Notes

When an Anatomical "Gift" Isn't a Gift: Presumed Consent Laws as an Affront to Religious Liberty

By Carrie Parsons O'Keeffe

I. Presumed Consent in Texas

A. Texas statutes broadly authorize medical examiners to harvest body parts without consent.
B. Modern definitions of death that encompass brain death result in increasingly invasive organ harvesting under presumed consent statutes.
C. Presumed consent statutes in Texas do not provide effective or realistic refusal options.
D. Medical examiners and the transplantation industry earn huge profits from human cadavers seized under color of law.
E. Lax consent requirements encourage deliberate ignorance.

II. Respite: The Illegality of Presumed Consent Under Texas and Federal Law

A. Presumed consent is unconstitutional under the vigorous religious liberties guaranteed by the Texas Constitution.
B. Presumed consent violates the Texas Religious Freedom Restoration Act.
C. Presumed consent statutes cannot withstand challenge under the Free Exercise Clause of the First Amendment.

1. Coroner release statutes are not generally applicable.
2. Texas' presumed consent statutes infringe upon other constitutionally protected rights.

III. International Norms

IV. Conclusion

> Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either...; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical . . .[1]

What if the price of living in a civil society was not just money, but a piece of your body? Imagine for a moment that a stranger you have never met demands the right to your organs after your death, or the organs of a loved one who has just passed away. Does this stranger have a *right* to your body? Could the state legally redistribute body parts according to its vision of the greater good? Imagine further that your religion forbade organ harvesting after death. Could the state still exact this corporeal death tax even if it violated your religious law and traditional right to bury your loved ones intact?

The affirmative answer to these questions might surprise you. The average American, having heard pleas to give the "gift of life," generally assumes that organ donation is a personal and voluntary choice belonging to individuals and their families. Yet this is not necessarily the case. Under presumed consent laws, the state assumes that all of its citizens wish to donate their organs after death. One must affirmatively "opt-out" in order to avoid organ harvesting.

Initially, presumed consent sounds appealing as a means of curing organ shortage while simultaneously respecting the rights of those who object to post-mortem organ extraction. Yet closer examination reveals that "opt-out" rights are illusory. Those who object to organ transplantation face enormous difficulty and uncertainty in attempting to ensure that their organs or those of their family members are not harvested against their will, provided that they even know "presumed consent" laws exist. Grieving families seeking relief upon discovering that the corpses of their loved ones were dismembered without their consent under color of law are often denied recovery because of liability shields and a body of case law that is reluctant to acknowledge legal interests in the dead.

The reality of presumed consent is far closer to organ conscription than philanthropic choice. State invasion of the human body or its remains for utilitarian ends is an affront to liberty, privacy, and family rights. In addition, for the various Jews, Christians, Muslims, Buddhists,

---

1. Preamble to the Virginia Bill for Religious Liberty (originally written by Thomas Jefferson), *cited in* Everson v. Bd. of Ed., 330 U.S. 1, 12-13 (1946).

Confucians, and others who oppose organ donation on religious grounds, presumed consent severely burdens their free exercise of religion by precluding quintessentially religious burial rites. Freedom of religion would be quite farcical if it did not include the right of families to bury their dead whole, without the state picking over the remains of their loved ones.

This article focuses on presumed consent laws in the State of Texas. Part I analyzes the scope and implications of current Texas nonconsensual organ harvesting statutes. Part II examines the constitutionality of Texas' presumed consent laws under the Texas Religious Freedom Restoration Act, the Texas Constitution, and the Constitution of the United States. Part III explores international norms concerning human rights and organ harvesting. State, federal, and international law strongly suggest that presumed consent is both unconstitutional and immoral. An anatomical gift should be just that—a gift, rather than conscription under the guise of a voluntary contribution.

I. Presumed Consent in Texas

A. Texas statutes broadly authorize medical examiners to harvest body parts without consent.

Section 693.003 of the Texas Health and Safety Code pertains to the disposition of bodies under the control of the medical examiner.[2] The statute, which authorizes presumed consent, differentiates among harvesting procedures based on the distinction between visceral and non-visceral organs and tissues.[3] Visceral organs are defined as "the heart, kidney, liver, or other organ or tissue that requires a patient support system to maintain the viability of the organ or tissue."[4] Section 693.003 initially states that visceral organs may not be harvested without the consent of a family member from the priority scheme detailed in Section 693.004.[5] For non-visceral organs and tissues, however, the medical examiner is authorized to harvest them if "no reasonable likelihood exists" that family members can be identified or contacted within a four-hour period.[6]

---

2. TEX. HEALTH & SAFETY CODE ANN. § 693.003 (Vernon 1992).

3. *Id.*

4. TEX. HEALTH & SAFETY CODE ANN. § 693.001. (Vernon 1992).

5. TEX. HEALTH & SAFETY CODE ANN . § 693.003(a) & (b) (Vernon 1992); TEX. HEALTH & SAFETY CODE ANN. § 693.004 provides that: The following persons may consent or object to the removal of tissue or a body part: (1) the decedent's spouse; (2) the decedent's adult children, if there is no spouse; (3) the decedent's parents, if there is no spouse or adult child; or (4) the decedent's brothers or sisters, if there is no spouse, adult child, or parent.

6. TEX. HEALTH & SAFETY CODE ANN. § 693.003(c) (Vernon 1992).

Quite peculiarly, however, Section 521.405 of the Texas Transportation Code authorizes "the removal of the heart, lung, kidney, liver, or other organ or tissue that requires a patient support system to maintain the viability of the organ or tissue" if a family member "is not contacted within four hours after death is pronounced."[7] This statute expressly permits liberal unauthorized removal of visceral organs, which would seem to be precluded under the Texas Health & Safety Code. The statute grants broad immunity, providing that one "who performs an action authorized by this section is not civilly or criminally liable because of that action. Each medical examiner is encouraged to permit organ and tissue removal at the earliest possible time."[8]

Corneas may be extracted under similar circumstances. Section 693.012 of the Texas Health & Safety Code permits cornea extraction upon request from an authorized official of an eye bank if the decedent died under circumstances requiring an inquest, no objection from family members is known, and the removal will not interfere with autopsy or post-mortem facial appearance.[9]

In summary, the statutes pertaining to organ and tissue extraction broadly authorize the medical examiner to remove body parts from individuals not known to be donors, limited only by vague and arbitrary discretion concerning the likelihood that a family member of the decedent might be contacted. Even if family members subsequently discover the nonconsensual harvesting and pursue legal remedy, civil or criminal liability of the medical examiner is precluded. In fact, medical examiners are explicitly encouraged to facilitate speedy harvesting. For corneas, the possibility of contacting a family member is irrelevant. Extraction is limited only when it might interfere with the public's interest in ascertaining the cause of death or when cosmetic considerations are relevant. These minimal restraints leave medical examiners relatively free to harvest the tissues of decedents under their control without ever obtaining consent.

B. Modern definitions of death that encompass brain death result in increasingly invasive organ harvesting under presumed consent statutes.

Modern technology has dramatically altered the legal definition of death. Traditional legal standards for determination of death focused on

---

7. TEX. TRANSP. CODE ANN. § 521.405(b) (Vernon 1999).

8. TEX. TRANSP. CODE ANN. § 521.405(c) (Vernon 1999).

9. TEX. HEALTH & SAFETY CODE ANN. § 693.012 (Vernon 1992); TEX. HEALTH & SAFETY CODE ANN. § 693.013 provides that: The following persons may object to the removal of corneal tissue: (1) the decedent's spouse; (2) the decedent's adult children, if there is no spouse; (3) the decedent's parents, if there is no spouse or adult child; or (4) the decedent's brothers or sisters, if there is no spouse, adult child, or parent.

permanent cessation of respiration and circulation.[10] Advances in artificial life support and the demand for organ transplantation led to the acceptance of brain death as a standard for determining death.[11] In Texas, both cardiac and brain death are recognized. Specifically,

> if artificial means of support preclude a determination that a person's spontaneous respiratory and circulatory functions have ceased, the person is dead when, in the announced opinion of a physician, according to ordinary standards of medical practice, there is irreversible cessation of all spontaneous brain function. Death occurs when the relevant functions cease.[12]

Determination of death is relevant to presumed consent because the majority of solid organs are harvested from patients whose respiration and circulation are maintained through artificial life support, but whose brain functions have perceptively ceased.[13] Acceptance of brain death as legal death is convenient for transplantation purposes, because "once a donor's breathing and heartbeat cease . . . the solid organs are damaged and quickly become nonviable for transplantation."[14]

Yet, even in the scientific community, brain death is not uncontroversial. Troubling evidence demonstrates that as many as twenty percent of allegedly brain dead individuals nonetheless register electrical brain activity on electroencephalograms.[15] The "brain dead" patient's heart rate and blood pressure have been known to rise upon incision and organ harvesting, suggesting response to stimuli.[16]

Nonetheless, brain dead patients are deemed deceased and are thus subject to presumed consent statutes. One victim of expedient presumed consent laws as applied to the brain dead was Arthur Forge, Jr. of Fort Worth, Texas.[17] When police found him in a field, unconscious and without identification, he was brought to John Peter Smith Hospital.[18] After he was declared brain dead, he was maintained on artificial life support for two days until his heart, liver, pancreas, intestines, kidneys, and one lung were harvested; at that point, he was disconnected from life

10. Eric C. Sutton, *Giving the Gift of Life: A Survey of Texas Law Facilitating Organ Donation*, 22 ST. MARY'S L.J. 959, 962 (1991).
11. *Id.*
12. TEX. HEALTH & SAFETY CODE ANN. § 671.001(b) (Vernon 1992).
13. Sutton, *supra* note 10, at 963.
14. *Id.* (citation omitted).
15. Maryellen Liddy, Note, *The "New Body Snatchers": Analyzing the Effect of Presumed Consent Organ Donation Laws on Privacy, Autonomy, and Liberty*, 28 FORDHAM URB. L.J. 815, 833 (2001) (citation omitted).
16. *Id.*
17. *Id.* at 815-16.
18. *Id.*

support.[19] Four days later, a simple fingerprint check revealed Mr. Forge's identity and the fact that his nephew had filed a missing persons report with the Fort Worth Police Department two full days before he was discovered in his unconscious state.[20]

Mr. Forge's story raises a number of concerns inherent to presumed consent in general, and the use of the brain death standard for nonconsensual organ harvesting in particular. First, his story demonstrates the unreliability of administrative procedures and the vulnerability of individuals in such unfortunate circumstances. Second, sustained artificial life support is itself controversial because many individuals would not wish to have their lives forcibly preserved in such a debilitated state. Most acutely disturbing is the fact that Mr. Forge, then an unidentified man, was sustained as "John Doe," a human being viewed predominantly as a vessel for organs needed by others. Only after he yielded his bodily harvest was he was laid to rest.

For many individuals of faith who oppose transplantation on religious grounds, stories like Mr. Forge's are terrifying and gruesome. While modern natural death statutes equate human life with registered functioning of the brain, religions often define life and death in terms of the relationship of the soul to the body. For example, in Asian cultures, "for the traditional-minded, death does not take place at a specific moment. The process of dying . . . involves not only heart and brain but soul."[21] Accordingly, many Asian countries do not recognize brain death as the legal standard of death.[22] In fact, in many world religious and cultural traditions, "brain death" does not conclusively establish death, and an individual whose lungs and heart still function is considered a live human being. For followers of these traditions, extraction of organs from a "brain dead" individual constitutes live dismemberment or murder. As noted by the Bellagio Task Force Report on Transplantation, Bodily Integrity, and the International Traffic in Organs,

> In the Middle East, religious precepts discourage and in places prohibit cadaveric organ donation. Islamic teachings emphasize the need to maintain the integrity of the body at burial, and although many religious leaders have sanctioned organ donation as a gift of life, others continue to object to the practice. So, too, some Orthodox Jewish rabbis sanction cadaveric donation on the grounds of "pekuach nefesh," the need to save a life. However, others reject the principle of

19. *Id.*

20. *The Sale of Body Parts by the People's Republic of China: J. Hearing Before the House Comm. on Government Reform and the International Relations Comm.*, 105th Cong. (1998) [hereinafter *China Hearing*] (testimony of Dr. David Rothman, Professor of Social Medicine, Columbia College of Physicians and Surgeons), http://www.house.gov/reform/hearings/ir-joint.

21. *Id.*

22. *Id.*

> brain death (equating it with murder), thereby making organ retrieval almost impossible. . . .
>
> Cultural barriers are no less significant in western countries. In the United States, for example, 53% of families (in one recent study) refused to allow their dead kin to become organ donors. Taboos against dismembering a dead body are far more widely shared than commonly appreciated.[23]

While the state must, as a practical matter, establish a reliable standard for classifying the dead, defining the rights of individuals and grieving families by modern technological theories alone when third parties stand to gain from such definitions is troubling. Modern and ever-changing science should not be the final arbiter of rights in a constitutional democracy. As explained by one court, "the law, equity and justice must not themselves quail and be helpless in the face of modern technological marvels presenting questions hitherto unthought of."[24] Even if the state continues to recognize both cardiopulmonary and brain death for other purposes, utilization of the brain death standard in the context of organ harvesting without explicit consent is extremely invasive and should be reconsidered.

C. Presumed consent statutes in Texas do not provide effective or realistic refusal options.

Honest appraisal of Texas' presumed consent laws reveals that even limited "opt-out" provisions are illusory. No provision is made for the objections of the decedent during his lifetime. Accordingly, a live person whose religion prohibits organ harvesting has no means of precluding the extraction of his body parts after his demise. He must rely entirely upon elements of chance, including whether he is carrying identification, whether there is a previously recorded familial objection, the time of his death, the location of his death, the availability of a family member who will respect his wishes within a brief window of time, and the policy of the medical examiner in the county of his demise with regard to nonconsensual organ harvesting.

Family members whose religions preclude organ harvesting bear a heavy affirmative burden to contact the medical examiner to avoid desecration of their loved one, assuming that they are even aware that laws permitting non-consensual organ harvesting exist. Indeed, presumed consent takes constructive notice to absurd new levels,

---

23. *Bellagio Task Force Report on Transplantation, Bodily Integrity, and the International Traffic in Organs*, International Comm. of the Red Cross (1997), http://www.icrc.org/icrceng.nsf.

24. *In re Quinlan*, 355 A.2d 647, 665 (N.J. 1976)

requiring that all citizens acquaint themselves with the intricacies of and contradictions between the Texas Health & Safety Code and the Texas Transportation Code. It is doubtful that many native-born and well-educated Texas citizens are aware that they carry such a burden, let alone immigrants, the homeless, and the underprivileged.

Furthermore, the family's contact with the medical examiner must be nearly immediate, as there is no window of time during which cornea extraction is prohibited and other body parts may be seized after merely four hours. Assuming family members are able to confront these obstacles and are not so ravaged with grief so as to be rendered incapable of contemplating these matters, they must rely upon whomever they reach by phone to convey their objection, thus rendering their loved one's remains subject to the uncertainty of a telephone message.[25] Medical examiners are not required to maintain refusal lists, nor are they required to adopt procedures to reliably record individual or family objections. Even if such objections were systematically recorded, another opportunity for administrative error arises when eye or tissue banks enter the scene.

Additionally, these procedures depend upon anticipating precisely in which county a person will die. In an increasingly mobile society, where individuals cross numerous counties and sometimes even state lines in their commutes alone, such a burden is unreasonable.[26] Families would have to contact the medical examiner of each and every county in which their family members travel. They might have to research the laws of other states. Depending on the policy of the particular county's medical examiner, they might be obliged to register their objection with the individual tissue banks involved as well. Yet not even the federal Food & Drug Administration knows about all the tissue banks operating in the United States.[27]

Remedies for wrongful organ harvesting are limited to negligence, gross negligence, or intentional tort remedies.[28] Considering the broad discretion granted to medical examiners, attempts to prove such claims are unlikely to succeed. Although the state, through organ conscription, permanently deprives families of their loved one's remains in order to

---

25. For a case involving alleged failure by a medical examiner's part-time investigator to convey a telephone message denying consent, *see* Korndorffer v. Baker, 976 S.W.2d 696 (Tex. App.—Houston [1st Dist.] 1997).

26. An intriguing inquiry beyond the scope of this paper concerns whether presumed consent laws impermissibly burden the constitutionally guaranteed right of interstate travel, U.S. CONST. art. 4, § 2, cl. 1.

27. *Tissue Banks: Is the Federal Government's Oversight Adequate?: Hearing Before the Permanent Subcomm. on Investigations of the Comm. on Governmental Affairs*, 107th Cong. 12 (2001) [hereinafter *Tissue Banks Hearings*] (testimony of Sen. Collins).

28. Texas law provides that one "who donates, obtains, prepares, transplants, injects, transfuses, or transfers a human body part from a living or dead human to another human or a person who assists or participates in that activity is not liable as a result of that activity except for negligence, gross negligence, or an intentional tort," TEX. CIV. PRAC. & REM. CODE ANN. § 77.003 (Vernon 2001).

benefit another individual, their loss is not considered a "taking" because bodies are not considered property under law.[29]

In summary, "opting-out" under presumed consent is not a genuine option. The stated intent of the Executive Committee of the National Conference of Commissioners on Uniform State Laws that drafted the Uniform Anatomical Gift Act (1987), upon which state presumed consent models are based, was to elevate societal need for organs over family interests in the body.[30] The very design of presumed consent necessarily limits family rights, and the ability to object to organ conscription is unrealistic and illusory.

D. Medical examiners and the transplantation industry earn huge profits from human cadavers seized under color of law.

Presumed consent laws pertaining to decedents under the control of the medical examiner are even more disconcerting when one considers recent revelations of profiteering by medical examiners and the tissue industry. In a recent congressional hearing evaluating the need for federal oversight of tissue banks, Senator Collins noted that "a single tissue donor can yield over $200,000 in revenue to tissue banks. Tissue banks make this money not by selling human tissue, which is illegal,[31] but by charging processing fees to the recipients of this material."[32] Tissue is processed by private, for-profit companies, which reportedly give money to non-profit tissue banks in return for exclusive rights to the tissue they collect.[33] Indeed, human tissues are a lucrative trade, with revenues expected to reach $1 billion by 2003.[34] One official noted that "the field is becoming more entrepreneurial."[35] Cosmetic use of human cadaver tissue is particularly profitable, with such tissues being used for lip enhancement, penile implants, and face lifts.[36]

---

29. For notable opinions rejecting a full property right in next-of-kin, seeState v. Powell, 497 So.2d 1188 (Fla. 1986); Georgia Lions Eye Bank, Inc. v. Lavant, 335 S.E.2d 127 (Ga. 1985).

30. Liddy, *supra* note 15, at 825.

31. Federal law states that it is "unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce," and specifies that valuable consideration "does not include the reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ," 42 U.S.C.A. § 274e(a) & (c)(2) (1991). Texas law provides that one "commits an offense if he or she knowingly or intentionally offers to buy, offers to sell, acquires, receives, sells, or otherwise transfers any human organ for valuable consideration," but makes an exception when valuable consideration consists of "a fee paid to a physician or to other medical personnel for services rendered in the usual course of medical practice or a fee paid for hospital or other clinical services," TEX. PENAL CODE ANN. § 48.02(b) & (c)(1) (Vernon 1994).

32. *Tissue Bank Hearings*, *supra* note 27, at 3.

33. *Id.* at 4 (statement of Sen. Levin).

34. *Id.* at 6 (statement of Sen. Durbin).

35. *Id.* at 9 (testimony of George F. Grob, Deputy Inspector General for Evaluation and Inspections, Office of the Inspector General, U.S. Department of Health & Human Services).

36. *Id.* at 7 (statement of Sen. Durbin).

With such enormous profit potential and the absence of any regulations pertaining to tissue usage, medical examiners enjoy prospects of significant pecuniary gain for the tissues they release under Texas law. A startling exposé by *The Chicago Tribune* reveals just such a situation in San Antonio, Texas:

> County supervisors even take bids from tissue banks on the right to bodies collected by the medical examiner. Last year, the winning contract went to South Texas Blood and Tissue Center, which agreed to pay $180,000 annually.
>
> "This is a business," said Vincent DiMaio, the Bexar County medical examiner. "People make a lot of money selling tissue."
>
> Since 1983, DiMaio has moonlighted as a tissue harvester, cutting bones and other parts from the bodies that passed through his office. Always, DiMaio insists, permission was given by the family of the deceased. The county, though, has spent more than $100,000 settling claims that he did not have permission.
>
> DiMaio has received up to $47,000 a year from tissue banks, according to county purchasing records. Several DiMaio assistants also received $50 from the tissue bank each time they obtained a family's consent to harvest tissue.[37]

Current presumed consent laws permit scandalous profiteering via the taking and selling of body parts without authorization under color of state law. Statutes preventing the sale of body parts for "consideration" leave significant loopholes that still allow the human body to serve as a commodity. Under the guise of philanthropy, presumed consent enriches both medical examiners and private, for-profit corporations.

E. Lax consent requirements encourage deliberate ignorance.

Medical examiners who aggressively promote organ harvesting have established policies of "intentional ignorance," whereby they deliberately do not seek consent from family members, even if they are available. In Ohio, whose presumed consent law pertaining to corneas is

37. Stephen J. Hedges, *Cadavers for Cash in Texas: 'People Make a Lot of Money Selling Tissue*, CHI. TRIB., May 22, 2000, at 10.

similar to that of Texas,[38] one medical examiner actively encouraged his subordinates *not* to seek information on objections to corneal removal and refused to give the Cincinnati Eye Bank the contact information for decedents' next-of-kin when asked.[39]

The "smoking gun" memorandum by the Ohio medical examiner provided unusual evidence upon which to base a claim for intentional deprivation of civil rights. In *Brotherton v. Cleveland*,[40] family members who had not consented to the cornea removal of their next-of-kin appealed to the United States Court of Appeals for the Sixth Circuit. The court held that state law granting families a quasi-property interest in their deceased family members constituted a "legitimate claim of entitlement" which would require pre-deprivation due process of law.[41] The resulting class action suit involved over 500 class members.[42] Such widespread objection to nonconsensual cornea harvesting in one county alone suggests that presumed consent is, in fact, presumptuous.

It is rare for medical examiners or others involved in tissue harvesting to express their intent as blatantly as Dr. Cleveland. The settlement in this suit was unusual, and other families affected by presumed consent face an uphill battle proving intentional injury. Nonetheless, the case is illustrative of the possibility for the abuse inherent in presumed consent laws, which rely upon known objections rather than requiring express authorization.

II. Respite: The Illegality of Presumed Consent Under Texas and Federal Law

Claims involving the removal of body parts without consent or claims regarding organ harvesting in excess of permission granted are frequently litigated as claims involving takings, equal protection, negligence, federal civil rights statutes, criminal statutes pertaining to interference with a corpse, and intentional infliction of emotional distress.[43] As of yet, there has not been a distinct claim that presumed

38. *See* OHIO REV. CODE ANN. § 2108.60.

39. Brotherton v. Cleveland, 141. F. Supp. 2d 894, 898 (S.D. Ohio 2001).

40. Brotherton v. Cleveland, 92 F.2d 477 (6th Cir. 1991).

41. *Id.* at 479.

42. Brotherton, 141. F. Supp. 2d at 901.

43. *See, e.g.*, In Re Quinlan, 355 A.2d 647, 665 (N.J. 1976); *Tissue Bank Hearings*, *supra* note 27, at 6 (statement of Sen. Levin); *Id.* at 9 (testimony of George F. Grob, Deputy Inspector General for Evaluation and Inspections, Office of the Inspector General, U.S. Department of Health & Human Services); Brown v. Delaware Valley Transplant Program, 615 A.2d 1379 (Pa. Super. Ct. 1992) (claiming mutilation of corpse, intentional infliction of emotional distress, civil conspiracy, and assault and battery); Lyon v. United States, 843 F. Supp. 531. (D. Minn. 1994) (alleging interference with dead body, intentional infliction of emotional distress, and negligent infliction of emotional distress); Kelly-Nevils v. Detroit Receiving Hosp., 526 N.W.2d 15 (Mich. Ct. App. 1994) (alleging negligence and unlawful mutilation of body); Perry v. St. Francis Hosp. and Med. Ctr., Inc., 886 F. Supp. 1551. (D. Kan. 1995) (alleging intentional infliction of emotional distress and outrage); Whaley v. County of Saginaw, 941. F. Supp. 1483 (E.D. Mich. 1996) (claim under 42

consent laws are unconstitutional on their face, or as applied, on religious liberties grounds. This is, perhaps, related to the scant success of families challenging presumed consent on other grounds and general despair over free exercise following the Supreme Court's decision in *Employment Division v. Smith.*[44] *Smith* did not overrule the Sherbert-Yoder strict scrutiny test for burdens on religious liberties,[45] but it did hold that neutral and generally applicable laws do not require elevated scrutiny, even if they incidentally burden the free exercise of religion.[46]

Nonetheless, grounds for relief are available in Texas under the Texas Constitution and the Texas Religious Freedom Restoration Act. Furthermore, *Smith* does not preclude federal relief under the United States Constitution, because presumed consent laws are not generally applicable and other constitutional rights are implicated, creating a hybrid scenario. Moreover, international norms and the moral devolution surrounding the increasingly rapacious demand for human organs provide powerful legal and policy arguments against presumed consent laws.

A. Presumed consent is unconstitutional under the vigorous religious liberties guaranteed by the Texas Constitution.

The State and people of Texas asserted their firm and binding resolve to protect religious liberty in the Freedom of Worship Clause of the Texas Constitution, Article I, Section 6, which states:

> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent. No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship. But it shall be the duty of the Legislature to pass such laws as may be necessary to protect equally every religious denomination

---

U.S.C.A. § 1983); Ramirez v. Health Partners of S. Arizona, 972 P.2d 658 (Ariz. 1998) (alleging battery, breach of contract, and intentional and negligent infliction of emotional distress); Mansaw v. Midwest Organ Bank, 1998 WL 386327 (W.D. Mo. 1998) (claim under 42 U.S.C.A. § 1983); George H. Lanier Mem'l Hosp. v. Andrews, 2001. WL 367596 (Ala. 2001) (alleging negligence and wantonness); Lions Eye Bank of Texas v. Perry, 56 S.W.3d 872 (Tex. App.—Houston [14th Dist.] 2001) (claim for mental anguish).

44. Employment Division v. Smith, 494 U.S. 872 (1990).

45. *See* Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205, 214 (1972).

46. *Smith*, 494 U.S. 872 (1990).

> in the peaceable enjoyment of its own mode of public worship.[47]

Subsequently, Section 29 of the Texas Constitution reiterates that "[t]o guard against transgressions of the high powers herein delegated, we declare that everything in this 'Bill of Rights' is excepted out of the general powers of government, and shall remain inviolate, and all laws contrary thereto . . . shall be void."[48] Accordingly, "the Bill of Rights serves as a shield against the powers and laws of government."[49] Thus, the framers of the Texas Constitution and its Bill of Rights contemplated that the freedoms they singled out for protection, including freedom of conscience, were inviolably beyond the reach of legislative interference.

First, it should be noted that the Texas Bill of Rights, in contrast to the federal Bill of Rights, appears at the very beginning of the Texas Constitution. The prominence of the Texas Bill of Rights asserts the state's founders' commitment to protecting the "general, great and essential principles of liberty and free government."[50] Second, the rules of construction in Texas demand that constitutional provisions be construed liberally.[51] Texas courts must recognize the special protections granted to personal freedoms, and they are bound to apply an individual, rather than societal, rights perspective.[52] Furthermore, when interpreting the Texas Constitution, courts should "rely heavily on the literal text"[53] and effectuate the plain language of the law.[54]

The plain language of the Texas Constitution is more all-embracing than that of the Constitution of the United States. The Texas Constitution recognizes an affirmative "natural and indefeasible right" to worship,[55] whereas the United States Constitution frames such right in negative terms by precluding legislative interference with religious worship.[56] Moreover, the framers of the Texas Constitution and the people of the State of Texas, in selecting its word choice regarding protection of conscience,[57] specifically sought to protect a broad category of conviction beyond that encompassed by the narrower term "religion."

---

47. TEX. CONST. art I, § 6.

48. TEX. CONST. art I, § 29.

49. Jackson v. Dietz, 940 S.W.2d 86, 90 (Tex. 1997).

50. TEX. CONST. art. I, § 1.

51. James C. Harrington, *Framing a Texas Bill of Rights Argument*, 24 ST. MARY'S L.J. 399, 412 (1993) (citing *Ex parte* Brown, 38 Tex. Crim. 295, 303, 42 S.W. 554, 556 (1897)).

52. *Id.* at 417 (citing LeCroy v. Harlon, 713 S.W.2d 335, 342 (Tex. 1986); DuPuy v. Waco, 396 S.W.2d 103, 106 (Tex. 1965)).

53. Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 394 (Tex. 1989).

54. *See* City of Beaumont v. Bouillon, 896 S.W.2d 143 (Tex. 1995); Mellon Serv. Co. v. Touche Ross & Co., 946 S.W.2d 862 (Tex. App.—Houston [14th Dist.] 1997).

55. TEX. CONST. art. I § 6.

56. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," U.S. CONST. amend. I.

57. TEX. CONST. art. I, § 6.

The language selected is unequivocal, proclaiming that human authority is not to interfere in the realm of religious belief "in any case."[58]

Although the article employs the term "ought" when describing the command of non-interference in religious affairs, Texas courts have asserted that the term is mandatory. Over a century ago, in determining whether it is permissible to distinguish seemingly directory constitutional provisions, the Texas Court of Appeals noted:

> [T]he great weight of authority seems to be the other way, holding that the courts nor any other department of the government are at liberty to regard any provision of the constitution as merely directory, but that each and every of its provisions must be treated as imperative and mandatory.[59]

Stating that it was unaware of any instance in which a Texas constitutional provision was held to be merely directory, the court adopted the doctrine that all constitutional provisions are always mandatory.[60]

Few court decisions have interpreted Section 6 of the Texas Bill of Rights, yet Texas courts have acknowledged that the "Texas Constitution grants greater religious freedom than is provided for in the United States Constitution."[61] Judges have recognized that "the framers of the Texas Constitution guarded religious liberty zealously, singling out this freedom for special treatment and protection. The bold language itself indicates that the rights and protections created in this section exceed those afforded by the United States Constitution."[62]

The Texas Supreme Court clarified that the Texas Constitution requires that strict scrutiny be applied in judicial review of religious freedom claims. In *State v. Corpus Christi People's Baptist Church, Inc.*,[63] the court explained that "if the complaining party demonstrates that it is burdened by the regulation, then the State must have a compelling state purpose for the laws."[64] Furthermore, in *Tilton v. Marshall*,[65] the court stated that the "government must show to the court that granting the [religious] exemption would significantly hinder a compelling state interest."[66] If plaintiffs can demonstrate a substantial burden upon the exercise of their religious beliefs, then the state is

58. *Id.*
59. Hunt v. State, 22 Tex. Ct. App. 396, 398, 3 S.W. 233, 234 (Tex. App. 1886).
60. *Id.* at 235.
61. Howell v. State, 723 S.W.2d 755, 758 (Tex. App.—Texarkana 1986).
62. Waite v. Waite, 64 S.W.3d 217, 227 (Tex. App—Houston [14th Dist.] 2001) (finding claimant's article I, § 6 claim not ripe for review) (Frost, J., concurring and dissenting).
63. 683 S.W.2d 692 (Tex. 1984).
64. *Id.* at 696 (Tex. 1984).
65. 925 S.W.2d 672 (Tex. 1996).
66. *Id.* at 678 (Tex. 1996).

obliged to demonstrate a compelling state interest and the lack of a less restrictive means of attaining state interest.[67]

In considering the burden that presumed consent inflicts upon grieving families, it should be remembered that *most* families are naturally extremely sensitive to the handling of their kin's remains. Those who would suggest that the human corpse is merely a shell without value would be hard pressed to explain why, decades after the Korean and Vietnam Wars, desperate families anxiously await the return of fallen prisoners of war for some hope of closure. Or why in the ruins of the World Trade Center, after endless hours of diligent searching, recovery workers halt in unison to honor every precious remnant of human remains recovered. Nor could they explain the outrage of dozens of Georgia families who discovered recently that, to their horror, their family members were not cremated according to their wishes. The simple fact of human history, still relevant in our time, is that treatment of the dead is crucial to the living, who suffer torment and agony when human remains are mishandled or dishonored.

That suffering is grossly exacerbated when dismemberment interferes with religious rites. Family members affected by organ conscription in contravention of their religious beliefs have suffered a permanent and irreparable harm. If a family's loved one was subjected to non-consensual organ harvesting while "brain dead," but the family's religious beliefs do not consider brain death to be death, the state has then gutted their next-of-kin while he was still alive. Regardless of whether harvesting was conducted pursuant to brain death or cardiac death, bereaved families know that strangers saw and handled the naked remains of their loved one, cutting into his flesh and removing his innards. Pieces of the loved one have been permanently removed and given or sold to someone else. The grieving process is cruelly elongated because burial according to religious law is effectively precluded. In some traditions, organ removal even prevents attainment of the afterlife.[68]

Surely, then, presumed consent statutes substantially burden the religious freedom of individuals who object to organ harvesting on religious grounds. The state, however, will likely argue that its presumed consent laws further the permissible governmental interest of protecting sight and life under its police powers. Assuming *arguendo* that the state's police powers are so broad as to encompass the right to extract, own, and transfer its citizens' body parts in the crudest form of bodily

67. *Howell*, 723 S.W.2d at 758.

68. "The idea of having a deceased relative whose body is not complete prior to burial or cremation is associated with misfortune, because in this situation suffering in the other world never terminates." *China Hearing*, *supra* note 21. (testimony of Dr. David Rothman, Professor of Social Medicine, Columbia College of Physicians and Surgeons) (citation omitted).

redistribution, the state nonetheless fails in that presumed consent is not the least restrictive means of furthering its goals.

A more reasonable option is promoting public awareness of organ shortage and encouraging genuine organ donation. Although it was the failure of such efforts that prompted presumed consent laws, the fact that individuals do not designate themselves as donors even after learning about organ shortage has certain implications. If the public at large supports organ transplantation so overwhelmingly, it should then follow that individuals voluntarily announce themselves donors. Speculation of those who support transplantation that the absence of volunteerism is related to mere laziness or the inability to confront death does not adequately support audacious state legislation presuming that all citizens authorize the physical invasion and extraction of their remains by the state.

Another less restrictive alternative suggested by some commentators is "mandated choice."[69] Under mandated choice, all individuals obtaining state identification are asked whether they wish to be organ donors. Rather than imposing the state's choice upon its citizens, the state could impose the lesser restriction of requiring citizens to make their own choice. Individuals unable to confront their future demise could simply refuse to donate initially, and thereafter amend their decision if they subsequently change their minds. Mandating a choice is certainly less restrictive than mandating a decision.

Some would suggest that genuine opt-out measures would effectively resolve the constitutional dilemmas posed by presumed consent statues. Belgium, for example, has a centralized database accessible only to transplant officials for individuals desiring to opt-out of Belgium's version of presumed consent.[70] Nonetheless, the Belgian model presents certain problems in our federal system, as presumed consent is a creature of state law, and federal involvement in organ transplant issues is only pursuant to congressional Commerce Clause powers. Privacy concerns are also relevant when national databases contain information regarding private citizens, particularly when such lists are likely to yield substantial numbers of adherents of minority faiths. Furthermore, to be even slightly protective of the rights of non-donors, strict legal sanctions would have to be imposed on those who extract organs without diligently searching the database.

Regardless of the existence or constitutionality of a centralized database, such a system still places an onerous burden on private citizens wishing to be buried with their organs intact. Immigrants, the homeless, and the undereducated are highly unlikely to be aware of presumed

---

69. *See, e.g.*, Sheldon F. Kurtz & Michael J. Saks, *The Transplant Paradox: Overwhelming Public Support for Organ Donation vs. Under-Supply of Organs: The Iowa Organ Procurement Study*, 21. IOWA J. CORP. L. 767 (1996).

70. Liddy, *supra* note 15, at 821.

consent laws. Indeed, many Texas lawyers are surprised by the existence of these statutes. Demanding that citizens acquaint themselves with the details of the various Texas state codes in order to avoid forfeiture of their body parts elevates the notion of constructive consent to absurdity.

In conclusion, Texas' presumed consent statutes do not pass muster under Article I, Section 6 of the Texas Constitution, which vigorously defends freedom of conscience. Presumed consent imposes a substantial and unacceptable burden on individuals and families whose religions forbid organ harvesting. The state interest in preserving sight and lives can be achieved through less restrictive means, such as education and mandated choice.

B. Presumed consent violates the Texas Religious Freedom Restoration Act.

In 1993, Congress overwhelmingly passed the Religious Freedom Restoration Act (hereinafter RFRA) pursuant to its enforcement power under the Fourteenth Amendment. The Act provided that "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[71] The Supreme Court of the United States, in *City of Boerne v. Flores*,[72] declared RFRA unconstitutional as applied to the states, although it continues to apply to the federal government.

The federalism concerns emphasized by the Court do not prevent the states from adopting their own legislation designed to facilitate accommodation of the free exercise of religion. Texas is one of eleven states that expressed its solidarity with Congress and its enduring commitment to religious liberties by electing to be bound by its own Religious Freedom Restoration Act.[73] Section 110.003 of the Texas Religious Freedom Restoration Act provides that a government agency may not substantially burden a person's free exercise of religion unless the government agency can demonstrate that the agency is furthering a compelling governmental interest using the least restrictive means possible.[74] Section 110.009 clarifies that the "protection of religious freedom afforded by this chapter is in addition to the protections provided under federal law and the constitutions of this state and the United States."[75]

---

71. Religious Freedom Restoration Act, 42 U.S.C.A. § 2000bb (1993).
72. City of Boerne v. Flores, 521. U.S. 507 (1997).
73. Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 ST. JOHN'S L.REV. 25, 45 (2000).
74. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 110.003 (Vernon Supp. 2002).
75. TEX. CIV. PRAC. & REM. CODE ANN. § 110.009 (Vernon Supp. 2002).

The constitutionality of the TRFRA could potentially be challenged on the grounds that it aids religion in contravention of the Establishment Clause, or that it impermissibly interferes with the separation of powers demanded by the Texas Constitution. As to establishment, some might argue that the TRFRA is unconstitutional because it runs afoul of the *Lemon* test, which demands that "a statute must have a secular legislative purpose."[76] Justice Stevens made such an assertion in his lone concurrence in *City of Boerne*, briefly suggesting that any "governmental preference" for religion is constitutionally infirm.[77] Yet such logic would tend to render the Constitution itself unconstitutional. The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[78] The free exercise of *religion* is singled out for protection. Suggesting that any state accommodation of religion inherently creates establishment would render the free exercise clause an unconstitutional nullity.

With regard to the separation of powers demanded by the Texas State Constitution, it could be argued that the TRFRA offends Article II, Section 1, which states:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others. . . .[79]

Such argument focuses on the specification of the level of scrutiny to be employed in actions arising under the TRFRA. Plainly, however, the Texas State Legislature is entitled to create causes of action and to waive its immunity when it sees fit. The state judiciary is not entitled to question the policy advanced by the legislature, which was clearly the very religious liberty demanded by the Texas State Constitution itself. Accordingly, the TRFRA was within the authority of the Texas State Legislature.

It should be noted that there are scant cases under the TRFRA, and that paucity of case law has led some courts to fall back on federal interpretation of the United States Constitution.[80] Furthermore, the

76. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).
77. *City of Boerne*, 521 U.S. 507, 536-37 (1997) (J. Stevens, concurring).
78. U.S. CONST. amend. I.
79. TEX. CONST. art. II, § 1.
80. *See, e.g.*, Jesuit Coll. Preparatory Sch. v. Judy, 2002 WL 107264 (N.D. Tex. 2002).

protection of the Act may prove somewhat redundant with that granted by the Texas State Constitution. Nonetheless, the Act plainly states that its protection is in addition to that afforded by federal law and submits laws affronting the free exercise of religion to strict scrutiny. Accordingly, under the same strict scrutiny analysis previously discussed, presumed consent statutes are invalid.

C. Presumed consent statutes cannot withstand challenge under the Free Exercise Clause of the First Amendment.

Proponents of presumed consent faced with a free exercise challenge will likely argue that statutes permitting the state to harvest human organs without consent are validated by recent Supreme Court jurisprudence in *Employment Division v. Smith*.[81] In *Smith*, the Court held that laws which burden the free exercise of religion are not subject to strict scrutiny review if they are neutral and generally applicable.[82] However, presumed consent laws are not generally applicable—their application is, in fact, quite particularized. Furthermore, *Smith* notes that free exercise claims in conjunction with other constitutionally protected liberties receive elevated scrutiny as hybrid rights.[83] Presumed consent laws infringe upon substantive privacy and procedural due process rights protected by the Fourteenth Amendment.[84]

1. *Coroner release statutes are not generally applicable.*

The Supreme Court in *Smith* proclaimed that religious beliefs do not excuse a person "from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[85] The *Smith* case involved a claim for exemption from drug laws by members of the

81. 494 U.S. 872 (1990).

82. *Id.* at 879-80.

83. *Id.* at 881-82.

84. For purposes of this paper, I will not focus on alternative hybrid grounds, although a number of claims are plausible. Apart from potential Establishment Clause concerns raised when the state engages in the traditionally religious domain of legitimate burial, it is also reasonable to argue that the state is taking sides in a matter of religious dogma—that is, the status of the body and soul after death and the legitimacy of organ transplantation. The Fourth Amendment is also implicated, as non-consensual harvesting of body parts by the state constitutes a seizure. Recognition of quasi-property interests of the family should bestow standing in this context. As previously mentioned in this paper, claimants have occasionally raised takings claims under the Fifth Amendment. Although generally unsuccessful, takings arguments are not completely settled, and academics increasingly promote recognition of full individual property rights in human body parts. Furthermore, the Ninth Amendment protects rights reserved for the people. Although courts are reluctant to protect rights under this amorphous provision, it is unlikely that the founders would have demanded that citizens forfeit their body parts to the state. Organ conscription is also questionable under the Thirteenth Amendment, which prohibits involuntary servitude.

85. 494 U.S. at 878-79.

Native American Church, who ingest peyote for ceremonial purposes.[86] In declining to apply strict scrutiny, the Court heavily emphasized the criminal nature of the law at issue. Distinguishing previous jurisprudence applying an elevated standard of review, the Court said that "the conduct at issue in those cases was not prohibited by law. *We held that distinction to be critical.*"[87] It is reasonable to argue that the *Smith* standard is inapposite where the laws at issue are non-penal.

Presumed consent statutes are not criminal statutes. They do not prohibit harm arising from the decedent or his remains. Indeed, criminal laws traditionally protect the sanctity of human remains. In fact, presumed consent authorizes state actors to do something that would be a criminal offense were it committed by anyone else.[88] Presumed consent laws are of an entirely different nature than penal laws: they affirmatively demand a bodily sacrifice from some citizens in order to benefit other citizens, and they exempt the state and its agents from otherwise generally applicable criminal statutes pertaining to corpse desecration. No criminal conduct by the decedent or his family members is involved.

Even if the *Smith* standard were held to apply to non-criminal laws, Texas' presumed consent statutes are hardly generally applicable. First, they apply only to individuals under the control of the medical examiner. The most particularized statute is Section 693.012 of the Texas Health & Safety Code, permitting non-consensual corneal extraction if the decedent died under circumstances requiring an inquest, no familial objection is known, and removal of the corneas will not interfere with autopsy or post-mortem facial appearance.[89] It is worth noting that, while the section contains an exemption to facilitate public need to determine cause of death or cosmetic appearance of the corpse, the potential religious objections of the family receive no such consideration. Section 693.003 of the Texas Health & Safety Code permits non-consensual harvesting of non-visceral organs or tissues if the medical examiner determines that "no reasonable likelihood exists" that any next-of-kin can be contacted within four hours, meaning that the applicability of the statute depends on the personalized assessment of the medical examiner.[90] Section 521.405 of the Texas Transportation Code pertains to a special class of individuals who are not declared donors and whose next-of-kin cannot be contacted within four hours, again applying only to

86. *Id.* at 874.

87. *Id.* at 876 (emphasis added).

88. The Texas Penal Code describes the offense of abuse of a corpse as follows: "(a) A person commits an offense if, not authorized by law, he intentionally or knowingly: (1) disinters, disturbs, removes, dissects, in whole or in part, carries away, or treats in a seriously offense manner a human corpse . . . ." TEX. PENAL CODE ANN. § 42.08 (Vernon 1994).

89. TEX. HEALTH & SAFETY CODE ANN. § 693.012 (Vernon 1992).

90. TEX. HEALTH & SAFETY CODE ANN. § 693.003(c) (Vernon 1992).

certain individuals subject to the individual assessment of the medical examiner.[91]

These statutes permit broad discretion by medical examiners, who are left to determine the "likelihood" that a family member might be contacted. Such discretion is significant because the Court in *Smith* reiterated the applicability of the *Sherbert* strict scrutiny test with respect to unemployment benefits where "individualized governmental assessment" was involved.[92] If such assessment necessitates strict scrutiny just for deprivation of government benefits that are not constitutionally required, certainly the deprivation of naturally endowed body parts should imply heightened review. The personal discretion of the medical examiner alone suggests that elevated scrutiny is appropriate.

Arguing that Texas' presumed consent statutes are generally applicable becomes even more untenable when one considers the context of other laws pertaining to the disposition of human organs. The Texas Anatomical Gift Act grants any individual with testamentary capacity the right to give all or part of his body as an anatomical gift.[93] For minors, parental consent is required.[94] In fact, Texas even permits individuals to grant their body parts to specific individual donees.[95] Special rules also apply to state prisoners. The Department of Corrections is required to provide inmates with forms on which they can indicate whether they wish to donate eyes, tissues, or organs if they die while in custody.[96] The Department of Corrections is further required to display such forms prominently and to provide information about the effect of executing an anatomical gift.[97]

Hence, different laws apply to adults wishing to be organ donors, minors wishing to be donors, prisoners, and various classes of individuals under the control of the medical examiner. The rights of those wishing to donate their organs are amplified through legislative grace, whereas the rights of non-donors are restricted or eliminated in circumstances convenient for transplantation. When the Court interpreted *Smith* in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[98] it examined the entire background of relevant state law, noting that the inclusivity of laws is highly relevant to whether they are, indeed, generally applicable. The Court declared that "[a]ll laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice."[99]

---

91. TEX. TRANSP. CODE ANN. § 521.405(a) & (b) (Vernon 1999).
92. *Smith*, 494 U.S. at 884.
93. TEX. HEALTH & SAFETY CODE ANN. § 692.003(a) (Vernon 1992).
94. *Id.*
95. TEX. HEALTH & SAFETY CODE ANN. § 692.007 (Vernon 1992).
96. TEX. GOV'T CODE ANN. § 501.0551 (Vernon 1998).
97. *Id.*
98. 508 U.S. 520, 542-43 (1993).
99. *Id.* at 542.

Presumed consent is not the general rule; the general rule under the Texas Anatomical Gift Act is that individuals have testamentary capacity over their organs and that families are also entitled to donate the remains of their next-of-kin. Under the penal code, the general rule in Texas is that desecration of a human corpse is a crime. Presumed consent laws defy neutrality and general applicability because they select particular groups of citizens and expeditiously deprive their families of the choice they would otherwise enjoy under state law, along with the civil and criminal remedies that normally apply. The Texas statutes permitting nonconsensual organ harvesting are the exception, rather than the rule, and they accordingly do not qualify as neutral and generally applicable laws under the *Smith* standard.

2. *Texas' presumed consent statutes infringe upon other constitutionally protected rights.*

Even if presumed consent statutes are deemed generally applicable laws, the Court in *Smith* nonetheless reserved more exacting scrutiny for free exercise claims "in conjunction with other constitutional protections."[100] State incision and extraction of human body parts infringes upon individual and family privacy interests protected by the Fourteenth Amendment, which provides that no "State shall deprive any person of life, liberty, or property, without due process of law."[101] The common law legacy of protecting the dignity of human remains, combined with the Supreme Court's precedent of recognizing bodily autonomy and family privacy rights, presents a strong case for the recognition of a fundamental right of families to bury their dead whole.

The United States Court of Appeals for the Ninth Circuit recently summarized the history of common law interest in dead bodies in its decision in *Newman v. Sathyavaglswaran*.[102] Upholding the right of parents to bring a cause of action under Section 1983 for nonconsensual harvesting of the corneas of their deceased children, the Ninth Circuit Court noted that "[d]uties to protect the dignity of the human body after its death are deeply rooted in our nation's history."[103] In 17th century England, English courts recognized the *right* of a decedent to be buried.[104] Individuals had a right to be buried in their parishes, and churches bore the duty of burial.[105] Bodies were not considered property because burial was a matter handled by the ecclesiastical courts.[106]

100. 494 U.S. 872, 881.
101. U.S. CONST. amend XIV, § 1.
102. 287 F.3d 786 (9th Cir. 2002).
103. *Id.* at 790.
104. *Id.*
105. *Id.* at 791.
106. *Id.*

Nonetheless, in 1840, enforceable common law duties were created with respect to the right of the dead to a dignified disposition.[107]

In the colonies in New England, the parish system similarly guaranteed the right of individuals to be buried according to religious law in their home parishes.[108] Although early American courts adopted the view of Blackstone that a human corpse is not property, the duty to protect human remains through provision of burial was recognized as a "universal . . . right of sepulture."[109] Near the end of the 19th century, as cases concerning corpse desecration increased due to the demand for medical cadavers and the growing popularity of cremation, "courts began to recognize an exclusive right of the next of kin to possess and control the disposition of the bodies of their dead relatives, the violation of which was actionable at law."[110]

This history, as summarized by the Ninth Circuit, affirms that the right to intact burial has a lengthy history among our people. Notably, burial has been recognized as an inherently *religious* matter, preserved for the authority of the ecclesiastical courts. The dead were not perceived as having no rights whatsoever—on the contrary, the dead had an actual vested right to be buried in accordance with religious law. Families have historically enjoyed exclusive possession of the remains of their loved ones. Presumed consent marks a radical departure from religious burial rites and family rights recognized since time immemorial. Because "[u]nder traditional common law principles, serving a duty to protect the dignity of the human body in its final disposition . . . is deeply rooted in our legal history and social traditions," the court held that the parents suing for nonconsensual organ harvesting had the exclusive right to possess and control the bodies of their children who had passed away.[111] The right of families to bury their dead whole is so deeply ingrained in our nation's history as to merit recognition as a fundamental right by the Supreme Court of the United States.

Also supporting a fundamental right of families to burial of their kin intact is the broad legacy of Supreme Court jurisprudence recognizing bodily autonomy, privacy, and family rights. With regard to bodily autonomy, the Court has held that surgical invasion of the body in order to extract evidence is unconstitutional;[112] that competent persons have a constitutional liberty interest in refusing medical treatment;[113] that

107. 287 F.3d 786, 791 (9th Cir. 2002).

108. *Id.*

109. *Id.* (alteration in original) (citations omitted) (quoting Wynkoop v. Wynkoop, 42 Pa. 293, 300-01, 1861 WL 5846 (1862)).

110. *Id.* at 792.

111. *Id.* at 796.

112. Rochin v. California, 342 U.S. 165, 173 (1952); Winston v. Lee, 470 U.S. 753, 755 (1985).

113. Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905) (holding that while there is a right in one's body, it can be overruled by government interests); Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 270 (1990).

procreation is a fundamental right not susceptible to arbitrary state interference;[114] that the use of contraceptives is constitutionally protected as a privacy interest;[115] that a woman has a constitutional right to abort her fetus until viability, despite the state's interest in protecting life;[116] that the right of family members to live together can be abridged only for a compelling state interest;[117] that marriage is a fundamental right protected by the Constitution;[118] and that parents have a fundamental right to direct the care, custody, and control of their children.[119] Taken as a whole, these rights suggest that there is a constitutionally protected realm of intimate personal and family matters which cannot be abridged by the state without compelling justification. That protected sphere must certainly include the right of families to bury their dead intact, without state seizure of human remains.

Assuming that the common law and Supreme Court jurisprudence recognize a fundamental liberty interest in a family's right to bury loved ones whole, the state can deprive such an interest only pursuant to due process of law. Presumed consent to the removal of one's body tissues by the state deprives individuals of numerous rights. Freedom of religion is one of these fundamental rights, and its deprivation involves procedural due process considerations. Similarly, although the next-of-kin of a decedent do not possess full property rights over the body, they nonetheless are entitled to a quasi-property right under state law that grants rights to either donate or refuse to donate organs. This entitlement cannot be summarily extinguished without due process of law.[120]

The sufficiency of procedural due process is measured under the standards set forth by the Supreme Court in *Mathews v. Eldridge*.[121] Considerations include the private interest affected by official action, the risk of erroneous deprivation, the value of additional safeguards, and the government interest involved.[122] The Court noted that "the degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative

114. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

115. Griswold v. Connecticut, 381. U.S. 479, 485 (1965); Eisenstadt v. Baird, 405 U.S. 438, 443 (1972).

116. Roe v. Wade, 410 U.S. 113, 153 (1973); Planned Parenthood v. Casey, 505 U.S. 833, 834 (1992).

117. Moore v. City of E. Cleveland, 431 U.S. 492, 499 (1977).

118. Loving v. Virginia, 388 U.S. 1, 19 (1967); Zablocki v. Redhail, 434 U.S. 374, 383 (1978); Turner v. Safley, 482 U.S. 79, 94 (1987).

119. Troxel v. Granville, 530 U.S. 57, 65 (2000).

120. It is noteworthy that even the Florida Supreme Court, which callously rejected takings arguments in non-consensual corneal harvesting as an "infinitesimally small intrusion," State v. Powell, 497 So.2d 1188, 1191 (Fla. 1986), later clarified in a certified question that Florida law does nonetheless recognize a legitimate claim of entitlement by the next-of-kin in possession of a decedent's remains which permits a § 1983 action for deprivation of procedural due process, Crocker v. Pleasant, 778 So.2d 978, 988 (Fla. 2001).

121. 424 U.S. 319 (1976).

122. *Id.* at 335.

decisionmaking process."[123] Presumed consent statutes dramatically affect religious and privacy interests, resulting in severe anguish and suffering for families whose loved ones have been intrusively picked apart in the most intimate of fashions by the state, in contravention of their religious beliefs. The degree of deprivation is, accordingly, quite severe. The Court also stated that "the possible length of wrongful deprivation . . . is an important factor in assessing the impact of official action on the private interests."[124] The deprivation wrought by presumed consent is permanent and irreparable and deeply scars grieving families.

The risk of erroneous deprivation under presumed consent statutes is quite significant, and the fairness and reliability of existing pre-deprivation procedures are minimal, if not non-existent. Texas statutes allow four hours or less for families to avoid non-consensual harvesting. Other than this short window of opportunity, there are no real requirements for safeguarding familial rights. There are, however, real incentives for medical examiners to deliberately evade pre-deprivation procedures, as they might interfere with potential pecuniary gain and transplantation efforts that the harvesting supports. Only the procedural safeguard of required explicit consent would rectify the risk of erroneous deprivation.

The final factor assessed in determining the extent of due process safeguards required is public interest and the cost of procedural safeguards prior to administrative decisions. Transplantation advocates, who often dominate the discourse with pleas to "give the gift of life," will advance their strongest argument here: that transplantation saves lives. Yet the analysis of public interest is not so simple. First, the human body parts taken under presumed consent laws do not all save lives. Corneas may preserve sight, but only if transplantation is successful. Corneas seized in Texas are often exported to other countries, rather than used to preserve the sight of Texans or other Americans.[125] Tissues may be diverted for cosmetic use while burn victims continue to wait for skin grafts. The absence of regulation in the tissue market precludes any certainty in knowing that seized cadaver tissues are used for philanthropic, life-saving purposes.

More importantly, however, there are significant ways in which organ conscription conflicts deeply with public interest. Public interest includes the right of the devoutly religious to bury their dead whole. It includes the right of innocent citizens to be free from governmental invasion of their eyes, flesh, and organs. Public interest demands the

123. *Id.* at 341.

124. *Id.* (citation omitted).

125. The Texas law allowing non-consensual harvesting of corneas "was enacted when corneas were in short supply; there is no longer a shortage in Texas or elsewhere in the nation, and thousands are exported to other countries each year." Ralph K.M. Haurwitz, *Cornea-Removal Law Challenged: Lawmaker Introduces Bill to Require Consent; Family's Case Questions Law's Constitutionality*, AUSTIN AMERICAN-STATESMAN, Dec. 28, 2002, at A1.

protection of vulnerable members of our society. Finally, public interest in the dignity of humankind demands recognition of the fact that the human body is not a commodity, and our loved ones are not spare parts.

The cost of implementing procedural safeguards before organ harvesting may indeed be somewhat diminished by the unavailability of human body parts for those who need organ transplants. Yet this cost can be ameliorated by increased education, mandatory choice, and vigorous efforts to obtain consent from individuals and families who do not object to organ transplantation on religious or other grounds. Furthermore, it should be remembered that the need of some individuals is insufficient justification to seize parts from the bodies of others. Whatever the rights of individuals before death and families post-mortem in human remains, one important fact is often neglected in the discourse over presumed consent: that transplant seekers do not have an affirmative right to the body parts of others. Bodily redistribution is not a legitimate state function, and the procedural due process employed in organ harvesting must take into account that it is a "gift" that is being sought, not an entitlement.

The severe and permanent deprivation of private rights, the absence of procedural safeguards, the ability to protect individual rights through the requirement of explicit consent prior to organ harvesting, and public interest in human dignity all strongly indicate that presumed consent statutes, by their very nature, violate procedural due process. This infringement bolsters the free exercise claims of presumed consent victims, providing additional motivation for the Supreme Court to apply elevated review. Under strict scrutiny, Texas' presumed consent laws are likely to fail for the same reasons discussed previously in the section pertaining to the Texas Constitution.

II. International Norms

Organ harvesting and transplantation issues are a worldwide concern. Corroborated tales of children kidnapped and sold for their organs, murderous organ gangs, adoption rings in which children are blinded for their corneas, and live donation by the poor for money, are gradually emerging from all corners of the globe.[126] International human rights laws currently address these bioethical and privacy concerns, and, as a nation that adheres to the rule of law and promotes individual rights, the United States should abide by these standards.

Nonconsensual organ harvesting is questionable under the United Nations Universal Declaration of Human Rights, which protects liberty

126. *See* http://sunsite.berkeley.edu/biotech/organswatch;www.vachss.com/help_text/organ_trafficking (links to recent news stories pertaining to organ trafficking).

and security of person.[127] "[A]rbitrary interference with. . . privacy, family, [or] home" is prohibited.[128] Furthermore, the family is accorded special protection from society and the state as "the natural and fundamental group unit of society."[129] Freedom of religion under the Declaration includes the right to actually observe one's religion rather than simply profess a belief.[130] Presumed consent offends these international human rights protections by violating bodily integrity, family privacy, and freedom of religion.

As our history and legal culture are so inextricably linked to our European counterparts, the law of the Council of Europe should serve as a useful reference. The Council's Charter of Fundamental Rights states in Article 3 that "(1) [e]veryone has the right to respect for his or her physical and mental integrity. (2) In the fields of medicine and biology, the following must be respected in particular: — the free and informed consent of the person concerned, according to the procedures laid down by law. . ."[131] The Council's Convention on Human Rights and Biomedicine Concerning Transplantation of Organs and Tissues of Human Origin did not directly address post-mortem organ harvesting, but the 2001 Additional Protocol, which has been adopted by ten member nations, specifies that "[o]rgans or tissues shall not be removed from the body of a deceased person unless consent or authorisation required by law has been obtained."[132] The Explanatory Report to the Additional Protocol explained that nations should inform their public about organ procurement laws.[133] Furthermore, even in European nations employing presumed consent with centralized opt-out mechanisms, a medical team in charge of removal of the organs of the deceased *must* attempt to reach his close relatives to try to ascertain information concerning *his* wishes, rather than those of his next-of-kin.[134]

It is intriguing to note that the Geneva Convention specifically addresses the harvesting of organs from prisoners of war. A 1977 Protocol Additional states that "[i]t is, in particular, prohibited to carry out on [prisoners of war], *even with their consent*: . . . (c) removal of

127. UNIVERSAL DECLARATION OF HUMAN RIGHTS, G.A. Res. 217(III)A, Art. 3, U.N. Doc. A/810 (1948).

128. *Id.* at Art. 12.

129. *Id.* at Art. 16(3).

130. *Id.* at Art. 18.

131. Charter of Fundamental Rights of the European Union, art. 3, 2000 O.J. (C 364) 01.

132. Additional Protocol to the Convention on Human Rights and Biomedicine, on Transplantation of Organs and Tissues of Human Origin, ch. IV, art. 17, Europ. T.S. No. 186 (2002), *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/186.htm.

133. Explanatory Report to the Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin, *available at* http://conventions.coe.int/Treaty/en/Reports/Html/186.htm.

134. *Id.*

tissue or organs for transplantation."[135] Commentaries to the Protocol explain that prisoners of war and other detainees of an enemy power are vulnerable, and it is necessary to observe strict ethical rules when the danger of abuse is so great.[136] Hence, even harvesting pursuant to consent is prohibited because the authenticity of such consent is suspect. In this sense, international law acknowledges that organ harvesting may only be conducted pursuant to genuine consent. It is peculiar that citizens of the State of Texas and other states that have adopted presumed consent laws appear to have fewer legal rights over their remains than international prisoners of war.

Nonetheless, the United States has repeatedly criticized other nations for unethical practices in the procurement of organs for transplantation. Congress has been particularly troubled by reports of the extraction and sale of the organs of Chinese prisoners, without their consent, for the benefit of wealthy transplant recipients, and has held numerous hearings on the subject in recent years. Ironically, some introspection might be in order, as Chinese laws pertaining to organ harvesting from prisoners are, at least facially, *less* audacious than American presumed consent statutes, including those of the State of Texas. Chinese provisions provide that the bodies and organs of executed prisoners may be extracted only when the prisoner's family does not collect his body or when the prisoner or his family consent to harvesting.[137] Even then, "the dead bodies or organs from the condemned criminals of minority nationalities are not to be used," as "respect should be shown to the mourning and funeral customs in the implementation of the Regulations."[138] Even the severely criticized Chinese government at least outwardly recognizes that the harvesting of human organs without consent is immoral, particularly when such harvesting interferes with religious beliefs.

Experts in the field of international organ transplantation have made poignant remarks concerning the moral devolution of this seemingly philanthropic pursuit. One prominent Japanese sociologist who has studied the repercussions of organ transplantation in Asia describes the emerging international social phenomenon as "life-

135. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 8 June 1977, *available at* http://www.unhchr.ch/html/menu3/b/93.htm (emphasis added).

136. Commentaries, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 8 June 1977, *available at* http://www.icrc.org/ihl.nsf.

137. Provisional Regulations of The Supreme People's Court, The Supreme People's Protectorate, Ministry of Public Security, Ministry of Justice, Ministry of Public Health and Ministry of Civil Affairs on the Use of Dead Bodies or Organs From Condemned Criminals (October 9, 1984), *cited in Tissue Bank Hearings, supra* note 27.

138. *Id.*

utilitarianism."[139] This sociologist, Dr. Awaya, testified before Congress concerning "kidney tours" during which wealthy foreigners are brought to China to tour the country on non-dialysis days while they wait for a transplant from an executed prisoner.[140] Having noticed that many desperate individuals in need of tissues do not care from whom their transplant comes or under what conditions, Dr. Awaya "warns that we are beginning to look at each others' bodies greedily, as a way of getting new parts to make our own lives longer. He calls it 'social or friendly cannibalism.'"[141]

These international norms and observations remind us that whenever the needs of some are placed above the rights and dignities of others, oppression is the natural result. When those needs involve human body parts, the potential for tyranny reaches dramatic new proportions. The new "life utilitarianism" suggests that unrestrained demands for others' organs in the name of preserving life may do so at the expense of humanity. The natural desperation of those needing transplants implies that legal safeguards are needed to protect the rights of others. The United States and the State of Texas should ensure that our own organ procurement methods are ethical, and that they adhere to international standards requiring genuine consent.

III. Conclusion

One cannot help but feel sympathy for individuals seeking organ transplants. Their circumstances are desperate and tragic. Presumed consent laws, while passed with the admirable intent of alleviating suffering, have merely redistributed that suffering by forcing recently bereaved and pious families to bear the burdens of those requiring transplants at the expense of their own privacy and religious rights. While some would urge that preserving sight and lives merits disrespecting the deeply held religious convictions of others, there are certain implications of such a choice which defy the values this nation claims to embrace.

Freedom of religion is rendered farcical if it does not guarantee the ability of families to bury their dead whole according to the demands of their faith. Those who would suggest that the free exercise clause, despite its explicit use of the term "exercise," protects merely profession of belief and the right to be free from deliberately discriminatory laws, attempt to make one of the freedoms most cherished by our founders merely redundant of free speech and equal protection. If death, the

---

139. *China Hearing*, *supra* note 21 (testimony of Dr. Tsuyoshi Awaya, Sociology of Medical Law Office, Tokuyama University, Japan).

140. *Id.*

141. Nancy Scheper-Hughes, *The New Cannibalism*, NEW INTERNATIONALIST MAGAZINE, Issue 300 (April 1998), *available at* http://www.newint.org.

driving mystery of faith itself, cannot escape the clutches of the modern regulatory state intact, one wonders what hollow freedom remains.

Presumed consent is not itself immune from establishment. It reflects a majoritarian view that the human corpse is valueless, save the utility of its spare parts to others. Those who suggest that some should sacrifice their religion and privacy to save the lives of others would be hard pressed to explain why they are permitted to bequeath their wealth to their families while others remain hungry, or why copyright laws monopolize life-saving drugs for the profit of large corporations. How can some individuals be forced to forsake body parts for harms they took no part in creating while the law recognizes the right of a woman to affirmatively abort her fetus and the right of individuals to deliberately refuse medical treatment at the cost of their own lives? The reason for these contradictions is that, embedded in presumed consent is the distinctively secular and modern view that the human corpse is not sacred. For those who view it as worthless, it is easy to demand such an "infinitesimally small intrusion" from others, but were their wealth or bodily autonomy on the line, the intrusion would assume far greater significance. This is because presumed consent is not religiously neutral—it reflects the state establishment of secular humanism applied to our very bodies.

Beyond issues of religion, even the most adamant proponents of organ transplantation in all situations should question laws that endow the government with the authority to conscript and redistribute the human body. In this nation founded upon mistrust of broad-based and far-reaching government power, permitting the government to seize the very flesh and innards of its citizens suggests that the police power is indeed quite limitless. Subjecting the disposition of the human body itself to the whims of the majority inflicts a most humiliating and invasive tyranny.

Presumed consent offends state, national, and international values as they are stated in our federal Constitution, the Texas State Constitution and statutes, and international human rights standards. American laws and ethics demand that Texas must ensure that an "anatomical gift" is, indeed, a gift.