

A HEART TO HEART TALK: EXAMINING AMERICA’S ORGAN DONATION SYSTEM

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INTRODUCTION

In late 2017, Selena Gomez, a popular American entertainer, actress, and singer, unexpectedly posted a picture on her social media account depicting herself at the hospital and holding hands with her best friend.¹ Both women were smiling and sitting in separate hospital beds, despite the serious health condition that brought them there.² In the caption underneath this picture, Gomez explained that she “needed to get a kidney transplant due to [her] lupus,” an autoimmune disease that she was diagnosed with just two years prior.³ Gomez continued by thanking her best friend in the picture for giving Gomez the “ultimate gift and sacrifice by donating her kidney to me.”⁴

Immediately after Gomez’s post went up, searches for topics such as organ donations and transplants started trending on the internet.⁵ News outlets that published Gomez’s story included facts about organ donations in America to provide background information on her post.⁶ Subsequently, interest in organ donation skyrocketed overnight, and Gomez’s post eventually became the third most-liked photo in 2017 on Instagram, a popular social media picture sharing site.⁷

But just as quickly as interest in organ donations rose, the interest can quickly fade away as the next celebrity story unfolds. Yet the problem of organ shortages remains. Because current laws do not sufficiently address the shortage, people impacted around the nation are becoming their own advocates. For example, in North Carolina, a

¹ Lisa Respers France, *Selena Gomez’s best friend gave her a kidney this summer*, CNN ENTERTAINMENT (Sept. 15, 2017, 4:36 PM), <http://www.cnn.com/2017/09/14/entertainment/selena-gomez-kidney-transplant/index.html>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *See id.*

⁶ *See* Rita Rubin, *Selena Gomez Brings Attention To Organ Donor Need And Fact That Lupus Is More Common In Young Women*, FORBES (Sep. 15, 2017, 12:43 PM), <https://www.forbes.com/sites/ritarubin/2017/09/15/selena-gomez-brings-attention-to-organ-donor-need-and-fact-that-lupus-is-more-common-in-young-women/#45a5e37175ee>.

⁷ Avery Hartmans, *Here are the 10 most-liked Instagram posts of 2017*, BUS. INSIDER (Nov. 29, 2017, 10:00 AM), <http://www.businessinsider.com/most-liked-instagram-posts-2017-beyonce-cristiano-ronaldo-selena-gomez-2017-11/#1-beyoncs-pregnancy-announcement-10>.

56-year-old photographer and minister, was in the middle of shooting a basketball game when doctors called to inform him that a compatible kidney and heart were available for him.⁸ The minister immediately rushed out, but right after buckling his seatbelt a second call devastatingly notified him that the organs were not viable.⁹ Despite knowing that it may be “too late for him,” he remains positive and reminds his ministry that organ donation is “a gift of life that . . . regular people hold in their hands.”¹⁰

Meanwhile, in Utah, a Brigham Young University senior and three-time heart recipient is advocating for organ donations in her own community.¹¹ For her, advocating for organ donation helps her show others “how important [organ donation] is . . . how rampant this issue is and [to] help others realize there are others at this university who go through hard things and [that students] are not alone in whatever [they] go through.”¹²

In reality, Gomez undoubtedly experienced a miracle – the United Network for Organ Sharing (“UNOS”) estimates that at the time of her transplant, 97,000 people were on the U.S. organ transplant waiting list for kidneys alone.¹³ Although stories about the average organ donor or recipient do not generate the global publicity that Gomez’s experience did, they are nonetheless important to understanding today’s donor shortage and illustrate why America’s current opt-out organ donation policy needs to be reformed. While completely restructuring organ donation policies from opt-out to opt-in sounds promising, it is not politically feasible. Consequently, legislatures should consider tailoring opt-in strategies and instituting smaller reforms, such as mandated choice and informed consent requirements,

⁸ Nancy McLaughlin, *Greensboro Man in Need of One More Miracle*, GREENSBORO NEWS & RECORD (Mar. 31, 2018), http://www.greensboro.com/news/local_news/greensboro-man-in-need-of-one-more-miracle/article_5d21e374-457b-5e85-b0bc-9d85853961b2.html.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Bradley Dodson, *BYU senior has lived through three heart transplants, asking for more to check donor box*, DAILY HERALD (Apr. 6, 2018), https://www.heraldextra.com/news/local/central/provo/byu-senior-has-lived-through-three-heart-transplants-asking-for/article_3d4862af-383d-5431-b821-be5040ed9f9c.html.

¹² *Id.*

¹³ Rubin, *supra* note 6.

to decrease the organ shortage problem. This comment will discuss the current opt-out policy in America and explain why it is ineffective.

This comment is limited in its discussion of rights concerning the body and its exploration of financial incentives to solve the organ donation crisis. Instead, this comment will focus on exploring alternatives to the opt-out policy and explain why an opt-in policy may not be politically feasible. In doing so, this comment will examine why Texas failed to pass opt-in legislation in 2017. Following the Texas example, this comment will next explore the viability of presumed consent, its implications, and its implementation around the world. Finally, this comment will explore mandated choice and additional informed consent requirements as alternative solutions that may be a steppingstone between opt-in and opt-out policies and the gap between organs available and organs needed.

I. BACKGROUND

Organ donation can be a taboo and controversial subject, yet the necessity of it is inevitable as the need for organs is climbing contemporaneously with the increase of chronic diseases.¹⁴ Hesitation and resistance regarding organ donations are deeply rooted in a variety of ethical and political issues including the sacredness of the body, views of the body as a property right, fear of the donation procurement process, religious beliefs, and the influence of family relationships.¹⁵ Diagnosis requiring an organ cannot be solved simply by taking a pill or seeking rehabilitation. Instead, the remedy truly depends on others to give more than just time or heartfelt consideration—it requires donors to give a tangible piece of themselves.

It is not that people are selfish, but that they are genuinely squeamish about asking, squeamish about consenting, and most of all

¹⁴ See *Be An Organ Donor*, NAT'L KIDNEY FOUND., <https://www.kidney.org/transplantation/beadonor> (last visited Nov. 8, 2018).

¹⁵ See Hayley Cotter, Note, *Increasing Consent for Organ Donation: Mandate Choice, Individual Autonomy, and Informed Consent*, 21 HEALTH MATRIX 599, 599–626 (2011).

squeamish about the inevitability of their own death.¹⁶ Advocate groups and health clinics alike try to reassure potential donors knowing that it could “be hard to think about what’s going to happen to your body after you die, let alone donating your organs and tissue.”¹⁷

Thus, advocates both in and out of the healthy community are trying to address public misgivings and myths that often preclude organ donations, such as the misconception that doctors will not try to save donor organs on the table.¹⁸ However, advocates’ efforts alone are not enough without legislative intervention. The organ shortage will persist unless the legislature steps in to implement reforms, such as mandated choice¹⁹ or additional informed consent requirements, that will both reassure and induce people to face the issue and understand their actions.

A. The Cost of Squeamishness: Numbers at a Glance

At the time of Gomez’s Instagram post, CNN reported that according to UNOS, 33,610 transplants were performed in the United States in 2016.²⁰ More than 13,000 of these transplants were kidney donations, and 5,629 were from living donors.²¹

Similarly, Forbes disclosed that in early 2011, more than 110,000 people were on the United States’ waiting list for an organ transplant.²² Between 2015 and 2016, there was an 8.5 percent increase in the total

¹⁶ Archie Bland, Opinion, *Why Are we Short of Donor Organs?*, GUARDIAN (July 20, 2015, 6:15 AM) <https://www.theguardian.com/commentisfree/2015/jul/20/shortage-donor-organs-superstition-squeamishness>.

¹⁷ *Organ Donation: Don’t Let These Myths Confuse You*, MAYO CLINIC, <http://www.mayoclinic.org/healthy-lifestyle/consumer-health/in-depth/organ-donation/art-20047529> (last visited Oct. 3, 2018).

¹⁸ *Id.*

¹⁹ See Cotter, *supra* note 15.

²⁰ France, *supra* note 1.

²¹ *Id.*

²² *Organ Donation: Pass it On*, NAT’L INST. OF HEALTH NEWS IN HEALTH (Harrison Wein ed.), Mar. 2011, at 1–2, <https://newsinhealth.nih.gov/sites/nihNIH/files/2011/March/NIHNIHMar2011.pdf>.

number of organ transplants.²³ In 2016, a little over 33,000 organ transplants occurred, demonstrating a marginal increase in donations over the past decade.²⁴

Notably, deceased donors can exponentially increase the number of transplants that occur because each individual can provide multiple transplant organs.²⁵ As a result, an eligible organ donor can potentially donate up to eight lifesaving organs, saving an equal number of lives.²⁶ Meanwhile, an average of nearly 20 in-need people die each day waiting for an organ as others debate whether to join the registry.²⁷

B. The Federal Framework for Organ Donation Procurement

The United States primarily operates its organ donation system based on an opt-in policy where individuals must initially register, or otherwise opt-in, to become an organ donor. Depending on the type of organ being donated, organ donors can be either living or deceased at the time of donation.²⁸ State and federal governments pass and impose legislation to provide the safest and most equitable system for the allocation and distribution of donated organs for transplantation.²⁹

²³ *U.S. organ transplants and deceased donors set new records in 2016*, U.S. DEP'T OF HEALTH & HUMAN SERVS., ORGAN PROCUREMENT & TRANSPLANTATION NETWORK (Jan. 9, 2017), <https://optn.transplant.hrsa.gov/news/us-organ-transplants-and-deceased-donors-set-new-records-in-2016/> [hereinafter DHHS, *Organ Transplants*].

²⁴ *Id.*

²⁵ *Id.*

²⁶ See *Organ Donation Statistics*, U.S. HEALTH RESOURCES & SERVS. ADMIN., U.S. GOV'T INFO. ON ORGAN DONATION & TRANSPLANTATION, <https://www.organdonor.gov/statistics-stories/statistics.html> (last visited Jan. 17, 2018) (listing the heart, two lungs, liver, pancreas, two kidneys, and intestines as the eight lifesaving organs an individual can donate).

²⁷ *Id.*

²⁸ See *Deceased donation*, UNITED NETWORK FOR ORGAN SHARING, <https://unos.org/donation/basic-path-to-donation/> (last visited Feb. 10, 2018) (describing the basing steps for donations from deceased donors and providing information about living donation).

²⁹ *Organ Donation Legislation & Policy*, U.S. HEALTH RESOURCES & SERVS. ADMIN., U.S. GOV'T INFO. ON ORGAN DONATION & TRANSPLANTATION, <https://www.organdonor.gov/about-dot/laws.html> (last visited Oct. 2, 2017).

In regard to federal oversight, there are several agencies who collaboratively play a role in the organ donation process.³⁰ However, the Health Resources and Services Administration (“HRSA”) is primarily responsible for the oversight of the transplant system in the United States.³¹ In 1984, the federal government passed the National Organ Transplant Act, which established the Organ Procurement and Transplantation Network (“OPTN”).³² OPTN’s purpose is to maintain a national registry for organ matching.³³ Although OPTN was created under federal law, the network is operated by a private nonprofit organization under federal contract.³⁴

Although HRSA and OPTN serve a specific function in federal oversight, generally, federal agencies and federal laws, such as the Charlie W. Norwood Living Organ Act,³⁵ provide a loose organ donation framework for states to follow.³⁶ Thus, states have great discretion to fine-tune actual implementation of organ procurement processes.³⁷ As such, the states dictate and create their own requirements for their own organ procurement policies and procedures.

³⁰ See *id.* (This website explains the federal agencies that play a role in the lifesaving organization donation process are the Centers for Medicare and Medicaid Services (“CMS”), Centers for Disease Control and Prevention (“CDC”), National Institutes of Health (“NIH”), Agency for Healthcare Research and Quality (“AHRQ”), and Food and Drug Administration (“FDA”).).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ Charlie W. Norwood Living Organ Donation Act, Pub. L. No. 110-144, 121 Stat. 1813 (2007) (amending the National Transplant Organ Act to permit paired human organ donations).

³⁶ See generally Alexandra K. Glazier, *Organ Donation and the Principles of Gift Law*, 13 CLINICAL J. OF AM. SOC’Y OF NEPHROLOGY 1 (2018).

³⁷ *Id.*

II. ANALYSIS

A. The Failure of the Current Opt-In Policy (Voluntary Consent) and Potential Solutions

As mentioned in Section II above, the United States currently utilizes an opt-in approach, which is alternatively known as the voluntary consent system for organ donations.³⁸ This system garners its name because individuals must affirmatively “opt-in” to become an organ donor.

An opt-in system does not automatically assume that individuals wish to be organ donors. Consent to donation must be affirmatively and freely given, regardless of whether the donor is living or deceased.³⁹ Thus, an individual must give explicit consent, prior to death, to donate his or her organs.⁴⁰ Additionally, some situations may also require that the potential donor’s family explicitly consents to organ procurement after the decedent’s death.⁴¹

Theoretically, an opt-in system supports liberty and autonomy by allowing individuals to choose whether to become an organ donor so long as explicit consent is freely given. However, an opt-in system poses two major problems that contribute to the organ donation shortage: narrowing of the organ donation pool and family action contradictory to the decedent’s wishes.

First, opt-in policies invariably narrow the organ donation pool because they allow potential donors who may not be supplied with adequate information about organ procurement to slip through the registration process. For example, the Texan opt-in donation policy⁴² relies on the assumption that individuals are sufficiently informed about the organ donation process when they register to be a donor at

³⁸ Cotter, *supra* note 15, at 600.

³⁹ See *Living Donation*, UNITED NETWORK FOR ORGAN SHARING, <https://unos.org/donation/living-donation/> (last visited Feb. 10, 2018) (“Your consent to become a donor is completely voluntary. You should never feel pressured to become a donor.”).

⁴⁰ *Id.*

⁴¹ Cotter, *supra* note 15, at 602.

⁴² *Organ Donation in Texas*, DMV.ORG, <https://www.dmv.org/tx-texas/organ-donor.php> (last visited Sept. 23, 2018).

their local Department of Public Safety office (“DPS”), which is one avenue for Texas citizens to opt-in to donation registries.⁴³

However, the sufficiency of the average citizen’s knowledge base regarding organ donation is likely questionable at the time of their decision. Furthermore, their ability to seek answers and reassurance are limited to the few brochures available at the DPS at the time of registration. Under the current Texas Transportation Code, only Donate Life Texas (“DLT”) brochures that provide information on how to contact DLT are required to be available on-site at the DPS.⁴⁴

Consequently, potential donors may not be prepared to decide to register as an organ donor when they are registering their vehicles or applying for a driver’s license. Their uncertainty and lack of information while in the DPS office may prompt them to err on the side of caution and refrain from opting-in to the Texas organ registry managed by DLT. Alternatively, undecided donors may leave the organ donation question blank, which makes their preferences unknown. Since current policies require affirmative consent to opt-in, unknown preferences do not contribute to the donation pool.⁴⁵ Due to the inconvenience of the organ donation registration process, it is unlikely that an undecided individual will change his or her preferences later, if he or she initially chose not to opt-in to the DLT registry on-site at the DPS.

The second major problem of opt-in policies is the ability for a decedent’s family to intervene with the organ donation process by refusing to honor the donor’s wish after the death.⁴⁶ Family intervention not only eliminates a potential organ donation from occurring but also infringes upon a decedent’s autonomous and voluntary choice to be an organ donor.

⁴³ *Id.*

⁴⁴ See Tex. Transp. Code Ann. § 502.189(b) (West 2017) (stating that “[t]he department shall make available for distribution to each office authorized to issue motor vehicle registrations Donate Life brochures that provide basic donor information in English and Spanish and a contact phone number and e-mail address . . . and information on the donor registry Internet website is included with registration renewal notices”).

⁴⁵ See Firat Bilgel, *The Impact of Presumed Consent Laws and Institutions on Deceased Organ Donation*, 13 EUR. J. HEALTH ECON. 29 (2012).

⁴⁶ Letter from Michael D. Maves, Exec. Vice President & CEO, Am. Med. Ass’n, to Carlyle C. Ring, Jr., Chair, Study Comm. (Feb. 17, 2004) (on file with Uniform Law Commission).

Conflicting familial intervention is contrary to the latest version of the Uniform Anatomical Gift Act (“UAGA”), which states that an individual’s previously expressed desires regarding organ donations cannot be overridden by anyone.⁴⁷ However, the UAGA is model legislation drafted by the National Conference of Commissioners on Uniform State Laws to harmonize the different way states have implemented their own organ donation system, and it is not binding at the state or federal level, unless explicitly adopted by a state.⁴⁸ Every state has incorporated aspects of the UAGA into their own legislation to varying degrees.⁴⁹

In practice, most organ procurements organizations⁵⁰ continue to seek family consent before proceeding with harvesting a decedent’s organs,⁵¹ even though this practice is directly contrary to the language of the UAGA and the wishes of the individual organ donor prior to the donor’s death.⁵² A medical professional’s enforcement of the decedent’s wishes is difficult because even if the decedent’s decision to consent to donation was explicit, the decedent’s decision is not necessarily binding on the physician because of family influence after death.⁵³ On the one hand, honoring such a wish may be difficult for grieving families who unexpectedly may be faced with such an emotional situation. On the other hand, organ donations are time

⁴⁷ See Ana S. Iltis, *Organ Donation, Brain Death and the Family: Valid Informed Consent*, 43 J. OF L., MED. & ETHICS 369, 371 (2015).

⁴⁸ See Cotter, *supra* note 15, at 602.

⁴⁹ See *id.*

⁵⁰ See Tex. Health & Safety Code Ann. § 692A.002(19), (24) (West 2017) (defining “organ procurement organization” to mean “a person designated by the secretary of the United States Department of Health and Human Services as an organ procurement organization” and defining “procurement organization” to mean “an eye bank, organ procurement organization, or tissue bank”).

⁵¹ See Cotter, *supra* note 15, at 611.

⁵² *Id.* at 602.

⁵³ Letter from Michael D. Maves, *supra* note 46, at 2.

sensitive.⁵⁴ Even if a family ultimately decides to follow a donor's wish, the shortest hesitation may bring forth serious negative consequences. Organs have a short time period in which they are viable for procurement and transfer, so when families are allowed to interfere with a donor's express wishes, a donor's affirmative opt-in is fruitless, and the organ donation shortage problem is exacerbated.⁵⁵

Despite these problems, organ donations and transplants are gradually increasing in number.⁵⁶ However, this increase pales in comparison to the rapid rise in demand for organ donations.⁵⁷ This growing disparity indicates that America's current opt-in system is not sufficient to meet the unprecedented gap between the need for organ transplants and the number of transplantable organs available.⁵⁸

The reality of the growing disparity between the need for donor organs and the availability of donor organs is that someone new is added to the national transplant waiting list every ten minutes.⁵⁹ To address this reality, lawmakers should reconsider whether the current opt-in policy, with its narrow organ donation pool and its inadvertently counterintuitive family intervention policies, truly works. Any reconsideration of current organ donation laws should include an analysis of the feasibility of moving toward a completely different system, such as opt-out, or whether other alternatives, such as mandated choice or additional informed consequent requirements, could renovate the current system and alleviate the growing organ shortage.

⁵⁴ See *Matching Donors and Recipients*, U.S. HEALTH RESOURCES & SERVS. ADMIN., U.S. GOV'T INFO. ON ORGAN DONATION & TRANSPLANTATION, <https://organdonor.gov/about/process/matching.html#criteria> (last visited Feb. 10, 2018) (explaining that OPTN uses a computer to match donor organ's organ to potential recipients using a variety of factors. Some factors, like the distance between the donor's hospital and patient's hospital become more important because of time).

⁵⁵ See *id.* (showing that heart and lungs are the most time sensitive as they can last about 4–6 hours out of the body while kidneys are least time sensitive as they can last about 24–36 outside of the body).

⁵⁶ Susan Scutti, *US organ transplants increased nearly 20% in five years*, CNN HEALTH (Jan. 9, 2017), <https://www.cnn.com/2017/01/09/health/organ-donation-2016/index.html>.

⁵⁷ See *Organ Donation Statistics*, *supra* note 26.

⁵⁸ See Bilgel, *supra* note 45.

⁵⁹ *Data*, UNITED NETWORK FOR ORGAN SHARING, <https://unos.org/data/> (last visited Jan. 17, 2018).

B. The Feasibility of the Opt-Out System (The Presumed Consent Law)

The natural alternative consideration to an opt-in system is its opposite: an opt-out system. The opt-out system is known as a presumed consent law because it presumes that all eligible individuals consent to be an organ donor.⁶⁰ Rather than taking an affirmative and explicit action to give consent, an individual must affirmatively revoke his or her status as an organ donor.⁶¹

Theoretically, an opt-out policy would increase organ donations upfront because individuals are classified as organ donors unless and until they explicitly indicate otherwise. Many opponents of an opt-out policy fear that such a policy will have the opposite effect and will lead to a detrimental decrease in donations. One major concern of those opposed to the policy is that an opt-out policy is coercive, eroding individual autonomy and, thus, impeding the American keystones of life and liberty.⁶² In light of this contention, opt-in policies are proving not to be politically feasible within the United States, as evidenced by Texas' attempt to pass opt-out organ donor legislation in 2017.

C. The Failed Texas Opt-In Attempt: Moving Forward with Lessons Learned

1. Current Texas Donation Practices through Donate Life Texas

The current Texas opt-in policy utilizes DLT, a non-profit organization affiliated with Donate Life America, as the only official organ, eye, and tissue donor registry for the state of Texas.⁶³ DLT offers

⁶⁰ Nicole Cobler, *Bill would require Texans to opt out of organ donation*, HOUSTON CHRON. (FEB. 28, 2017, 9:07 AM), <http://www.chron.com/local/texas-politics/texas-legislature/article/Bill-would-require-Texans-to-opt-out-of-organ-10963486.php>.

⁶¹ See Bilgel, *supra* note 45, at 29.

⁶² See discussion *infra* Section V.D.

⁶³ See *About Donate Life Texas*, DONATE LIFE TEXAS, <https://www.donatelifetexas.org/donate-life-texas/> (last visited Nov. 9, 2017) (explaining that Donate Life Texas is part of the national Donate Life America registry network which is consulted by Texas organ, eye, and tissue recovery organizations to confirm registration status when a person passes away).

several methods for individuals to opt-in to the donation registry.⁶⁴ These methods vary from traditional paper forms to iPhone apps.⁶⁵ Through these mediums, an individual communicates directly with DLT to give DLT his or her affirmative and direct consent to be an organ donor.⁶⁶

Alternatively, and used more frequently, an individual can indirectly communicate to DLT their desire to be an organ donor by checking “yes” to an organ donation prompt when registering his or her vehicle with the Texas DPS or when applying for or renewing his or her driver’s license with the DPS.⁶⁷ By checking the “yes” box on these applications, the individual’s direct consent manifests into a “document of gift” used to indicate and make an anatomical gift in Texas.⁶⁸ This anatomical gift is embodied in the form of a donor card or some other record—most commonly, a heart symbol on the front of a Texas driver’s license.⁶⁹

2. Texas’ 2017 Opt-Out Proposal

In 2017, Texas Representative Jason Villalba of North Dallas proposed an opt-out amendment to alter Texas’ current practices in order to encourage more donations. In particular, Rep. Villalba proposed an amendment to Texas Transportation Code § 521.401(c) through House Bill Number 1938 (“H.B. 1938”), which was ultimately unsuccessful.⁷⁰ H.B. 1938 proposed to shift Texas from an opt-in

⁶⁴ See *How to Register*, DONATE LIFE TEXAS, <https://www.donatelifetexas.org/register-today/> (last visited Jan. 23, 2018).

⁶⁵ *Id.*

⁶⁶ See *id.* (assuring potential donors that if they register more than once, then the system will combine duplicate records based on the individual’s identifying information and that the most recent record will reflect the registration status).

⁶⁷ See Tex. Transp. Code Ann. § 521.401 (West 2017).

⁶⁸ See Tex. Health & Safety Code Ann. § 692A.002(8) (West 2017) (defining “document of gift” to include “a statement or symbol on a driver’s license, identification card, or donor registry”).

⁶⁹ See *id.*

⁷⁰ Claire Ricke, *Organ donor bill proposes ‘opt-out’ policy for Texas organ donation*, KXAN (Mar. 1, 2017, 3:40 PM) <https://www.kxan.com/news/organ-donor-bill-proposes-opt-out-policy-for-texas-organ-donation/>.

system toward an opt-out based practice.⁷¹ If H.B. 1938 had passed, Texas would have been the first state in the nation to pass opt-out organ donation legislation.⁷²

H.B. 1938 proposed to change § 521.401(c) of the Texas Transportation Code to allow driver license applicants 18 years or older “the opportunity to refuse to indicate on the person’s driver’s license or personal identification certificate that the person is willing to make an anatomical gift, in the event of death . . . and an opportunity for the person to refuse to consent to inclusion in the statewide Internet-based registry of organ, tissue, and eye donors and release to procurement organizations.”⁷³ The opportunity to refuse language in the proposed changes to § 521.401(c) is indicative of an opt-out policy.

3. Overcoming Donation Hesitation by Understanding the Need for Donations

In response to Rep. Villalba’s proposed legislation, DLT and its executive director vocally opposed H.B. 1938, arguing that the proposed changes could be a set-back if adverse public reaction thwarted the current trend toward increased donation efforts, especially at a time when 48 percent of Texans are registered organ donors.⁷⁴ In light of the nation’s gradual rise in organ donations over the past six years, organizations such as DLT, who work to promote and encourage the use of organ registries, understandably want to protect the nation’s gradual trend toward increased numbers of registered organ donors.⁷⁵ In contrast to their arguments, growing evidence indicates a strong preference among the U.S. population as a whole for organ donor registration.⁷⁶ Rather than result in backlash

⁷¹ *Id.*

⁷² *Id.*

⁷³ H.B. 1938, 2017 Leg., 85th Reg. Sess., at § 2 (Tex. 2017).

⁷⁴ See Claire Allbright, *Student advocates in support of bill creating an opt-out organ donation system*, DAILY TEXAN (Apr. 28, 2017, 12:38 PM) <http://www.dailytexanonline.com/2017/04/28/student-advocates-in-support-of-bill-creating-an-opt-out-organ-donation-system>.

⁷⁵ DHHS, *Organ Transplants*, *supra* note 23.

⁷⁶ See *Organ Donation Statistics*, *supra* note 26.

and a reduction in the number of registered donors, an opt-out policy would make more potential donors' preference's known.

The fear that an opt-in policy would slow growth is assuaged by the fact that presumed consent has maintained a presence in the public sphere, despite ongoing opposition.⁷⁷ According to a 2012 national survey by the U.S. Department of Health and Human Services ("DHHS"), 51 percent of Americans support presumed consent laws, and only 23 percent indicate they would opt-out of a donor registry if presumed consent were implemented.⁷⁸ The DHHS survey supports two conclusions: (1) a slim majority of people are willing to be donors but have never opted-in and (2) the number of potential donors who would choose to not opt-out exceeds the number of people who currently have opted-in.

Therefore, the opt-in policy would increase the donor pool because it would capture those potential donors who currently choose to leave their donor preference unknown. By capturing this group of potential donors, the opt-out policy would essentially eliminate the current situation where potential donors are able to avoid making their preference known by not affirmatively answering the opt-in questions on their vehicle or drivers' license registrations with the state. Even if opt-out only captured a few more donors who had not made their preferences previously known, this would make a substantial impact considering that one donor alone can save up to eight lives.⁷⁹

4. Addressing Liberty Concerns Through Legislative Safeguards

Other opponents to H.B. 1938 included public groups such as Empower Texans, a non-profit service organization dedicated to promoting citizenship,⁸⁰ and Texas Right to Life, an anti-abortion group.⁸¹ These groups embody the adverse reactions to the proposed policy changes that DLT feared because they focus their concerns on

⁷⁷ *Id.*

⁷⁸ Cobler, *supra* note 60.

⁷⁹ See *Organ Donation Statistics*, *supra* note 26.

⁸⁰ See *About*, EMPOWER TEXANS, <https://empowertexans.com/about/> (last visited Feb. 10, 2018) (stating that Empower Texans uses "research, reporting, and advocacy" to "empower taxpayers to advocate for good governance and hold their elected officials accountable").

⁸¹ Cobler, *supra* note 60.

individual liberty and perceive that an opt-out system would be deceptive, abusive, and coercive to individuals.⁸² Furthermore, opponents of the opt-out legislation believe presumed consent violates privacy and forces people to become organ donors automatically, regardless of whether questions were asked during the registration process.⁸³

However, a proponent of an opt-out policy, the American Medical Association (“AMA”) anticipated this concern and acknowledge that countries like the United States who place great emphasis on autonomy and individuality would naturally face opposition to presumed consent.⁸⁴

Furthermore, the AMA believes that a presumed consent strategy should be used for increasing organ donations only if certain safeguards are imposed.⁸⁵ Such safeguards might include broader education of the public regarding organ donations,⁸⁶ as many misperceptions regarding the organ donation procedure still exist.⁸⁷ Another safeguard might include a system and infrastructure that documents an individual’s choice to opt out.⁸⁸ Such a record system would have to accurately refer to the individual’s free and voluntary choice.⁸⁹ Through such safeguards, an individual’s individual liberty and autonomy are preserved.

⁸² *See id.*

⁸³ *See id.*

⁸⁴ *See* Letter from Michael D. Maves, *supra* note 46, at 2.

⁸⁵ *See id.*

⁸⁶ *Id.*

⁸⁷ *See Organ Donation Myths and Facts*, U.S. HEALTH RES. & SERVS. ADMIN., U.S. GOV’T INFO. ON ORGAN DONATION & TRANSPLANTATION, <https://organdonor.gov/about/facts-terms/donation-myths-facts.html> (last visited Jan. 1, 2018) (addressing common myths such as medical condition, age limitations, religion, hospital treatment, wealth, celebrity, funeral practices, potential for abuse, coma, and sexual orientation that prevent potential organ donors from registering).

⁸⁸ Letter from Michael D. Maves, *supra* note 46, at 2.

⁸⁹ *See generally* Code of Med. Ethics Opinion 6.1.4, *Presumed Consent & Mandated Choice for Organs from Deceased Donors*, AM. MED. ASS’N, <https://www.ama-assn.org/delivering-care/presumed-consent-mandated-choice-organs-deceased-donors> (last visited Feb. 10, 2018) (emphasizing that physicians should only proceed with organ procurement after verifying that there was no documented prior refusal in presumed consent policies and that the individual’s consent to donate was documented under mandated choice).

Accordingly, H.B. 1938 attempted to include such safeguards to enable individuals to make informed decisions and understand the resulting significance of their decision prior to opting-out. Specifically, the opt-out provision would require the Texas Department of Transportation to ask applicants 18 years or older who are applying for an initial or renewal driver's license multiple questions about registering as an organ donor and the organ donation process.⁹⁰

For example, H.B. 1938 proposed an opt-out provision by initially asking applicants whether they would "like to refuse to join the organ donor registry."⁹¹ If the applicant did not opt-out, the registration system would then add another safeguard by informing applicants that "[i]f you answer "no" to the previous question or do not answer the previous question, you consent to join the organ donor registry by performing either of those actions."⁹² The proposed language clearly and explicitly allows an individual to understand the significance of not opting out by either answering no or by leaving the question unanswered.

Additionally, under H.B. 1938 "if the applicant [did] not affirmatively refuse to be included in the registry" then the department would provide "information needed for identification purposes at the time of donation to the nonprofit organization contracted to maintain the statewide donor registry."⁹³ Despite this automatic enrollment and disclosure of information—presumably to DLT which currently operates Texas' registry—free-choice is still available because the opt-out procedures would give prospective donors the direct ability to refuse, or opt-out of, participation in the registry in the initial question.⁹⁴

In response to the opposition of H.B. 1938, Rep. Villalba remarked that "the only reservations are from people who believe the government is taking organs without consent and [we have] dealt with

⁹⁰ Tex. H.B. 1938.

⁹¹ *Id.* at § 2.

⁹² *Id.*

⁹³ *Id.* (including information such as the person's name, date of birth, driver's license number, and most recent address).

⁹⁴ *See id.*

that in the legislation.”⁹⁵ Despite Rep. Villalba’s reassurances, safeguards, and support, H.B. 1938 failed to pass.⁹⁶ Whether the Texas legislature will revisit the issue or reconsider presumed consent laws in the future remains unseen.⁹⁷ This loss indicates that completely changing an opt-in policy to an opt-out one may be too radical and politically infeasible. Consequently, after the 2017 legislative session, Texas joined the list of other states, including Colorado and New York, who have attempted—but failed—to pass opt-out organ donor legislation.⁹⁸

Although these attempts to adopt opt-out laws were ultimately unsuccessful, they are significant. The growing opt-out movement demonstrates that state legislatures are beginning to recognize the dire shortage of organs available for transplantation. State government’s efforts to address this public health issue and provide legal solutions, even if unsuccessful, are still important because they generate public discussion and make progress toward solve America’s organ donation shortage.

Just because an opt-out organ donation policy seems infeasible currently, this does not mean that an opt-out policy will never be feasible. The National Academies of Science, Engineering, and Medicine (previously known as the Institute of Medicine, or “IOM”), a private nonprofit organization that facilitates intellectual discussion and advances scientific principles⁹⁹ recommended against pursuing an opt-out system at this time but suggested that presumed consent could be a viable solution for the United States in the future.¹⁰⁰ Likewise, the views of the Texas Medical Association and the Texas Hospital Association, who supported the presumed consent policy in H.B.

⁹⁵ Ricke, *supra* note 70.

⁹⁶ Cobler, *supra* note 60.

⁹⁷ A derivation of H.B. 1938 was not resurrected in the 2019 Texas Legislative Session.

⁹⁸ Cobler, *supra* note 60.

⁹⁹ *Advising the Nation, Advancing the Discussion. Connecting New Frontiers*, NAT’L ACADS. OF SCIENCES, ENG’G, & MEDICINE, http://www.nationalacademies.org/brochure/index.html?_ga=2.146899760.648719787.1497270255-141596223.1486144204, (last visited Feb. 10, 2018).

¹⁰⁰ See Iltis, *supra* note 47, at 369.

1938,¹⁰¹ are aligned with the AMA's view that presumed consent is an option worthy of exploration.¹⁰² The AMA has taken the cautious position that unless data suggests a positive effect on organ donations, presumed consent should not be widely implemented.¹⁰³ Because presumed consent has not been instituted in the United States, an exploration of whether such positive data exists must be conducted beyond the United States' organ donation systems.

D. How Viable is a Presumed Consent Policy? Examples from a Global Perspective

Countries around the world, notably ones in Europe and South America, have considered or implemented presumed consent laws because organ donation shortages are a worldwide issue.¹⁰⁴ According to a 2012 study from Stanford University and Cornell University, 90 percent of people from presumed consent countries will donate compared to fewer than 15 percent of people in countries where one must opt-in to donate.¹⁰⁵ Although their values and legal systems may vastly differ from the United States, insight into how presumed consent laws unfold on the ground globally may be helpful in understanding how the United States can make an opt-out system feasible in the future and what smaller actions the country can take to achieve this goal.

1. Brazil: Pitfalls of a Presumed Consent Policy

In 1997, Brazil passed a presumed consent law that ultimately experienced widespread backlash from the public for being too harsh and imposing.¹⁰⁶ Under Brazil's law, individuals could opt out, and their decision would be denoted by a note on an ID card or driving

¹⁰¹ Cobler, *supra* note 60.

¹⁰² See Letter from Michael D. Maves, *supra* note 46, at 1.

¹⁰³ See AM. MED. ASS'N, Code of Med. Ethics Opinion 6.1.4, *supra* note 89.

¹⁰⁴ See Bilgel, *supra* note 45, at 30.

¹⁰⁵ Cobler, *supra* note 60.

¹⁰⁶ Q&A: *Organ donation laws*, BBC NEWS (Nov. 17, 2008, 1:19 PM), <http://news.bbc.co.uk/2/hi/health/7733190.stm> [hereinafter BBC NEWS, Q&A: *Organ Donation Laws*].

license,¹⁰⁷ much like Texas' current use of the heart symbol on the front of driver licenses.¹⁰⁸ However, the Brazilian law led to a decline in organ donations¹⁰⁹ and was repealed the next year.¹¹⁰

The failure of Brazil's presumed consent legislation can be attributed to a multitude of reasons, including individual mistrust and the government's inability to thwart body snatching.¹¹¹ In addition, Brazil suffered from severe lack of medical infrastructure, timely organization of the procurement process, and efficient allocation of organs¹¹²—all of which negated the efficiency and value of the presumed consent process.

Brazil's failure reemphasizes that if such a law were to succeed in the United States, the United States would need to require a mechanism to prevent fraud and abuse. This mechanism could speak to the safeguards the AMA recommended, especially in the area of accurately recording responses to pacify individual mistrust and fear of abuse.¹¹³ Additionally, an integrative and collaborative relationship with medical organizations would help avoid the political and structural pitfalls that Brazil experienced. Here, retaining partnerships with national and state-level medical organizations who have expressed support such as the AMA, Texas Medical Association, and Texas Hospital Association would be key in implementing a fair and efficient procurement strategy.

2. Austria: The "Hard" Opt-out Presumed Consent Policy

In contrast to the United States and Brazil, many European countries still utilize opt-out organ donation policies and have passed bills similar to Texas' H.B. 1938.¹¹⁴ However, their presumed consent

¹⁰⁷ *Id.*

¹⁰⁸ See Tex. H.B. 1938.

¹⁰⁹ *Organ donation: Does an opt-out system increase transplants?*, BBC NEWS (Sept. 10, 2017) <http://www.bbc.com/news/health-41199918> [hereinafter BBC NEWS, *Organ donation*].

¹¹⁰ BBC NEWS, *Q&A: Organ Donation Laws*, *supra* note 106.

¹¹¹ *Id.*

¹¹² Bilgel, *supra* note 45, at 37.

¹¹³ Letter from Michael D. Maves, *supra* note 46, at 2.

¹¹⁴ Ricke, *supra* note 70.

laws vary in levels of severity and enforcement. For example, Austria applies a strict level of enforcement without any exceptions.¹¹⁵ An Austrian who has not opted-out is presumed to be an organ donor.¹¹⁶ This automatic assumption applies even if the decedent's relatives know that the decedent would have objected but failed to properly opt-out during life.¹¹⁷ This type of strict enforcement is often referred to as a "hard opt-out" system.¹¹⁸

Although harsh, the automatic assumption that does not defer to familial wishes, addresses one major problem of opt-out policies, especially in the United States where the potential for family intervention remains problematic despite UAGA recommendations. Strict adherence to an individual's decision to remain in the opt-in system, or to explicitly refuse consent, is typically binding.¹¹⁹ When a country has adopted a presumed consent policy, there is an implicit assumption that within the country there is a societal acceptance of and inclination toward organ donations, and, typically, these countries assign property rights in human organs to the public domain.¹²⁰ Despite its harshness, "hard opt-out" systems see an increased rate of organ donation of up to 25 percent.¹²¹

3. Spain: Tailoring Opt-Out Policies for Families

In contrast to the Austrian model, Spain is more flexible in terms of adherence to and enforcement of their organ donation policy. In Spain, relatives of the deceased are consulted and asked to agree with the deceased's prior organ donation decision.¹²² Although this practice initially seems counter to the strict application of opt-out legislation,

¹¹⁵ Bilgel, *supra* note 45, at 30.

¹¹⁶ *See id.* at 32.

¹¹⁷ BBC NEWS, *Q&A: Organ Donation Laws*, *supra* note 106.

¹¹⁸ BBC NEWS, *Organ donation*, *supra* note 109.

¹¹⁹ Bilgel, *supra* note 45, at 30.

¹²⁰ *Id.* at 29.

¹²¹ BBC NEWS, *Organ donation*, *supra* note 109.

¹²² BBC NEWS, *Q&A: Organ Donation Laws*, *supra* note 106.

familial consultation – rather than intervention – may be a reason why Spain’s opt-out system continues to be successful.¹²³

In the United States, families who are not asked for consent or consulted may be offended by being excluded from the procurement process.¹²⁴ Consequently, even if the decedent was a registered donor, an upset family may thwart the donation process by asserting a right on the body of the next of kin if possible to oppose the donation.¹²⁵

A response to the problem of family intervention in the United States is to reevaluate the enforcement policies currently imposed to fulfill an organ donor’s wish when a family intervenes and decides otherwise.¹²⁶ One solution includes providing doctors who follow an organ donor’s directive with immunity from suits brought by the deceased’s estate.¹²⁷ Another, albeit harsher, solution would be to impose civil penalties for violation of patient authorization against those, including family, who do not follow the decedent’s directives.¹²⁸

However, any legal penalties are likely to draw political criticism beyond what opt-out proposals already face in the United States. Such lengths to make presumed consent a viable solution may not be necessary if other considerations are factored into its application. As the Spanish model demonstrates, the potential for family interference can be addressed in an opt-out setting. Countries who maintain combined registries and always seek family consent experience the number of deceased donors jumping substantially to an estimated 75 percent on average.¹²⁹

¹²³ BBC NEWS, *Organ donation*, *supra* note 109 (“Spain is often touted as an opt-out scheme success story.”).

¹²⁴ Bilgel, *supra* note 45, at 36.

¹²⁵ *See id.*

¹²⁶ *See* Douglas W. Hanto, Commentary 1, *Family Disagreement over Organ Donation*, 7 ETHICS J. OF AM. MED. ASS’N 581, 581-83 (2005).

¹²⁷ Letter from Michael D. Maves, *supra* note 46, at 2.

¹²⁸ *See* Cotter, *supra* note 15, at 605.

¹²⁹ *Id.* at 602-19.

4. Singapore: Tailoring for Religion

Singaporeans addressed religious pushback to government-sponsored opt-out legislation by allowing religious exceptions for individuals, such as Muslims.¹³⁰ This carve out would be extremely important if the United States were to carry out an opt-out policy, not only on constitutional grounds, but also because religious misconceptions regarding whether organ donation is allowed and its impact on funeral rights are significant concerns that currently act as barriers to U.S. organ donations.¹³¹

Before H.B. 1938 failed to pass in Texas, Rep. Villalba mistakenly stated that “the stigma to [donating organs . . . ,] the religious objections to it[,] have generally fallen away, and today most people can get comfortable with the idea of [opt-out].”¹³² However, the combination of H.B. 1938’s outcome and the need for people and groups, such as the student advocates at Brigham Young University (“BYU”) and the Mayo Clinic, to address religion, indicate otherwise. For example, students at BYU, which is owned and operated by The Church of Jesus Christ of Latter-day Saints, questioned whether their religion was against organ donations even though their written church material assures them that it is not.¹³³ Potential donors need to be effectively informed and assured with legitimate material, so that they remain in whatever donor pool the legislation enables.

5. Summarizing the Global Perspective

Around the world, different countries are experimenting with implementing their own organ procurement policies. Despite

¹³⁰ BBC NEWS, *Q&A: Organ Donation Laws*, *supra* note 106.

¹³¹ MAYO CLINIC, *supra* note 17 (explaining that organ donation is consistent with the beliefs of most major religions including Roman Catholicism, Islam, most branches of Judaism and most Protestant faiths and urging potential donors to ask a member of their clergy if they are unsure).

¹³² Cobler, *supra* note 60.

¹³³ Dodson, *supra* note 11 (citing HANDBOOK 2: ADMINISTRATING THE CHURCH, at 21.3.7 (CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 2019), which states that the “donation of organs and tissues is a selfless act that often results in great benefit to individuals with medical conditions[, and t]he decision to will or donate one’s own body organs or tissue for medical purposes, or the decision to authorize the transport of organs or tissue from a deceased family member, is made by the individual or the deceased member’s family”).

variances, these countries demonstrate that although organ donation appears to be an individual choice, multiple influences and factors impact the actual outcome before and after a potential organ donor's death. These global lessons are just as important as the lessons gleaned from Texas' H.B. 1938. State legislatures in the United States should take note of these failures and successes to help them accomplish successful reform of current organ donation laws.

Regardless of whether an individual's organs are viable and transferable, family interference, religious preferences, and the availability and quality of information regarding organ donation practices create a tremendous impact on whether a donation will actually take place no matter what country an individual resides in. Without considering such factors, countries that utilize presumed consent policies have deceased donation rates 3.5 percent higher on average compared to informed consent countries.¹³⁴

E. Alternatives to Presumed Consent

If presumed consent is a viable option, but not ready to be implemented in the United States, then other solutions that are less politically and publicly divisive should be used as a steppingstone. At the very least, these solutions serve as a compromise between opt-in and opt-out policies while still decreasing the organ donation shortage.

1. Mandated Choice (Required Response)

One solution may be to implement mandated choice, which is known as a "required response."¹³⁵ Mandated choice is not to be confused with the automatic presumption of consent that an opt-out policy assumes. Mandated choice is a system in which individuals are prospectively required to register their organ donation preferences before they die.¹³⁶

The AMA suggested that a more acceptable solution to an opt-out policy might be to mandate choice by requiring individuals to express

¹³⁴ Bilgel, *supra* note 45, at 33.

¹³⁵ Cotter, *supra* note 15, at 604.

¹³⁶ *Id.*

their preferences regarding organ donation when renewing their driver's licenses.¹³⁷ Although such legislation would mandate that an individual must select a preference on whether to become an organ donor, the choice to become an organ donor is not automatically assumed. Thus, mandated choice focuses solely on the problem of unknown preferences that currently plagues opt-in policies.¹³⁸

Admittedly, while a mandated choice policy requires individuals to make their preferences known, it still does not catch all the potential organ donors. Another potential problem that a mandated choice policy may encounter is that it would not solve organ shortages on a national level because mandated choice does not account for people who may already be required to respond in some states in order to complete their applications for a driver's license or people who may never apply for a driver's license. Additionally, mandated choice does not necessarily mean that the individual understands his or her decision.¹³⁹

However, mandated choice could be a steppingstone along with other reforms to increasing the organ donation pool. For example, if Texas adopted a mandated choice policy, Texans would not be able to leave the question of whether to become a donor blank when renewing their driver's licenses. As a result, society would not be left to decide what a decedent's preference is after his death.¹⁴⁰ This requirement would directly address the current opt-in problem in states that use a system similar to Texas' because it would eliminate the uncertainty involved with respect to potential donors who did not make their preferences known at the time of applying for or renewing their driver's licenses.¹⁴¹

Additionally, mandated choice would not infringe upon the autonomy and individual liberty concerns of organizations such as

¹³⁷ Letter from Michael D. Maves, *supra* note 46, at 2.

¹³⁸ See Cotter, *supra* note 15, at 604-06.

¹³⁹ See AM. MED. ASS'N, Code of Med. Ethics Opinion 6.1.4, *supra* note 89 (opining that "[d]onations under mandated choice would be ethically appropriate only if an individual's choice was made on the basis of a meaningful exchange of information about organ donation in keeping with the principles of informed consent").

¹⁴⁰ *Id.*

¹⁴¹ See *id.*

DLT and Empower Texas because individuals would be affirmatively choosing whether to opt in or opt out. Even if mandated choice did not automatically increase the organ donation pool to the same degree an opt-out policy would, mandated choice policies still have the potential to increase overall organ supply while maintaining individual autonomy and preserving informed consent.¹⁴²

2. Additional Informed Consent Requirements

In a theoretical world operating under an opt-in system, an individual has truly and freely given informed consent to become a potential organ donor. This individual would be of sound body and mind when deciding to become a donor and would have the ability to evaluate all his donation options and understand the risk of each available option.¹⁴³ However, informed consent is a subjective determination, and most families who object to the donation process may question if the decedent was truly informed at the time he selected a preference, especially if the decision was made in a rush during the driver's license application or renewal process, a situation that could be likely at any Texas DPS location.

Furthermore, on top of the environmental pressures that could affect a person's decision-making process, under the current system, it is uncertain whether the individual truly understood the information provided to them at the time of deciding to become an organ donor, especially if the information was given via a standard form of the type where individuals typically check-off boxes to symbolize assent.¹⁴⁴ Even if organ donation requires an individual's authorization, opponents to a decedent's donation registration could question whether a signature on a form sufficiently proves that the individual understood and fully consented to what he or she was signing at the time of registration. The ramifications of relying on these signatures as manifestations of consent are immense. Frequently, authorizations,

¹⁴² *Id.*

¹⁴³ See Cotter, *supra* note 15, at 601-02.

¹⁴⁴ See *How to Register*, *supra* note 64.

such as signatures, are treated as if they express a deep wish or desire of the individual.¹⁴⁵

Additionally, driver license-based registries, as used in Texas, are often treated as advance directives that no one but the originator may revoke.¹⁴⁶ Although in Texas that is not always the case due to familial intervention, it brings into question whether driver license registries should be so deeply tied to the organ donation process and whether it is fair for a driver license registry to take precedence over an individual's will.

For example, relying on a registry so intertwined with the driver's license application and renewal process does not account for the periods in between renewals. In Texas, individuals' driver's licenses generally last for a period of six years before they must be renewed.¹⁴⁷ An individual cannot predict when his or her death may occur. Before the next renewal period, that same individual may decide he or she would like to register as a donor, but that individual may do nothing to officially change his or her preferences in Texas's donor registry. This scenario highlights the issues inherent to relying on the driver's license registration/renewal donor registry: it is unclear whether individuals know that they can change their organ donation preference at the time of renewal or in between renewals or even know how to do so. This uncertainty may contribute to the lack of trust that the public feels towards organ procurement, which leads licensed drivers not to register because of their fear in being caught in the uncertainty regarding the organ donation process when approached from the DPS registry system.¹⁴⁸

To combat this uncertainty, donor registry information and brochures should explain the distinction between authorization and informed consent to potential organ donors who are considering whether to opt-in or opt-out of the registry. Authorization gives another permission to act; whereas, informed consent consists of

¹⁴⁵ See Cotter, *supra* note 15, at 599-626.

¹⁴⁶ *Id.* at 611.

¹⁴⁷ TEX. DEP'T OF PUB. SAFETY, TEX. DRIVER HANDBOOK, 11 (2017), <https://www.dps.texas.gov/internet/forms/Forms/DL-7.pdf>.

¹⁴⁸ See Tara Parker-Pope, *The Reluctant Organ Donor*, N.Y. TIMES WELL BLOG (Apr. 16, 2009, 11:20 AM), <https://well.blogs.nytimes.com/2009/04/16/the-reluctant-organ-donor/>.

understanding and agreeing to a particular action.¹⁴⁹ Valid informed consent should consider four requirements to be added to donor registry information that will help donors understand the choices they are considering and to which they may be assenting.¹⁵⁰

The first element of valid informed consent starts with disclosure of relevant information including how the procurement process works, how to change the status of decisions between renewal periods, and how to contact the facilitating organization for more information.¹⁵¹ Thus, merely displaying brochures, as seen in the Texas DPS' office would not be sufficient to meet this element. Instead, materials should be more interactive and accessible to potential donors.

As a second element, informed consent should involve decisional capacity by authorized decision makers.¹⁵² To meet this element, is it sufficient to consider someone who is 16 years old or older applying for their driver's license a capable decision maker? Unfortunately, the answer to this question is not within the scope of this article. Rather, for the sake of this comment, this element is likely met simply because we allow first-time applicants of driver's licenses to decide whether they want to be organ donors at the time of initial registration. Additionally, the Mayo Clinic would likely respond "yes" because this organization acknowledges that age is a major concern for would-be donors.¹⁵³ The Mayo Clinic even states that those under the age of 18 may consider donating and notes that parents or legal guardians can authorize the decision.¹⁵⁴ Although that might seem invidious, the Mayo Clinic poignantly points out that "children, too, are in need of organ transplants, and they usually need organs smaller than those an adult can provide."¹⁵⁵

¹⁴⁹ *Illis, supra* note 47, at 370.

¹⁵⁰ *Id.* at 369–82 (defining the four elements of valid consent).

¹⁵¹ *See id.*

¹⁵² *See id.*

¹⁵³ *See generally* MAYO CLINIC, *supra* note 17.

¹⁵⁴ *Id.* (stating that many states allow donors under the age of 18 but that a donor under the age of 18 must have his or her family's consent).

¹⁵⁵ *Id.*

The third and fourth elements of informed consent are, respectively, the requirements for plainly understandable language and a free and voluntary choice made and clearly communicated by the individual.¹⁵⁶ These elements question whether the current legislation and information being presented is such that a lay person could understand the context and impact of organ donation preferences.¹⁵⁷ Meeting these requirements are key to establishing continual trust between the government and the public—something that the Brazil opt-in policy, for example, failed to do.

By implementing procedures and practices that contains these four elements for valid consent, individuals will better be able to understand of their roles, obligations, and powers in choosing whether to become an organ donor. Because valid consent speaks to free choice and autonomy, more people may support this type of reform, even if they do not support an all-out implementation of an opt-out policy, such as the reforms that Texas' H.B. 1938 tried to implement.

CONCLUSION

There is no guarantee that individuals who chose to become organ donors will ever donate, for a complexity of reasons ranging from the incompatibility of their organs with another person to the fact that the opportunity to donate may never arise.¹⁵⁸ However, encouraging people to become organ donors can have a huge impact on the overall availability of donor organs, as each person has the potential to save the lives of up to eight people with his or her organs.¹⁵⁹ Despite advocacy efforts from donation-supporting organizations and individuals, the number of organs currently available for donation is

¹⁵⁶ See Iltis, *supra* note 47, at 369–82.

¹⁵⁷ See *generally id.* (defining the four elements of valid consent).

¹⁵⁸ See *Organ Donation Statistics*, *supra* note 26 (stating that only 3 in every 1,000 “people die in a way that allows for organ donation”).

¹⁵⁹ *Organ Donation: Pass it On*, *supra* note 22, at 1.

simply not enough to save all the people who are waiting on the list for an organ transplant.¹⁶⁰

Currently, the United States employs an opt-in system. Even though this system appeals to our sense of autonomy and the current number of organ donors has been steadily increasing, the United States is still experiencing a major shortage in organ donations that is causing our current system to default.¹⁶¹ The United States should look to other nations when determining the best way to address this issue, as an opt-out policy, which presumes consent, is an imperfect a solution that is fraught with opposition, complications, implications, and uncertainty.

Ultimately, the best solution may be to compromise between an opt-out and opt-in policy by mandating responses or strengthening informed consent requirements. By balancing an individual's freedom to choose based on informed decisions with the individual's family influences and other procedural and regulatory safeguards, an accommodating law that gradually incorporates change could be more positively received while still increasing donor rates.

¹⁶⁰ See *Organ Donation Statistics*, *supra* note 26 (indicating that as of January 2019, over 113,000 people are waiting on the national transplant list and that 20 people each day die waiting for a transplant).

¹⁶¹ *Organ Donation Facts*, DMV.ORG, <https://www.dmv.org/organ-donation-facts.php> (last visited July 12, 2019) ("In 2013, there were 14,257 organ donations, which resulted in 28,953 organ transplants. Unfortunately, this number is only a fraction of the number of people in need of a transplant. Most Americans say they support organ donation, but only a small number know how to register.").