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Should the State Have Rights to Your Organs? Dissecting Brazil's Mandatory Organ Donation Law

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COMMENT

SHOULD THE STATE HAVE RIGHTS TO YOUR ORGANS? DISSECTING BRAZIL'S MANDATORY ORGAN DONATION LAW

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I. INTRODUCTION

The Brazilian Congress recently passed the controversial Presumed Organ Donor Law (PODL)¹ which mandates that "[u]nless manifestation of will to the contrary, in the scope of this Law, it is presumed that authorization is given for the donation of tissues, organs and human body parts, for the purpose of transplantation or treatment of diseases."² The purpose of the law is to increase the number of donor organs and to simplify the organ-donation process.³ In addition, the law aims to reduce organ trafficking.⁴ However, the law, which became effective on January 1, 1998, has fueled widespread public debate in Brazil on the legal, ethical, cultural, religious, and public policy ramifications of compulsory organ donation.⁵

Because of strong legal, political, medical, and religious challenges, the law has not been implemented.⁶ Critics of the law prefer specified voluntary donation instead of mandatory donation.⁷ More importantly, opponents of PODL fear that the

1. D.O.U. No. 9.434, de 4 de fevereiro de 1997, D.O. 1997.

2. CHAPTER II, Art. 4. To be exempted from the program, a citizen must have "[t]he expression 'non-donor of organs and tissues' . . . engraved in an indelible and inviolable manner in the Civil Identity Card or in the Driver's License of a person who opts for this condition." *Id.* at § 1. The law precludes the use of organs from people who are deemed legally incompetent, as well as minors and any unidentified decedent. *See id.* at Arts. 5 & 6.

3. *Bill Seeks to Make all Brazilians Organ Donors*, Reuters, Jan.16, 1998, available in LEXIS, News Library, Curnws File [hereinafter "*Bill Seeks*"]. Sen. Lucio Alcantara, who drafted the bill, claims that the law is needed because "Brazil suffers from a lack of donors and paperwork that makes organ-donation complicated." *Id.*

4. *See id.*

5. *See* Andrea McDaniels, *Brazil Mandates Organ 'Donation' for Transplants*, CHRISTIAN SCI. MONITOR, Jan. 8, 1998, at 1.

6. *See id.* Many doctors refuse to obey the law because they believe it "violates the individual's right to choose and unfairly impacts the poor." *Id.*

7. *See Brazil Passes Automatic Organ Donations*, UPI, Jan. 16, 1997, available in LEXIS, News Library, Curnws File.

poor, the illiterate, and those who are unaware of their legal rights will be disproportionately burdened by the law because they may be unaware or unable to opt-out of the program.⁸

In its haste to increase the pool of organ donors through presumed organ donation, the Brazilian government has failed to include essential provisions to address the potential legal, ethical, and social issues which PODL poses. The most glaring weakness of the law is that it does not allow family members to raise legal objections to the harvesting of the deceased's organs where the deceased did not have the opportunity to oppose organ donation before death.

This Comment will analyze the possible legal, ethical and social impact of presumed organ donation in Brazil. Part I reflects on the legislative history of the Presumed Organ Donation Law. Part II examines possible alternatives to presumed organ donation and analyzes their viability within the context of Brazil's legislative objectives. Part III highlights the advantages and disadvantages associated with presumed organ donation. Finally, Part IV suggests modifications to the Presumed Organ Donation Law to address the concerns that the law raises.

II. A BRIEF HISTORY OF THE PRESUMED CONSENT ORGAN DONATION LAW

The main objective of the law is to boost the number of organ donors,⁹ and thereby increase the number of transplants in Brazil.¹⁰ Moreover, the law aims to reduce organ trafficking and streamline the organ donation process.¹¹ Proponents of the bill argue that a government survey indicated that seventy percent of citizens pooled support the move to adopt presumed consent to organ donation.¹² Additionally, supporters of the bill claimed that

8. See Mario Osava, *Brazil: Public Opposes Compulsory Organ Donation*, Inter Press Service, Jan. 12, 1998, available in LEXIS, News Library, Curnws File.

9. See *Bill Seeks*, *supra* note 3 and accompanying text.

10. See Fabiana Frayssinet, *Brazil-Health: Concern Over Organ Donation Law*, Inter Press Service, Feb. 25, 1997, available in LEXIS, News Library, Curnws File. Currently, Brazil averages only eight transplants per one million inhabitants compared to 25 transplants per million in the United States and Europe. See *id.*

11. See *Bill Seeks*, *supra* note 3. Organ trafficking is an ongoing problem in Brazil. See *infra* notes 79-80 and accompanying text.

12. See Osava, *supra* note 8. A poll conducted by the Brazilian daily, *Folha de Sao Paulo*, indicated that there was a reduction in the number of citizens willing to donate

many Brazilians awaiting organ replacement will benefit from the increased number of organs available for transplant operations.¹³ Those in favor of the bill also argued that since similar laws exist in several European countries, Brazil was not unique in adopting compulsory organ donation.¹⁴

Opponents of the bill countered that Brazil's problem was not a shortage of donors but a lack of adequate infrastructure to support an effective organ donation system.¹⁵ Furthermore, critics argued that the Brazilian version of mandatory organ donation is distinguishable from the European models because the European system allows family members to "opt-out" a deceased family member who did not have the opportunity to exercise her opposition to donating her organs.¹⁶ Religious legislators who prefer a traditional system where donors must make an affirmative voluntary commitment to become an organ donor also opposed the bill.¹⁷ The Federal Council on Medicine also challenged the constitutionality of the bill on the grounds that the bill violates both the individual rights of citizens and medical ethics because it forces doctors to engage in practices that violate their consciences.¹⁸

The bill was vigorously debated in several public forums and in the media.¹⁹ It survived two votes in the Senate and another in the Chamber of Deputies and was finally approved in October 1997.²⁰

organs from 75% to 63% between 1995 and 1998. *See id.*

13. *See Bill Seeks, supra* note 3.

14. *See Brazil Law Makes all Citizens Organ Donors*, REUTERS N. AM. WIRE, Feb. 4, 1997, available in LEXIS, News Library, Curnws File. Spain and Belgium were the two examples cited. *See id.*

15. *See Wayne Kondro, Brazil's Law on Organ Donation Passed*, 349 THE LANCET 482 (1997).

16. *See Osava, supra* note 8. Brazilian doctors also argue that presumed organ donation only works when a country has an efficient health system and a large educated middle class that is aware of its legal rights - both requirements which Brazil lack. *See* McDaniels, *supra* note 5, at 1.

17. *See Brazil Passes Automatic Organ Donations*, UPI, Jan. 16, 1997, available in LEXIS, News Library, Curnws File.

18. *See* McDaniels, *supra* note 5, at 1. "The freedom of conscience and of belief is inviolable. . . ." C.F. Art. 5, § VI.

19. *See Osava, supra* note 8.

20. *See id.*

III. ALTERNATIVES TO PRESUMED ORGAN DONATION

A wide variety of organ procurement systems have been used by different countries to secure an adequate supply of donor organs.²¹ The challenge many governments face is to strike a balance between procuring the maximum number of organs while simultaneously respecting the religious, ethical, constitutional and property rights of its citizenry.²² Numerous factors prevent states from obtaining the maximum number of organs possible.²³ This section describes the four major types of organ procurement systems used by different nations and analyzes their applicability to the Brazilian situation.

A. No Domestic Organ Procurement

Under a "no domestic organ procurement" system, the removal of organs is prohibited because of the belief that the deceased must be buried with all her organs.²⁴ Few nations have employed this strategy, with Japan and Iran being notable exceptions.²⁵ Normally, strong religious or cultural objections from citizens in these countries bar the state from implementing a no domestic organ procurement policy.²⁶ Consequently, organ demands must be met by traveling overseas to purchase organs or through importation.²⁷ Thus, a no domestic organ procurement approach is extremely deferential to the cultural and religious values of a nation.

21. See Christian Williams, *Combating the Problems of Human Rights Abuses and Inadequate Organ Supply Through Presumed Donative Consent*, 26 CASE W. RES. J. INT'L. L. 315 (1994).

22. See *id.* at 329-30.

23. These include: the education of the public about the benefits of organ donation; public attitude regarding organ donation; governmental and health professionals' attitudes toward organ donation; moral or ethical objections to organ donation caused by religious or cultural traditions or enacted laws; potential property rights the donor or his family might have in the organs; the civil or privacy rights the donor may have in the organs; the cost of the transplant operation; hospital resources for transplants; organ resources for transplant; political or social motives to be achieved through organ donation; and the determination of death in relation to the usefulness of the cadaveric organs. See *id.* at 317.

24. See *id.* at 332.

25. See *id.* at 331.

26. See *id.* at 332.

26. See *id.* at 331-32.

27. See *id.* at 332.

However, while a no domestic organ procurement policy reflects a state's respect for the cultural or religious values of a society, this model clearly will not achieve Brazil's goal of increasing the supply of transplant organs. Furthermore, apart from the international backlash this policy causes because of perceived unfairness and the concern over a country's image as a "consumer of body parts,"²⁸ importation of organs encourages organ trafficking because of the profit motive and would therefore be inconsistent with the Brazilian legislature's intent of reducing organ trafficking.²⁹ Additionally, given the lack of a safe and reliable supply of organs, importation of organs may well be the least reliable means of organ procurement.³⁰ A "no domestic organ procurement" policy is therefore not a viable alternative to presumed organ donation within the context of Brazil's current legislative objectives.

B. Voluntary Non-Pecuniary Donation of Human Organs

Under a system of voluntary non-pecuniary donation, a donor—while still healthy—gives prior consent to the removal of organs.³¹ The donor receives no financial compensation but is reimbursed for any expenses associated with the removal of the organ.³² The United States has adopted this policy which is codified under The National Organ Transplant Act of 1984.³³ The rationale behind the voluntary allocation system is to avoid the commercialization of organs and thereby protect societal values.³⁴

The organ supplier is typically a family member of a person who has been fatally injured in an accident. The families, who

28. See *id.* In addition, the Brazilian constitution prohibits the sale of human organs. See *infra* note 79 and accompanying text.

29. See *Bill Seeks*, *supra* note 3.

30. See Williams, *supra* note 21, at 333.

31. See Lloyd Cohen, *Increasing the Supply of Transplant Organs: The Virtues of a Futures Market*, 58 GEO. WASH. L. REV. 1 (1990).

32. See Williams, *supra* note 21, at 333.

33. Pub. L. No. 98-507, 98 Stat. 2339 (42 U.S.C. §§ 273-274(e) (Supp. IV 1986)). The Act states: "It shall be unlawful for any person to knowingly acquire, receive or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce." *Id.* at § 274(e).

34. See Williams, *supra* note 21, at 333-34.

are normally consulted by medical professionals, often agree to organ donation out of altruism.³⁵ This policy, therefore, relies heavily on the altruistic desire of donors to supply organs to patients who are often in desperate need.

1. Voluntary Inter-vivos Donations

Voluntary inter-vivos donation allows a living person to donate a paired organ—a kidney, for example—along with replenishable bodily items such as blood, plasma, skin and bone marrow.³⁶ Countries, such as Britain, that adopt this policy normally limit the potential donors to family members because of the belief that a person who is unrelated to the donor may not have sufficient incentive to donate an organ and may in fact be selling the organ.³⁷ Countries with no brain-death law and which want to prevent commercialization of organs, rely exclusively on voluntary inter-vivos donations.³⁸

2. Voluntary Cadaveric Organ Donations

Under a system of voluntary cadaveric organ donation, a deceased organ donor can donate at least twenty-five different body parts and fluids.³⁹ Almost all of these cadavers must be placed on a respirator and ventilator to ensure that oxygen is delivered to the organs.⁴⁰ Thus, a country that implements this system must have a brain-death law because when the heart dies the other organs also die and are no longer useful for transplantation.⁴¹ In addition, there must be a mechanism through which the donor's intent can be registered.⁴²

35. See *id.* at 333. Williams further suggests that some donors may actually be motivated by coercion or a sense of moral duty when a close relative's life is at stake, thus the donation is not necessarily voluntary. See *id.* at n.114.

36. See *id.* at 334.

37. See *id.*

38. The result is that only a small number of organs are secured and this shortage inevitably leads to human rights violation linked to the procurement of organs. See *id.*

39. These include parts of the inner ear, a variety of glands (pancreas, pituitary, thyroid, parathyroid, and adrenal), blood vessels, tendons, cartilage, muscles (including the heart), testicles, ovaries, fallopian tubes, nerves, skin, fat, bone marrow, blood, livers, kidneys, and corneas. See Cohen, *supra* note 31, at 3.

40. See *id.* at 4.

41. See Williams, *supra* note 21, at 335.

42. See *id.*

The Uniform Anatomical Gift Act⁴³ is the legislative mechanism that regulates posthumous organ donation in the United States. The Act allows any adult of sound mind to permit or bar the posthumous use of her organs for transplantation, research or teaching.⁴⁴ A person may donate all or a portion of her body by will⁴⁵ or through a non-testamentary document such as a donor card.⁴⁶ Where the individual does not express a choice, the next of kin can donate the deceased organs posthumously.⁴⁷ Donees include hospitals and doctors, accredited medical and dental schools, organ banks and individuals in need of transplants.⁴⁸

The main weakness of voluntary cadaveric donation is that it has consistently failed to provide enough donor organs to keep pace with the ever-growing demand for organ transplantation.⁴⁹ As a result, nations have had to introduce laws to increase the number of organs procured. The United States, for example, added a provision to the 1986 Omnibus Budget Reconciliation Act barring hospitals from participating in Medicare and Medicaid unless they establish "written protocols for the identification of potential organ donors."⁵⁰ Under this provision, medical professionals must inform members of the potential donor's family of their choice to donate the patient's organs if the patient dies.⁵¹ In spite of this, many doctors still do not ask the family if they wish to donate the deceased's organs and even when the deceased's intent is clearly expressed, many doctors still feel ethically compelled to get consent from the deceased's family.⁵²

Because of the failure of voluntary cadaveric donation to secure adequate organ procurement, some commentators have suggested that an incentive would increase organ donation. One particularly interesting suggestion is to give individuals who have pledged to donate their organs priority in receiving organs

43. See 42 U.S.C.A. 274(e), §§ 1-4 (1968).

44. See *id.* at § 2 (b).

45. See *id.*

46. See *id.* § 4.

47. See *id.* § 2.

48. See *id.* § 3.

49. See Roger D. Blair & David Kaserman, *The Economics and Ethics of Alternative Cadaveric Organ Procurement Policies*, 8 YALE J. ON REG. 403, 405 (1991).

50. 42 U.S.C. § 1320 b - 8 (a)(1)(A).

51. See 42 U.S.C. § 1320 b - 8 (a)(1)(A)(ii).

52. See Williams, *supra* note 21, at 336.

in the event the organ donor needs a transplant.⁵³ While this proposal avoids the ethical and legal concerns associated with the financial incentive that organ sale poses, it raises problems of its own. First, it discriminates against those who do not donate because of genuine religious or moral reasons.⁵⁴ Second, it undermines altruism, which is the linchpin of voluntary donation.⁵⁵ Third, it discriminates against the procrastinating donor.⁵⁶ However, perhaps the most important reason why priority in receiving a needed organ may not be an effective means of increasing organ donation is the unwillingness of most people to contemplate their own mortality.⁵⁷

Brazil has failed to procure an adequate supply of organs under a system of voluntary non-pecuniary donation.⁵⁸ The reasons for this failure include a general distrust of the government, lack of adequate infrastructure to support organ transplantation, reluctance of citizens to contemplate their own deaths and a general distrust of medical professionals.⁵⁹

Given these factors, unless the Brazilian government can win the confidence of the public—a task that can only be achieved over an extended period of time—voluntary organ donation is unlikely to increase in the near future. Moreover, a massive public awareness campaign would be needed to inform the public of both the need for organs and the safeguards built into the system to protect the rights of donors. However, even in countries where these mechanisms are in place, organ donation is still inadequate.⁶⁰ Consequently, additional incentives may be needed to increase organ donation.

C. *Organ Sale and Trade*

An organ sale and trade procurement system offers donors financial compensation, which provides added incentive to donate

53. See *id.* at 337.

54. See *id.*

55. See *id.*

56. See *id.*

57. See Cohen, *supra* note 31, at 11.

58. See Frayssinet, *supra* note 10.

59. See Diana Jean Schemo, *Rio Journal; Death's New Sting in Brazil: Removal of Organs*, N.Y. TIMES, Jan. 15, 1998, at A1.

60. See Williams, *supra* note 21, at 340.

organs and thus alleviate the shortage of transplant organs.⁶¹ Organ sale and trade is justified on two grounds: social utility and personal autonomy.⁶² However, these two justifications can be challenged on several points. First, the social utility argument is based on the assumption that a market system would alleviate or "solve" the organ-shortage problem.⁶³

But even strong supporters of organ sale procurement concede that the effect of an organ market on the supply of organs is uncertain because of the potential for financial incentive to "completely subsume the gift approach as 'vendors' . . . 'sell now' rather than 'donate later'."⁶⁴ The social utility argument for organ sales thus undermines the gift system and its impact on the supply of organs is uncertain.

Second, the personal autonomy argument is grounded in the "liberal individualist tradition that affirms the moral freedom of persons to do with their bodies what they wish, free of interference from the state, so long as others are not harmed by the action."⁶⁵ This argument ignores the fact that even in highly individualist nations, such as the United States, public policy concerns limit the individual's freedom to engage in activities that do not appear to harm others. Prostitution is a classic example of these restrictions.

Next, the personal autonomy argument presumes that an individual has private property rights in her organs.⁶⁶ However, the World Health Organization has denounced the sale of human organs⁶⁷ and the United States has banned the sale of organs.⁶⁸ Several rationales are offered for the ban on the sale of human organs. First, access to the market would be conditioned on the willingness to sell and the ability to pay.⁶⁹ Consequently,

61. See Blair & Kaserman, *supra* note 49, at 420 (arguing in favor of a market alternative to voluntary donation).

62. See Courtney S. Campbell, *The Selling of Organs, the Sharing of Self*, 19 SECOND OPINION 69, 70 (Oct. 1993).

63. See *id.*

64. *Id.*

65. *Id.* at 71. The issue of private property rights in one's organs will be addressed in Part IV B.

66. See Cohen, *supra* note 31, at 15.

67. See WORLD HEALTH ORGANIZATION, WHA 40.13, HUMAN ORGAN TRANSPLANTATION: A REPORT ON DEVELOPMENTS UNDER THE AUSPICES OF WORLD HEALTH ORGANIZATION, at 8 (1987-1991).

68. National Organ Transplant Act of 1984, 42 U.S.C. § 274(e) (Supp. 1986).

69. See Campbell, *supra* note 62, at 72.

transplant decisions would not be based on medical necessity, but instead would be based on the recipient's financial status. Inevitably, the poor would be deprived of life-saving organs while the wealthy would have access to organ transplantation.

A second rationale for banning the sale of human organs flows from the assumption that a person has viable alternative choices under a personal autonomy regime. However, where a desperate Brazilian mother of four is willing to sell her heart in exchange for jobs for her four children,⁷⁰ the notion that a perfectly autonomous exchange transpires is highly questionable. Instead, the decision to sell appears to be based on an irrational act of desperation, which is inconsistent with the concept of personal autonomy. Third, no well regulated commercial market for human organs exist; those countries that allow organ sales are among the worst violators of human rights.⁷¹ Last, the personal autonomy argument ignores the psychological alienation that organ sale may have on some vendors. "To sell an organ symbolizes a selling of part of the self."⁷² In contrast, the donation of an organ after death avoids the risk of alienation since the body has undergone "a form of natural severing."⁷³ Moreover, an organ donated during life may communicate powerful transcendent themes of sacrifice, communion, and love while also creating a sense of community.⁷⁴

Proponents of organ sales respond to these criticisms by asserting that a market system would eliminate the black market,⁷⁵ that medical professionals engaged in transplantation are compensated therefore there is nothing immoral or unethical about organ sales,⁷⁶ that a decrease in the number of donated organs would be outweighed by the overall increase of the number of organs procured,⁷⁷ and that inequities are inherent in all markets.⁷⁸ Despite these claims, the potential for human rights violations, such as illegal trading and murdering for

70. See Williams, *supra* note 21, at 323.

71. See *id.* at 345.

72. Campbell, *supra* note 62, at 77.

73. *Id.*

74. See *id.*

75. See Williams, *supra* note 21, at 345.

76. See Theodore Silver, *The Case For a Post-Mortem Organ Draft and a Proposed Model Organ Draft Act*, 68 B.U. L. REV. 681, 702 (1988).

77. See *id.*

78. See *id.* at 701.

organs, coupled with the risk of abuses resulting from organ sales by the indigent, has forced some states to ban the commercial sale of human organs.⁷⁹

Organ sale is not a viable option for Brazil's legislature because "[t]he Constitution promulgated in Brazil on 5 October 1988 prohibits (in Section 199) any kind of commercial transactions in human organs, tissues and substances (intended for transplantation, research, or therapeutic purposes), as well as any blood or blood derivatives."⁸⁰ In spite of this, Brazil is still a huge market for organ traffickers⁸¹ and there have been reports of bodies "washed up on the beach, their kidneys surgically removed."⁸² Commendably, the legislature has included the reduction of organ trafficking as one of its objectives under the Presumed Organ Donation Law.⁸³

IV. THE ADVANTAGES AND DISADVANTAGES OF PRESUMED CONSENT

"Presumed consent" or "routine salvage" is a procurement system in which all decedents are presumed to donate their organs unless the decedent or her survivors expressly state otherwise.⁸⁴ Although the individual and the surviving family have a right to object to organ donation, this right must be exercised affirmatively.⁸⁵ At least fourteen nations currently employ a presumed consent system.⁸⁶ In the United States, while the federal government has not adopted a presumed consent organ procurement policy, several states have employed presumed consent for the harvesting of corneas.⁸⁷

79. See Williams, *supra* note 21, at 346-47. The European Community, for example, has banned the sale of organs because of the disproportionate impact that it would have on the poor. See *id.* at 347 n.207.

80. WORLD HEALTH ORGANIZATION, *supra* note 67, at 16.

81. See *Uruguay Cracks Ring Selling Human Organs*, CHI. TRIB., Nov. 27, 1991, at C10. In fact, Brazil was the traffickers' largest market. See *id.*

82. Williams, *supra* note 21, at 323 n.36.

83. See *Bill Seeks*, *supra* note 3.

84. Silver, *supra* note 76, at 703.

85. See *id.*

86. The countries include: Austria, The Czech Republic, Denmark, France, Finland, Greece, Israel, Italy, Japan, Norway, Poland, Spain, Sweden, and Switzerland. See *id.*

87. See *State v. Powell*, 497 So. 2d 1188 (Fla. 1986); *Georgia Lyons Eye Bank, Inc. v. Lavant*, 335 S.E. 2d 127 (Ga. 1985) (holding that law which gives coroner presumed consent to remove deceased's cornea without the consent of relatives is constitutional).

Presumed consent, when rigidly enforced, has proven to be the most effective means of maximizing organ procurement.⁸⁸ However, even in countries where this system has been successful in increasing organ donation, there is still a waiting list for organs since the optimum number of organs is not secured due to the insistence of some doctors on getting the approval of family members.⁸⁹ Presumed consent is therefore viewed by some as a system that increases organ donation without unduly burdening personal freedom.⁹⁰ The merits of this claim will be discussed in the next two sections.

A. The Advantages of Presumed Consent

Apart from the fact that presumed consent has been proven to be the most effective means of procuring organs—and thereby saving more lives—several other arguments have been offered in favor of a presumed consent system. First, presumed consent is alleged to be more compassionate toward family and society.⁹¹ Decisions concerning organ donation often occur amidst the trauma of the loss of a family member. During these traumatic events, “when our lives have become unraveled, we need ritual, routine and automatic procedures. These procedures ought to be those that reflect our collective judgment expressed in more normal times.”⁹² Presumed consent thus implements society’s more reasoned judgment, the argument goes, at a time when grieving relatives are ill equipped to make a truly informed and rational decision.⁹³

Second, advocates of presumed consent claim that the system does not radically deviate from traditional humanistic values because “by making the basic presumption one which favors life, and thus putting the burden of objecting upon persons who would deny life to another, the policy of saving human life is

88. In Austria, for example, the donation rate for kidneys is twice that of the United States. See Williams, *supra* note 21, at 340.

89. Some doctors request the consent of relatives in order to avoid potential lawsuits. See *id.* at 340-41.

90. See Silver, *supra* note 76, at 703-04.

91. See *id.* at 704.

92. Arthur L. Caplan, *Organ Transplants: The Cost of Success*, 13 HASTINGS CENTER REP., Dec. 1983, at 23, 25-26.

93. See *id.*

given priority."⁹⁴ Instead of cheapening human life, supporters of presumed consent view the policy as a means of reinforcing the value of human life.

Third, supporters of presumed consent also argue that the system is more cost effective than voluntary donation because of lower advertising and public awareness overhead.⁹⁵ Additionally, presumed consent is easier to manage than voluntary donation since the physician does not have to get the consent of the deceased's relatives thus increasing the odds that the organ is as fresh as possible.⁹⁶ Last, proponents of presumed consent assert that the opt-out provision affirms the individual's freedom by ensuring that the donor's choice is honored, instead of allowing relatives to decide whether or not to donate the decedent's organs.⁹⁷

B. The Disadvantages of Presumed Consent

Critics of presumed consent argue that the risks associated with presumed consent outweigh the benefits that the system offers. First, while conceding that the system increases the number of organs available for transplant, opponents point out that the system has not provided an adequate supply of organs.⁹⁸

Second, instead of reducing the bereaved family's anguish, presumed consent might actually amplify the family's anguish by forcing the family to protest donation at a time when the hospital's good will is cherished.⁹⁹ The family must, therefore, wrestle not only with the issue of the deceased's wishes, but also the hospital's implicit interest in securing the deceased's organs.

Third, critics argue that presumed consent "insidiously exploits the citizen's regrettable reluctance to dissent, even though dissent is her right. It would depend for its success on the unhappy fact that most humans are disinclined toward active protest of that which is customary and routine."¹⁰⁰ In addition,

94. Silver, *supra* note 76, at 705.

95. *See id.* at 705-06.

96. *See Williams, supra* note 21, at 363.

97. *See id.* at 362.

98. *See David E. Jefferies, The Body as Commodity: The Use of Markets to Cure the Organ Deficit*, 5 *IND. J. OF GLOBAL STUD.* 621, 649 (1998).

99. Silver, *supra* note 75, at 706.

100. *Id.*

presumed consent is viewed as "conscriptio in disguise" since the government gives citizens the impression that they have the right to object to donation, when in fact many would not.¹⁰¹ As a result, the procrastinating or reluctant dissenter may not be able to exercise the right to opt-out.¹⁰²

Fourth, presumed consent undermines the inherent altruistic benefits that voluntary donation provides.¹⁰³ The final major criticism of presumed consent, and the most relevant one to the Brazilian situation, is that the system will "lead to a situation where the poor, the uneducated, and the legally disenfranchised might bear a disadvantageous burden, and only the more advantaged groups would exercise autonomy" since only the more advantaged groups would be aware of their right to opt-out.¹⁰⁴ The more advantaged group would also benefit from the increased supply of organs because they are far more likely to be able to pay the cost of transplant surgery than are the indigent.

V. CHALLENGES TO BRAZIL'S PRESUMED CONSENT LAW

Having outlined the arguments for and against the system of presumed consent, several possible challenges to Brazil's version of the law will now be evaluated. The statute might be challenged under the theories of property right, privacy right, freedom of conscience, and on public policy grounds.

A. *A Property Right Challenge*

The Brazilian constitution states that "the privacy, private life, honor and image of persons are inviolable, and the right to compensation for property or moral damages resulting from the violation thereof is ensured."¹⁰⁵ If a decedent's organs are considered property, removal of these organs without compensation would amount to a "taking."¹⁰⁶ However, it is doubtful that cadaveric organs can be considered property since it is unlikely that cadavers have constitutional rights.¹⁰⁷ Even

101. *Id.*

102. See Williams, *supra* note 21, at 343. See also Campbell, *supra* note 62, at 77.

103. See *id.*

104. *Id.*

105. C.F. Art. 5 § 10.

106. See Silver, *supra* note 76, at 712.

107. See *id.* at 713-15.

under the Anglo-American common law, for example, there is no true property interest in a cadaver; instead, the next of kin in the United States have a quasi-property interest which is limited to custody of the body for burial or lawful disposition.¹⁰⁸

Furthermore, property implies the existence of a value which is capable of transfer from one owner to another for equivalent value.¹⁰⁹ Since the Brazilian constitution prohibits the sale of human organs,¹¹⁰ post-mortem organs are not amenable to exchange for value and would therefore not qualify as property. A property right challenge to the Presumed Organ Donation Law is therefore unlikely to succeed.

B. A Right to Privacy Challenge

The Brazilian constitution also protects the privacy of the individual.¹¹¹ However, as in the case of a property right claim, it is doubtful that the privacy of the deceased is subject to constitutional protection.¹¹² Even in the United States, "there is now little reason to believe that the decision to withhold post-mortem organs would fall within the sphere of constitutionally protected decision-making recognized by the Supreme Court."¹¹³

Even if there is a constitutionally protected right to privacy, the Brazilian government may still be able to defend the Presumed Organ Donation Law on the grounds that it promotes a state interest—the acquisition of organs to preserve life—of sufficient magnitude to justify the intrusion into protected decision-making.¹¹⁴ In addition, "an individual's interest in preserving bodily integrity while alive is not equivalent to the interest in bodily integrity after death,"¹¹⁵ and, thus, post-mortem organ retrieval is not unduly burdensome to the deceased's privacy interests. As such, a privacy challenge to the law is unlikely to prevail.

108. See *Brotherton v. Cleveland*, 923 F.2d 477, 481 (6th Cir. 1991).

109. See Silver, *supra* note 76, at 715.

110. See *supra* note 76 and accompanying text.

111. See *supra* note 105 and accompanying text.

112. See Silver, *supra* note 76, at 717.

113. *Id.*

114. See *id.*

115. *Id.* at 718.

C. *Freedom of Conscience*

The Federal Council on Medicine has challenged the constitutionality of the Presumed Organ Donation Law on the basis that the "law violates both individual rights of citizens and medical ethics because it forces doctors to perform actions that go against their conscience."¹¹⁶ The Brazilian constitution guarantees that the "freedom of conscience and of belief is inviolable, ensuring the free exercise of religious cults and guaranteeing, as set forth in the law, the protection of places of worship and their rites."¹¹⁷

While it could be argued that this provision relates to religious freedom and is, therefore, not applicable to the Presumed Organ Donation Law, such a narrow interpretation of the law seems unwarranted.¹¹⁸ Instead, the stronger argument for the government is that the law expressly allows citizens to opt-out of the system, and therefore each person reserves the right to honor her conscience. In fact, while ruling that the law is constitutional, Brazil's federal attorney, Gerald Brindero, observed that although the law allows physicians to remove organs without family consent, it did not *bar* them from respecting the wishes of family members.¹¹⁹ This appears to be a more reasonable interpretation of the law and sounder public policy which recognizes the possibility that an individual did not have the opportunity to oppose donation.

D. *Public Policy Challenge*

The strongest challenge to Brazil's model of presumed consent is that the system is both unethical and ineffective public policy. First, "[e]xploitation of one's reluctance to assert her rights is not a sound basis for social policy."¹²⁰ It is, therefore, unethical to impose a policy which depends on the reluctance or

116. McDaniels, *supra* note 5.

117. C.F. Art. 5 § 6.

118. For example, the government clearly could not successfully argue that it is free to violate a citizen's freedom of conscience on political issues because politics is not specifically mentioned in the freedom of conscience provision of the constitution.

119. See New "Presumed Consent" Law in Brazil Draws Ire of Public, *Physician Groups*, TRANSPLANT NEWS, Jan. 16, 1998, available in LEXIS, News Library, Curnws File.

120. See Silver, *supra* note 76, at 706.

ignorance of citizens for its success—even if the motive of the state might be commendable.

In the present context, the problem is not the motive of those who would assert rights or claims to our bodies. That motive is typically found to be the preservation of life and health and the cure of the sick. Rather, the problem is found in the details of the proposed solutions. Because they seek to directly regulate the human body, the risk of unintentionally trampling upon individual rights and liberties is ever present. As such, there arises a need to recognize danger when it is not intended and to bring to bear a clear eye and an inquiring mind on proposals which directly affect our persons and our liberties. Any new law that confers power over the human body, whether made by a legislature or by a court, has such an aspect and should give us pause.¹²¹

With millions of illiterates and workers who are fearful of losing their jobs if they take time off to opt-out,¹²² there is a strong probability that millions of Brazilians will be unable to exercise their right to exempt from the Presumed Organ Donation Law. Consequently, the law will have a disparate impact on the disenfranchised who will, in essence, be supplying transplant organs for the wealthy. Furthermore, given Brazil's human rights record,¹²³ there is the risk that over zealous physicians might extract organs from potential donors before death or fail to provide adequate care to patients in order to hasten death and then harvest the deceased's organs.

The presumed consent law has also proven to be highly ineffective in increasing the organ supply. In fact, support for organ donation has actually declined under the law from seventy-five percent to sixty-three percent and many Brazilians have "rushed" to register their objection to organ donation because of strong distrust of the government and medical professionals.¹²⁴ Moreover, the problem has been compounded by the conflicting messages sent by government officials. The Minister of Health, for example, has advised doctors to obtain permission from

121. See Jefferies, *supra* note 98, at 650.

122. See McDaniels, *supra* note 5.

123. "Despite encouraging good faith efforts by many authorities, including at the federal executive level, human rights violation [in Brazil] continued to be severe and varied." See *Human Rights Watch World Report 1998*, 92.

124. Schemo, *supra* note 59.

relatives before removing a patient's organs, while the legal counsel for the Health Ministry has threatened to prosecute doctors who seek consent from a patient's relatives.¹²⁵ This climate of uncertainty, coupled with bureaucratic blunders and inadequate infrastructure, has further eroded support for the Presumed Organ Donation Law. The law clearly needs to be modified if it is to achieve the legislature's objective of increasing the supply of transplant organs while simultaneously avoiding the legal, ethical, and policy issues it raises.

VI. PROPOSED MODIFICATIONS TO THE PODL

The most important change the law needs is a provision which allows family members to opt-out a patient who did not have the opportunity register her objection to the law. This provision would help to reassure citizens who have yet to opt-out of the system or are undecided as to whether or not to donate their organs, that the government and hospital personnel would not have the sole right to make this decision. In addition, such an amendment would not only reduce the level of distrust the public has for the government, but it would place Brazil among the vast majority of presumed consent nations that use this provision as a means of protecting patients' wishes.

Next, a massive public education campaign is needed to ensure that *all* citizens are fully aware of their right to opt-out of the system. This aids in ensuring that a person who fails to opt-out of the system has made a voluntary, informed decision to do so and is not simply ignorant of the right to object to organ donation. Admittedly, this may result in a reduction in the number of potential donors, but it avoids the unethical practice of securing organs based on the fact that a person is uninformed of her right to withhold donation.

VII. CONCLUSION

These changes, along with an improvement in the organ collection infrastructure, will provide Brazil with an effective organ procurement system with adequate safeguards to protect the interests of individual citizens from the potential abuses inherent in presumed organ donation.

125. *See id.*

ADDENDUM

Subsequent to this article being written, the Brazilian government modified the Presumed Organ Donation Law to allow family members to opt-out decedents who did not personally opt out of the system.

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