.\textsuperscript{132} Thus, from a consequentialist or utilitarian perspective, the use of a default to maximize societal welfare is easily justified.

There remains, however, a non-consequentialist concern that setting a default conflicts with individual autonomy because it interferes with their right to make their own decisions.\textsuperscript{133} Admittedly a default does influence decision-making and therefore impinges decision-making autonomy to some degree. But if the question is presented in a way that still allows for meaningful individual choice, autonomy is preserved because “not every interference with the voluntary character of one’s actions interferes with a person’s ability to choose his mode of life.”\textsuperscript{134} The proposed opt-out system would give people this freedom of choice: a person can either consciously affirm the presumption of donation or rebut that presumption by checking a box.\textsuperscript{135} Merely shifting from a no-donation default (opt-in) to a default to donate (opt-out) system would subtly nudge, but not force, individuals to become registered donors. And this could ultimately raise donation rates to the benefit of society at large. Accordingly, because individuals would still have a choice and would still recognize that they have a choice, their autonomy would remain intact and respected.

2. Family Wishes

\textsuperscript{132} Korobkin, supra note 128, at 1679. And again, we would expect this to happen infrequently, due to the structure of a system such that people only enter the donor pool by having the option in front of them, or by their own affirmative actions to join a registry.

\textsuperscript{133} See Craig Smith, Daniel Goldstein, & Eric Johnson, \textit{Smart Defaults: From Hidden Persuaders to Adaptive Helpers} 10-12 (INSEAD Faculty and Research Working Paper, No. 20, 2008), available at http://www.insead.edu/facultyresearch/research/details_papers.cfm?id=19621. Accepting this argument, however, would also mean condemning an opt-in system, which also has a default that interferes with truly autonomous decision-making. Only a mandated choice system would avoid this problem, but faces its own tension with autonomy by forcing individuals to make a decision that they may not want to make.

\textsuperscript{134} Id. at 13 (citing \textsc{Gerald Dworkin}, \textsc{The Theory and Practice of Autonomy} 14, (1988)).

\textsuperscript{135} See Cass Sunstein and Richard Thaler, \textit{Libertarian Paternalism is Not an Oxymoron}, 40 U. Chic. L. Rev. 1159, 1162 (2003). \textit{But see} Smith, Goldstein, & Johnson, supra note 132, at 13-14 (doubting that any meaningful freedom of choice exists when decisions are plagued by cognitive errors). While cognitive errors from defaults certainly affect decision-making, they do not control decisions, and therefore Smith, Goldstein and Johnson are wrong to place so much emphasis on the affect of cognitive biases an conclude that they effectively foreclose free choice.
Under the proposed out-opt system, the decedents’ expression of their desire to donate their organs would preclude any objections to donation by the family.\textsuperscript{136} Prohibiting the family from overriding this donation decision is consistent with Section 8 of the current UAGA, placing the decedent’s own donation decision above any objections of others, because in both the current opt-in system and the proposed opt-out system, the donation preference results from a conscious decision of the individual.\textsuperscript{137} Since the state already knows with confidence what the individual’s donation preference is, there is no need to seek the family’s consent as a “next-best” source of ascertaining the decedent’s wishes. In this regard, the proposed opt-out system is more akin to the current opt-in system than to a presumed consent system, many in which family consent is routinely sought.\textsuperscript{138} As such, switching to an opt-out system would not alter the status quo precluding family members from overriding an individual’s decision to make a gift.

What would change is that the family would no longer have a role in making gifts on a decedent’s behalf, precisely because the state purportedly already knows the individual’s preference.\textsuperscript{139} Because the conscious decision to opt-out would be a clear manifestation of the individual’s intent not to donate, allowing the family to override that decision would be an unethical violation of his or her autonomy. Thus, the proposed opt-out system would not permit the family to make a gift over the decedent’s wishes not to for the same reasons explained

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\textsuperscript{136} See supra note 5.
\textsuperscript{137} Cf. REV. UNIF. ANATOMICAL GIFT ACT § 8(c) (“[A] person other than the donor is barred from making, amending, or revoking an anatomical gift of a donor’s body or a part if the donor made an anatomical gift of the donor’s body or the part under Section 5 . . . .”). This notion of placing the decedent’s expressed wishes as paramount and impervious to familial override would carry over to presumed consent.
\textsuperscript{138} And this difference makes sense. In “wide” presumed consent systems common in Europe, it is not clear that any individual registered to be a donor consciously chose to register, or was entered into the pool by their own inaction. Thus, in such systems, it makes sense to seek family consent as a proxy for the individual’s own desires. See Richards, supra note 15, at 389.
\textsuperscript{139} Assuming that the individual had received or renewed a driver’s license or state I.D. It is possible that the exclusion of the family from the gift making process may elicit some disapprobation from families that feel excluded from this very personal decision. But the decision is just that—personal, and when the person’s wishes are already known, there is no need for familial input. Thus, any outrage is misguided because, in effect, the proposed opt-out system epitomizes respect for individual autonomy by placing their known wishes paramount.
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above.\textsuperscript{140} As a result, while in the current opt-in system one may become a donor either by voluntarily registering \textit{or} through the family making a gift on one’s behalf, in the proposed opt-out system, the family has no opportunity to make a gift on one’s behalf. This reduction in opportunities for a donation to be realized may hamper the effectiveness of an opt-out system.\textsuperscript{141}

V. Would Presumed Consent be effective in increasing organ donation?

While an opt-out system in the U.S. could be legally and ethically defensible, whether it would be effective in raising donation rates is less than clear. As discussed briefly above, the proposed opt-out system would not be equivalent to a “wide” presumed consent system common in Europe. Nonetheless, their structure of recording preferences both set “donation” as the default option. Thus, looking into the effect that switching to a presumed consent system has on donation rates may prove helpful. There are studies that suggest opposite outcomes on presumed consent’s effectiveness in raising donation rates. Yet evaluating the studies and the strength of the arguments sheds some light on the debate.

Some studies have suggested that any given country’s donation rate depends on social, cultural, and operational factors and therefore conclude that “[p]resumed consent alone is unlikely to explain the variation in organ donation rates between countries.”\textsuperscript{142} Similar studies illustrate that countries with presumed consent do not tend to have higher donation rates than the U.S.\textsuperscript{143} Those points are conceded. They are, however, limited to inter-country comparisons and do not prove or disprove that for any given single country, all other factors remaining constant, a switch to an opt-out system would increase donation rates.

\textsuperscript{140} See supra notes 136, 137, and accompanying text.
\textsuperscript{141} See infra Section V.
\textsuperscript{143} Boyarsky, \textit{et al}, \textit{Potential Limitations of Presumed Consent Legislation}, 93 TRANSPLANTATION 136, 136-40 (2012). It is important when making such claims to distinguish between live and cadaveric donation rates, as many studies are not always clear about whether they refer to just cadaveric rates or a combined rate.
To address this question, an appropriate study would compare the donation rates within the same country before and after switching to an opt-out system. Unfortunately, such data is limited. Yet one study included analysis of the donation rates in three countries (Austria, Belgium, and Singapore) before and after switching to a presumed consent system. Each of the three countries showed an increase in donation rate of 20-30%. Although the study did not track external factors that may have influenced the donation rates, such as “increased publicity [of organ donation] and organizational and infrastructural changes,” the increase is still compelling for two reasons.

First, even accepting that influences outside of the legislative switch were contributing factors to the 20-30% increase, it seems farfetched that they accounted for the entire increase, thus suggesting that the legislative switch to presumed consent itself had some positive impact on donation rates. Secondly, any organizational or infrastructural changes likely occurred as a part of the implementing the legislative switch, and thus, they should be viewed as part-and-parcel to the legislative switch to an opt-out system. In that light, the switch to presumed consent (including the manner of its implementation) in those countries seemed to raise donation rates by approximately 20-30%. A separate study controlled other variables affecting a country’s donation rate and similarly concluded that presumed consent legislation alone accounted for a sizeable increase in donations.

Extrapolating these results to other countries, however, becomes tricky. When a country has low donation rates to begin with, changing to a presumed consent system may yield a large magnitude rate increase. But when a country already has comparatively high donation rates

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144 Rithalia, et al, supra note 141.
145 Id.
146 Id.
147 Id.
148 Supra Abadie & Gay, note 3, at 612-613.
(such as the United States), each additional increase in donation rates becomes increasingly more difficult to achieve. Thus, it cannot be said universally that switching to a presumed consent system would yield a 20-30% increase in donation rates. Nonetheless, the increase in those three countries suggests that a positive effect on donation rates generally accompanies a switch from an opt-in system to a presumed consent system. And while the proposed opt-out system would differ from a true presumed consent system, a transition to the proposed system would also conceivably yield some positive effect for this reason and additional reasons explored below.149

Perhaps the strongest arguments against the efficiency of an opt-out system are not in studies but rather in speculation—that switching would damage the relationship between the organ donation community and the public, ultimately lowering the donation rate.150 This would result from a large number of people opting out.151 Also, as noted above, switching from an opt-in system to an opt-out system would reduce the number of opportunities for a donation to occur. In an opt-in system, donation can result when the individual joins a registry or when the family donates on the decedent’s behalf. In an opt-out system, the only opportunity for a donation to occur is when the individual chooses not to opt-out.152

Additionally, social challenges to switching away from an opt-in system may also present barriers to effective implementation: public disapproval of Brazil’s adoption of a presumed consent system led to a sharp decline in donation and a summary reversion to an express consent system.153 Similar public outcry has marked Wales’ attempt to transition to a presumed consent system, but it is yet to be seen whether the country will become the first in the UK to adopt an

149 See infra Section VI, Part 1-3.
150 The current conversion rate is approximately 75 percent. This comprises both donations from individuals who opted-in to donation while alive and those family members on behalf on individuals who had not recorded their intentions. See OPTN DSA Dashboard Report, at 2, ASSOCIATION OF ORGAN PROCUREMENT ORGANIZATIONS.
152 Or, of course, if the individual affirmatively joins a donor registry outside the context of the DMV.
153 CHILDRESS & LIVERMAN, supra note 14, at 29.
opt-out system and whether the switch will increase donation rates.\textsuperscript{154} Similarly, legal challenges, although largely meritless as discussed \textit{supra} Section III, could have a devastating effect on the donation community both in terms of halting future donations and undermining the integrity, positive imagine, and relationship the donation and medical community has with the public.

Thus, even if presumed consent should theoretically increase donation rates, these logistical concerns, although speculative, remain serious potential barriers to implementing a presumed consent system or any opt-in system in a country that has historically been opt-in.

VI. A proposal to implement an opt-out system of organ donation

As briefly introduced earlier, this note advocates for adopting an opt-out system for recording organ donation preferences that differs from “wide” presumed consent in key ways. Thus, the proposal would most accurately be called simply an “opt-out system.”\textsuperscript{155} Such a system of obtaining organ donation preferences would be implemented through state Department of Motor Vehicles (“DMV”) whenever an individual seeks to renew or receive a driver’s license or state ID. The form would have a section informing people that if they do not wish to become an organ donor, they must check the box to opt-out. This system resembles the current system in many states that have an opt-it box, but would switch the default to “donation” rather than “no-donation.”\textsuperscript{156} The proposal also closely resembles the recent efforts of a New York bill that would “provide space on the [driver’s license] application so that the applicant may . . . opt-out of the New York state organ and tissue registry,” automatically enrolling any applicant who does


\textsuperscript{155} The term presumed consent may imply a system broader than the one proposed in this note, and thus may be misleading. It also carries with it some stigma and thus should be avoided for that reason also for the sake of seeking public approval.

\textsuperscript{156} For state-specific information about opportunities to register to be an organ through a state’s DMV, see Donor Information, The Unofficial DMV Guide, http://www.dmv.org/organ-donor.php.
not decline to be registered. Building on the New York bill, the opt-out system proposed here would also encompass state ID applications, as conceivably many individuals in urban areas do not drive. One potential logistical problem would be that people may not read the form carefully, do not notice the default option to the donation question has been switched, and therefore incorrectly record their preference. To insure against this, it would be prudent for the form to draw attention to the switch or for DMV’s to post notices that inform people of the switch.

This would differ from presumed consent in its purest form—a “wide” system in which everyone is presumptively added to the donor pool unless they themselves muster the initiative to take affirmative action. While such a system might be may be legal, ethically defensible, and effective in other countries, a modified form of an opt-out system would be most consistent with United States ideologies. The “presumed consent” would only apply to people who actually are presented with the option; thus the individual does not have to take affirmative action and overcome the burden of apathy in order to rebut the presumption that he or she would like to become a donor. Thus, switching from opt-in to opt-out, both which rest on the individual’s affirmative action, is more of a system design change rather than an entire system change.

As mentioned in earlier sections, this key limitation to the “presumed consent” aspect of the opt-out system is crucial to alleviating legal, ethical, and social tensions stirred up by the term presumed consent. Limiting the system only to those individuals who are actually

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158 Such as putting the question in a separate, bolded box, inserting attention-drawing language in capital letters, or using underlining or italics.
159 Arguably, by informing people on how to opt-out, the system runs the risk of having less people entry the donor registry. But as discussed infra Section VI, changing the wording is unlikely to have this effect.
160 See Richards, supra note 15, at 388-90.
161 Such ideologies meaning those rooted in a firm sense of individual choice, freedom, with minimal government intrusion, as opposed to more socially-oriented, communitarian European ideologies.
162 See supra note 7 and accompanying text.
presented with the option ensures that any decision to opt-out is consciously made, which comports with the gift-law principal of donative intent.\textsuperscript{163} Similarly, when an individual consciously expresses a desire to make an anatomical gift, it logically would impede the family members from claiming any constitutional interest in the body to prevent that donation from being realized.\textsuperscript{164} Limiting the opt-out mechanism to those who are confronted with the choice also theoretically eliminates the ethical risk of false-negatives—accidental donations made without altruistic desire.\textsuperscript{165} The system may also calm social anxiety about the government overstepping its boundaries—while the opt-out system’s default in favor of donation may be irritatingly presumptive, it hardly can be construed as governmental body-snatching.\textsuperscript{166}

1. The Importance of Wording and the Framing Effect

In a way, this system slightly resembles a required response or mandated choice approach, defined by the American Medical Association as a model in which “individuals are required to express their preference regarding organ donation at the time of performing a state-regulated task,” and theoretically the form would not be accepted unless the individual states a preference.\textsuperscript{167} The opt-out system would be also administered while the individual is performing a state-regulated task. But whereas a mandated choice model would ask “do you wish to become an organ donor?” and the individual would have to answer “Yes” or “No,” the opt-out model would present people a rebuttable presumption of becoming a donor, just as the current system presents the rebuttable default of not donating. Thus, while mandated choice is only about how the preference is recorded, an opt-out or opt-in system takes a presumptive stance about what that preference is, which thus dictates how the question is presented.

\textsuperscript{163} See supra Section III.
\textsuperscript{164} See supra Section II.
\textsuperscript{165} See supra Section IV.
\textsuperscript{166} Id.
\textsuperscript{167} Opinion 2.155 – Presumed Consent and Mandated Choice for Organs from Deceased Donors, AMERICAN MEDICAL ASSOCIATION.
In fact, how the question of becoming an organ donor is presented matters. It is a well-established phenomenon that the wording of a question substantially affects the answers. And this “quest-wording effect” or “framing-effect” has been proven in the context of obtaining an individual’s preference on whether to become an organ donor. Psychologists Eric Johnson and Daniel Goldstein suggest that “the problem of donor procurement is not one of changing people’s choices through education or incentives” but rather in how the request to become a donor is framed. Thus, “increases in donation rate could be achieved, quite cost-effectively, through a change in the way the question is asked.” Illustrating this point and question-wording effect, Johnson and Goldstein conducted an experiment in which they asked 161 individuals whether they would donate their organs, using one of three different question-wordings:

1. Participants are told to assume they had just moved to a state where the default was to not be an organ donor. Choice: confirm that they did not want to donate or change that status.
2. Participants are told to assume they had just moved to a state where the default was to be an organ donor. Choice: confirm that they wanted to donate or change that status.
3. Participants were required to choose whether they wanted to donate or not, with no prior default position. Choice: I want to donate my organs or I do not want to donate my organs.

The result was only 42% deciding to become an organ donor under Option 1 (an opt-in model with a no-donation default); 82% deciding to donate under Option 2 (an opt-out model, with donation as the default); and 79% deciding to donate under the neutral, free-choice third option (resembling a mandated choice model).

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168 Graham Kelton & Howard Schuman, *The Effect of the Question on Survey Responses: A Review*, 145 JOURNAL OF THE ROYAL STATISTICAL SOCIETY 42, 48, 51, 54 (explaining how question wording effect can have substantial impact on opinion survey responses, though noting that much about question wording effects is still unknown).
170 *Id.* at 1713.
171 *Id.*
172 *Id.*, see Kelly A. Carroll, *Does How We Ask for Organs Determine Whether People Decide to Donate?*, 7(9) AMERICAN MEDICAL ASSOCIATION, VIRTUAL MENTOR (2005) (discussing Johnson and Goldstein’s findings on the question-wording effect with regard to donation decisions).
Thus, how the question of donation was framed seemed to impact donation decisions more than the individual’s true preferences. Indeed, Johnson and Goldstein explain how preferences are *constructed* in response to options and are “not yet articulated in the minds of those who have not been asked.” But all sorts of factors and cognitive biases plague this ad hoc construction of this preference, \(^{173}\) collectively demonstrating a powerful framing effect: that the same question presented in different ways and yields different responses. \(^{174}\) Specifically, the study illustrated the power of default options in drawing higher responses than neutral open-ended questions. \(^{175}\) The “default effect” is “the effect that default options have on decision-maker’s uncertainty about their own preferences” and pulls people to “choose options presented as defaults more often than they otherwise would” if, instead, the option were presented neutrally. \(^{176}\) Many theories have attempted to explain what causes the default effect, attributing it to implied endorsement (“that people interpret the default as the recommended course of action”\(^ {177}\)), an effort-versus-apathy problem (that people “might not bother” to dissent from the default because of the effort involved in doing so); \(^{178}\) and various cognitive biases, \(^{179}\) largely rooted in loss aversion, (“that people may feel as if they somehow possess the default option and that giving it up would be perceived as a loss.”) \(^{180}\)

\(^{173}\) Johnson and Goldstein hint at this, suggesting cognitive biases play a role in explaining the default effect, but do not delve into the exact cognitive biases at work. This note now builds on their data.


\(^{175}\) Compare wording 1 with wording 3. To a less extent, this is also seen in comparing wording 2 with wording 3.


\(^{177}\) The implied endorsement explanation is actually more accurately described as part of a separate cognitive bias, the social desirability effect. See infra Section VI, Part 2.

\(^{178}\) See Smith, Goldstein, and Johnson, supra note 133, at 8.

\(^{179}\) A cognitive biases obstruct our rational decision-making by introducing irrelevant, complicating factors and leading us to false conclusions. They are “predictable tendencies that guide our behavior in cases where we have to act quickly, lack sufficient information, and fail to anticipate what our feelings and moods will be [later].” SUNSTEIN AND THALER, supra note 151, at 6.

\(^{180}\) The main loss-aversion biases used to explain default effects are the endowment effect, status-quo bias. For more on this, see Smith, Goldstein, and Johnson, supra note 133, at 7. This paper suggests other cognitive biases that may be behind the default effect specifically in the organ donor question context.
Outside the loss-aversion framework of cognitive biases, the acquiescence bias also explains why defaults are effective.\(^{181}\) When faced with a question or statement, acquiescence bias is the tendency to agree with that statement or question.\(^{182}\) The acquiescence bias thus makes an individual more likely to “agree” with a no-action default option, and not nay-say the presumption, regardless of the underlying issue. Because an opt-in system has the default option against donation, people are likely to “agree” with that position not to donate, even though they may have answered differently had the question been presented neutrally.\(^{183}\) Similarly, an individual would be likely to “agree” to the no-action default in favor of donation in an opt-out model simply because people have an easier time saying “yes” than “no.”\(^{184}\)

2. Other Cognitive Biases that Nudge People Toward Donation

In addition to the cognitive biases that explain default effects generally, an opt-out system exhibits additional and unique cognitive biases that “pull” the respondents toward the default to donation: the social desirability bias and the omission bias.\(^{185}\)

The social desirability bias is the tendency of people to respond in a way that they believe would be viewed approvingly by others.\(^{186}\) When presented with a no-action default, an individual might assume that the presumptive default is set to reflect the normative consensus,

\(^{181}\) Unlike the endowment effect and status-quo bias, the acquiescence bias has nothing to do with possession or continuity versus change. Indeed, it is a much simpler explanation rooted in terms of a base tendency toward agreement.

\(^{182}\) Baruch Fischhoff, Charles Manski, Elicitation of Preferences 116-17 (2000) (“[A]cquiescence bias results from a response style where the subject has a preference for agreeing or finds it easier to agree than to disagree. . . . [R]esponse acquiescence is wide-spread and pervasive. . . . If acquiescence bias is qualitatively important, wording a question as positive or negative will influence the measured rate of agreement in a population.”) (quotations omitted) (emphasis added).

\(^{183}\) This explains the gap between the 42% response to wording 1 and the 79% response for wording 3.

\(^{184}\) This explains why the wording 2 response was slightly higher than the wording 3 response.

\(^{185}\) While existing scholarship has explained the role of cognitive biases to the default effect, this area has not been fully explored. For example, it appears no one has yet discussed the omission and social desirability biases in the context of defaults to donation. Although the latter does resemble the notion of “implied endorsement,” more than a simply re-characterization of a factor, the social desirability bias further develops the explanation of the default effect in the specific context of pro-donation defaults.

the socially desirable outcome. In the context of defaults about organ donation, the social desirability bias complicates our preference-forming cognition. This is because an individual is likely to already have a positive perception of organ donation as socially desirable.\(^\text{187}\) Thus, an opt-in model’s default option of no-donation creates a conflicting message: that \textit{not} donating is the socially desirable normative consensus. This conflict then impedes the individual’s cognition and preference-forming—their previous impression of donation is now cast into doubt by the no-donation default. Conversely, an opt-out model’s default to donation would \textit{reinforce} the individual’s prior favorable impression of organ donation. This effect may then compel an uncertain or indifferent individual to accept the default to donate because the default presents donation as the unambiguous socially desirable option.\(^\text{188}\)

Omission bias also may be operative in explaining how defaults affect a person’s decision of whether to become an organ donor. The bias occurs when people view an action as more wrongful than an inaction, even though the two yield the same consequence.\(^\text{189}\) Accordingly, given society’s generally positive attitude toward organ donation,\(^\text{190}\) one might view donating as something one \textit{should} do and \textit{not} donating might be seen as somehow morally “wrong.” Thus, an individual might perceive it as more wrong to choose to opt-out (action) than to not choose to opt-in (inaction), even though both result in no donation. Accordingly, the omission bias might deter an individual from opting-out when faced with a default to donate because the individual imputes an additional sense of moral guilt to the \textit{action} of opting-out of becoming a donor.

3. The Opt-out Model’s Superiority

\(^{187}\) See \textit{supra} note 7 and accompanying text.

\(^{188}\) Whereas that same individual might \textit{not} have chosen to donate under the opt-in model due to the conflicting impressions of what is the socially desirable outcome.

\(^{189}\) \textsc{Daniel Barrels, Linda Skitka, Douglas Medin}, 139-42 \textit{Moral Judgment and Decision Making} (2009).

\(^{190}\) See \textit{Gallup}, \textit{supra} note 7, at 6.
An opt-out model thus operates as a nudge and would best account for and adapt to the various cognitive biases that mark our decision-making and preference forming about organ donation.\(^{191}\) Opt-in models suffer from the default effect, which actually deters people from donating when the default is *not* to donate.\(^{192}\) Although some have suggested that a mandated choice model is the best way to nudge individuals to become organ donors,\(^{193}\) it too is inferior to an opt-out model.\(^{194}\) Although a mandated choice approach would be a clear improvement from the current opt-in model, because it removes the negative default effects that nudge people away from donating, it does nothing to nudge people toward donating. It simply prompts people to make a decision, and thus it does not go far enough. An opt-out model would actually *work with* the cognitive biases and use the default effect to nudge people toward donating.\(^{195}\) A default to donation wording would thus optimize registration rates and best increase societal welfare.

**VII. An Opt-Out System Would Be One Step Among Many**

\(^{191}\) A nudge is “any aspect of the choice architecture that alters people’s behavior in a predictable way without forbidding options or significantly changing their economic incentives.” Nudges “work with our biases, and help prompt us, in subtle ways, to make decisions that leave us and, usually, society better off.” SUNSTEIN AND THALER, *supra* note 151, at 6-7.

\(^{192}\) That is, the framing effect of making the default *not* to donate pulls people toward that option of not becoming a donor, when those same people would choose to become a donor when asked the question differently. See Johnson & Goldstein, *supra* note 169 at 1317.

\(^{193}\) SUNSTEIN AND THALER, *supra* note 151, at 178-82. Although they concede the allure of an opt-out system, they conclude that the social and political backlash render it unworkable. This conclusion, however, was premised on a presumed consent system that would apply to *everyone* and would not routinely seek family consent. As such, their stark and bleak outlook on presumed consent is limited to such harsh systems, and would not apply to the proposed opt-out system in this paper and the New York bill, which apply more narrowly and respect family wishes.

\(^{194}\) K. Whyte, et al., *Nudge, Nudge, or Shove, Shove, The Right Way for Nudges to Increase the Supply of Donated Cadaveric Organs*, 12(2) THE AMERICAN JOURNAL OF BIOETHICS, 31-38 (2012) (criticizing the mandated choice model proposed by Sunstein and Thaler as undermining the rationale behind nudges). Whyte, et al, focus their criticism on Sunstein and Thaler’s failure to consider the circumstantial factors that affect one’s perceptions and state of mind when forced with a mandated choice. Unfortunately Whyte’s proposal is also flawed—while they note the importance of respecting families’ by giving them a role in the decision-making process in an opt-out system, they propose a broad opt-out system that applies to anyone who fails to take affirmative action to opt-out, as opposed to only those who have the option in front of them at the DMV. *Id.* They fail to note, more fundamentally, that a mandated choice does not actually *nudge* an individual to make a certain decision—it merely nudges them to make a decision. Thus, it does not go as far as it could or should.

\(^{195}\) For a fuller discussion about the ethicality of using defaults to maximize public welfare, see Smith, Goldstein, & Johnson *supra* note 133, at 8-16.
Switching to the proposed opt-out system would be a step in the right direction, but it would not be a “silver bullet” solution to the organ shortage. The U.S. can and should learn from the successes of Spain, which appear largely attributable to its investment in organizational initiatives and institutional training.\textsuperscript{196} Simply training physicians on how to approach the subject of donation with family members or having designated donation agents on staff could help increase family consent rates.\textsuperscript{197}

Additionally, efforts should be made to the people who do not go through the typical DMV process of obtaining a driver’s license or state ID, as they do not have the option in front of them, and therefore will be not entered into a donor registry unless they affirmatively do so. In a New York Times article, Richard Thaler challenged Steve Jobs to write an app that allows users to sign up as donors in their home state.\textsuperscript{198} Donate Life, among many other websites, currently provides such a service through a user-friendly online system that connects visitors to state registries.\textsuperscript{199} And responding to Thaler’s article, a private developer created a free iPhone app, DonateLives,\textsuperscript{200} though a parallel app is not yet available for Android devices.\textsuperscript{201} Innovative ideas to increase registration and educate people on organ donation would continue to be imperative, even in the opt-out system. Success in reducing the organ shortage will depend on the continuation of such innovation to increase registration and public education on donation.

\textsuperscript{197} Conceivably, though, having an organ donation agent on staff at hospitals could create a negative, perception that the hospital is overly eager to snatch people’s organs. Given the time-sensitive nature surrounding eligible donors, however, the practical benefits of such an agent might outweigh that risk.
\textsuperscript{199} Register as an organ, eye, and tissue donor, DONATE LIFE, http://donatelifeline.net/register-now/
\textsuperscript{200} See DonateLives, APP\textsuperscript{LE} ITUNES PREVIEW, http://itunes.apple.com/us/app/donatelives/id34334272?mt=8 (“This app was inspired by Richard Thaler’s column on organ donation in the New York Times on 9/26/09 and was developed for free by Serenity Integration, LLC”); see Bob Tedeschi, NEW YORK TIMES, Signing up as an Organ Donor, the Easy Way, October 12, 2010, available at http://www.nytimes.com/2010/10/14/technology/personaltech/14smart.html?pagewanted=all
\textsuperscript{201} Id. As of April 1, 2012, there is still no Android app to register as an organ donor.
Conclusion

The goal of this article has been twofold: to illustrate how an opt-out system such as that proposed in New York would differ from a typical presumed consent system in key ways making it legally and ethically viable, and second, to explain how such a system has the potential to increase donation rates. While a “wide” system of presumed consent, as seen in many European countries, would likely survive a constitutional challenge,202 it would be in tension with gift-law principals and ethical concerns of autonomy, and thus would likely not be well-received. Thus, the preferable option would be a narrower opt-out system that ensures that people join donor registries through conscious decisions and that retains an informal role of families to make their wishes known. Such a system would respect individual choice and eliminate the risk that people who do not wish to donate would mistakenly become organ donors. Moreover, having the default be in favor of donation creates positive signaling effects that could increase both registration rates.

It is crucial to realize that a shift from an opt-in model on a DMV form to an opt-out model would be a change in system design and not a full-blown legal change to a presumed consent system. It is thus equally crucial that the implications of a switch not be overstated or overblown. The danger of over-emphasizing and exaggerating the switch is that it would spark unwarranted fears of extreme government intrusion and ethical violations, the kind of concerns that are associated with the wide-presumed consent systems in Europe. Yet that would not be the

202 The narrower, opt-out system proposed in this paper would of course fare even better against a constitutional challenge. But even a claim against “wide” presumed consent system may have a difficult time establishing the property interest and state action elements of a due process claim. See supra Section II.
case, as this note has explained. The proposed shift would not result in the state making anyone’s decision for them.\textsuperscript{203}

Given the subtle, limited, and respectful nature of the opt-out system proposed here, even if the switch is ineffective, validating the predictions that an opt-out system would actually reduce donation rates, the system could easily be reverted without lasting damage to the donation community. There exists good reason to believe, however, that the switch would be effective in increasing donation rates because it would nudge people to decide to donate through by adapting to the cognitive errors implicit in our preference forming and preference forming. Accordingly New York’s bill proposing a limited opt-out system ought to pass into law, and the rest of the nation should follow.

\textsuperscript{203} The New York proposal consisted of two separate bills pertaining to organ donation simultaneously, one switched the DMV form from opt-in to opt-out, the other would remove the next of kin’s ability to challenge the deceased’s donation decision. \textit{See supra} note 5.