

## Anatomical Intent

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Organ transplantation holds the potential to save a sick person's life, but for a large population of hopeful transplant patients, the short supply of transplantable organs causes a delay or denial of life-saving treatment. In the United States, recent survey data revealed that almost two-thirds of respondents were registered as organ donors,<sup>1</sup> but national transplantation statistics show that, in 2006, less than half of potentially recoverable organs were actually recovered and found suitable for transplantation.<sup>2</sup> Consequently, despite recent favorable trends showing an increase in organ donation, the demand for healthy organs continues to outpace supply by a significant margin.<sup>3</sup>

The persistently dire global shortage of transplantable human organs has therefore renewed debate about ending the ban on compensation for organ donation.<sup>4</sup> The most controversial proposals for legalizing compensation envision a regulated market in which living donors would be permitted to sell organs extracted by surgical operation.<sup>5</sup> Other proposals would confine transplant markets to the sale of cadaveric organs harvested after the donor's death—a system more similar to the current program of gratuitous organ

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1. HEALTH RESOURCES AND SERVICES ADMINISTRATION, U.S. DEP'T HEALTH & HUMAN SERVS., 2012 NATIONAL SURVEY OF ORGAN DONATION ATTITUDES AND BEHAVIORS 18 (Sept. 2013), <http://organdonor.gov/dtcp/nationalsurveyorgandonation.pdf> [<http://perma.cc/DF9B-L6HY>] [hereinafter 2012 NATIONAL SURVEY].
  2. R.S. Sung et al., *Organ Donation and Utilization in the United States, 1997-2006*, 8 AM. J. TRANSPLANTATION 922, 926 fig.5 (2008).
  3. See, e.g., Editorial, *Ways to Reduce the Kidney Shortage*, N.Y. TIMES, Sept. 1, 2014, <http://www.nytimes.com/2014/09/02/opinion/ways-to-reduce-the-kidney-shortage.html> [<http://perma.cc/FR95-AFHN>] (“In the United States last year, there were about 16,900 kidney transplants, while the waiting list for kidneys currently exceeds 100,000 patients. The average wait time for a transplant has risen to almost five years; more than 4,000 people die each year while waiting and a great many more, possibly thousands, become too sick to undergo transplantation and are dropped from the wait lists.”).
  4. See *infra* note 14.
  5. See, e.g., Alexander Berger, Op-Ed, *Why Selling Kidneys Should Be Legal*, N.Y. TIMES, Dec. 5, 2011, <http://www.nytimes.com/2011/12/06/opinion/why-selling-kidneys-should-be-legal.html> [<http://perma.cc/BHN2-AKHL>] (proposing compensation of \$50,000 per kidney); Sally Satel, *Why People Don't Donate Their Kidneys*, N.Y. TIMES, May 3, 2014, <http://www.nytimes.com/2014/05/04/opinion/sunday/why-people-dont-donate-their-kidneys.html>, [<http://perma.cc/8SSK-9ZNN>] (proposing incentives for organ donation)

donation.<sup>6</sup> This Essay explores the regulatory implications of adopting the latter approach, wherein the donor's estate would be permitted to sell the decedent's organs posthumously and distribute the proceeds to the donor's heirs or beneficiaries. Because the posthumous extraction of human organs implicates widely and strongly held beliefs about individual autonomy, privacy, and religious liberty, this Essay adopts the presumption that a policy of legalizing compensation for cadaveric organ donation would be predicated upon the decedent's willingness to participate in such a system. In this vein, I will refer to the organ donor's preference to permit or prohibit the postmortem sale of his or her bodily remains as "anatomical intent." Assuming, then, that a regulated market for transplantable organs would respect the donor's wishes, how should the law elicit and ascertain anatomical intent?

Drawing insight from the time-tested experience of inheritance law in implementing donative intent, this Essay offers suggestions for the development of registration procedures and default rules for the posthumous sale of human organs. I argue that registration procedures must be sufficiently secure to prevent fraud and undue influence, but that security features should be narrowly tailored and non-burdensome in order to avoid creating a procedural deterrent to donor registration. For individuals who die without registering their anatomical intent, I argue that default rules should respect the autonomy, privacy, and religious liberty interests of non-donors by presuming that the decedent prefers to prohibit the postmortem sale of his or her bodily remains absent an affirmative indication of intent to donate.

## I. BACKGROUND ON COMPENSATED ORGAN DONATION

Current federal and state laws prohibit most forms of compensation in exchange for the donation of human organs. Under the National Organ Transplant Act (NOTA), the transfer of human organs "for valuable consideration for use in human transplantation" is a felony punishable by fine and up to five years' imprisonment.<sup>7</sup> Congress enacted this prohibition to address concerns that compensated organ harvesting would lead to the exploitation of vulnerable individuals desperate for cash and potentially unaware of the health risks of donating vital body parts, such as a kidney or

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6. See, e.g., David Horton, *Indescendibility*, 102 CAL. L. REV. 543, 586 (2014).

7. 42 U.S.C. § 274e(a)-(b). NOTA does permit compensation for expenses incurred in the organ donation process. *Id.* § 274e(c)(2). NOTA defines the term "human organ" broadly to include "the human (including fetal) kidney, liver, heart, lung, pancreas, bone marrow, cornea, eye, bone, and skin or any subpart thereof and any other human organ (or any subpart thereof, including that derived from a fetus) specified by the Secretary of Health and Human Services by regulation." *Id.* § 274e(c)(1).

liver, during life.<sup>8</sup> Likewise, the Revised Uniform Anatomical Gift Act, some form of which has been adopted in forty-six states, prohibits compensation for the posthumous harvesting of human organs for similar reasons.<sup>9</sup>

Despite a nearly global ban on the sale of body parts,<sup>10</sup> a booming international black market for transplantable organs has emerged and given rise to an ugly phenomenon known as “transplant tourism.”<sup>11</sup> “Organ brokers” reap steep illicit profits by matching transplant surgeons with indigent donors hoping for a more stable financial future and with gravely ill patients seeking a life-saving organ at extremely high prices.<sup>12</sup> According to a recent report, for example, donors from developing countries have been willing to sell a kidney for as little as \$5,500, while patients suffering from renal failure have been willing to pay upwards of \$250,000 for a kidney transplant.<sup>13</sup> Recognizing the need to increase the supply of transplantable organs and to regulate what has become an exploitative black market, a growing chorus of scholars and commentators have called for (and debated) the development of a regulated market in which organ donors would be permitted to accept valuable consideration.<sup>14</sup> By allowing the posthumous sale of anatomical remains, a

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8. See Steve P. Calandrillo, *Cash for Kidneys? Utilizing Incentives to End America’s Organ Shortage*, 13 GEO. MASON L. REV. 69, 80 (2004); Jed Adam Gross, Note, *E Pluribus Unos: The National Organ Transplant Act and Its Postoperative Complications*, 8 YALE J. HEALTH POL’Y, L. & ETHICS 145, 178-80 (2008); c.f. *Flynn v. Holder*, 684 F.3d 852, 860 (9th Cir. 2012) (finding that permitting sale of human organs during life would create perverse incentives for “poor people to sell their organs, even when the transplant would create excessive medical risk, pain, or disability for the donor”).
  9. UNIF. ANATOMICAL GIFT ACT § 16, 8A U.L.A. 19 (2006) (amended 2009); *Legislative Fact Sheet—Anatomical Gift Act (2006)*, UNIF. LAW COMM’N, [http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Anatomical%20Gift%20Act%20\(2006\)](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Anatomical%20Gift%20Act%20(2006)) [<http://perma.cc/LZW2-483D>].
  10. Iran is the only country in which it is legal to accept compensation for inter vivos organ donation and in which there is no waiting list for renal transplants. See Glenn Cohen, *Transplant Tourism: The Ethics and Regulation of International Markets for Organs*, 41 J. L. MED. & ETHICS 269 (2013).
  11. *Id.*
  12. See Kevin Sack, *Transplant Brokers in Israel Lure Desperate Kidney Patients to Costa Rica*, N.Y. TIMES, Aug. 17, 2014, <http://www.nytimes.com/2014/08/17/world/middleeast/transplant-brokers-in-israel-lure-desperate-kidney-patients-to-costa-rica.html> [<http://perma.cc/T975-QMSL>].
  13. *Id.*
  14. See, e.g., Calandrillo, *supra* note 8, at 132 (proposing several “means of incentivizing organ donation”); Joseph B. Clamon, *Tax Policy as a Lifeline: Encouraging Blood and Organ Donation Through Tax Credits*, 17 ANNALS HEALTH L. 67 (2008); Lloyd R. Cohen, *Increasing the Supply of Transplant Organs: The Virtues of a Futures Market*, 58 GEO. WASH. L. REV. 1, 2 (1989) (proposing “a futures market in which healthy individuals would be given the opportunity to contract for the sale of their body tissue for delivery after their death”); H. Tristram Engelhardt, Jr., *Giving, Selling, and Having Taken: Conflicting Views of Organ*

regulated market could potentially increase the overall supply of transplantable organs and provide a new and valuable financial resource for poor families; by limiting the market for transplantable organs to bodily remains harvested posthumously, the law could prevent the exploitation of indigent donors who, in desperation, might otherwise come to rely on the sale of organs during life as a source of short-term economic security.<sup>15</sup>

This Essay's inquiry is limited to the decedent's anatomical intent and therefore leaves others to answer the difficult ethical questions of whether social policy considerations, such as the public's shared interest in increasing the overall availability of transplantable organs, would justify *overriding* a decedent's opposition to compensated cadaveric harvesting. For our purposes, it is sufficient to note two recent empirical findings about organ donation preferences in the United States: First, nearly half of surveyed Americans opposed an organ donation system that would override the donor's choice to participate.<sup>16</sup> This finding suggests that a regulated market for compensated organ donation would likely be politically tolerable only if the law respected the right of individuals not to participate. Second, more than a quarter of potential donors said they would respond favorably to financial incentives for organ donation.<sup>17</sup> This finding suggests that preferences regarding anatomical intent are, at least for some individuals, influenced by economic considerations. Taken together, these empirical findings imply that a system overriding the

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*Transfer*, 1 IND. HEALTH L. REV. 31, 32 (2004) (arguing that prohibitions on the sale of harvested organs are inconsistent with "secular moral authority"); Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 435 n.392 (2000) (collecting citations); Robert Steinbuch, *Kidneys, Cash, and Kashrut: A Legal, Economic, and Religious Analysis of Selling Kidneys*, 45 HOUS. L. REV. 1529 (2009) (proposing a regulated market for compensated organ donation); Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813, 1834-35 (2007) ("We would likely get far better results [in encouraging organ donation] if we offered organ providers compensation—or, more precisely, offered them the choice of keeping the compensation, forgoing it, donating it to a familiar cause of their choice (for instance, their church) rather than to a stranger, or spending it on their children."); *How Much for a Kidney?*, N.Y. TIMES: ROOM FOR DEBATE (Aug. 21, 2014), <http://www.nytimes.com/roomfordebate/2014/08/21/how-much-for-a-kidney> [<http://perma.cc/BZ6S-V4PS>]. Opponents of legalizing compensation for organ donation argue that the market alienability of human body parts creates perverse incentives for economically disadvantaged donors and contributes to the degradation of human dignity that accompanies the commodification of human body parts. See generally MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996).

15. As David Horton correctly observes, "the dead do not suffer when they make unwise decisions." Horton, *supra* note 6, at 573.
16. See 2012 NATIONAL SURVEY, *supra* note 1, at 25, 48 (finding that although 85% of surveyed Americans support gratuitous organ donation, nearly 47% oppose or strongly oppose a presumed consent system on grounds that the government should not override individual choice, personal freedoms, or religious liberties).
17. *Id.* at 52 (25.4% of respondents would be more likely to donate organs in response to financial incentives while only 9.5% would be less likely to donate).

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decedent's anatomical intent would probably be both politically objectionable and potentially unnecessary to achieve the desired outcome of increasing the aggregate supply of transplantable organs. A compensation program for organ donation of a kind that seeks to elicit and implement anatomical intent may therefore be more feasible and effective in terms of increasing the supply of organs.

To further the development of a compensated organ donation program organized around the decedent's anatomical intent, the balance of this Essay will discuss the procedures and presumptions necessary to ascertain donor preferences regarding the decision to allow or prohibit the sale of cadaveric organs. This discussion will draw upon insights from the time-tested inheritance law principle of donative intent, which holds that the function of wealth transfer law is to facilitate, not regulate, the donor's intent with respect to the transfer of property.<sup>18</sup> I will examine two aspects of compensated cadaveric harvesting particularly in need of regulatory development: (1) registration procedures through which donors would manifest anatomical intent, and (2) default rules that would apply when individuals die without manifesting anatomical intent.

### II. REGISTRATION PROCEDURES FOR MANIFESTING ANATOMICAL INTENT

Registration procedures for manifesting anatomical intent must be sufficiently secure to protect the donor but sufficiently simple to avoid deterring willing donors from registering their intent. In most states, the current system of gratuitous organ donation designates the department of motor vehicles (DMV) as the primary point of contact for organ donor registration. According to a 2012 survey of registered organ donors, approximately sixty percent of these donors registered their intent to donate as part of a process for applying for or renewing a state driver's license; the remaining forty percent registered their status by signing an independent organ donor registry or organ donor card.<sup>19</sup> Existing registration procedures are simple but relatively unsecure because they often can be completed by mail or computer outside the purview of direct state supervision. This level of security is satisfactory for the moment because current law prohibits the sale of organs, which, in turn, minimizes incentives for abuse or manipulation of the

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18. See, e.g., RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (2003) ("The controlling consideration in determining the meaning of a donative document is the donor's intention. The donor's intention is given effect to the maximum extent allowed by law.").

19. 2012 NATIONAL SURVEY, *supra* note 1, at 18.

donor registration process.<sup>20</sup> Legalizing compensation for the posthumous sale of organs, however, would increase the potential for fraud, forgery, and undue influence by members of an individual's family or household who would stand to benefit financially as future heirs or beneficiaries of that individual's estate. As David Horton correctly observes in a recent insightful article, "the ease with which expressions of a decedent's wishes could be manipulated would invite opportunism" because compensated harvesting "would cause the value of the estate to swell by thousands of dollars."<sup>21</sup> Horton's concern is confirmed by the marked rise of reported elder abuse in the United States, most of which is committed by members of the victim's own family.<sup>22</sup> Registration procedures for compensated organ donation would therefore require additional security measures to protect the integrity of the decedent's anatomical intent.

In the inheritance law context, the law of wills historically secured the will-making process by imposing and strictly enforcing formal requirements for will execution.<sup>23</sup> In New York, for example, the testator must *subscribe* by signing at the bottom of the will, *publish* by "declar[ing] to each of the attesting witnesses that the instrument to which his signature has been affixed is his will," and obtain the signatures of at least two *attesting witnesses* within 30 days of execution or acknowledgement.<sup>24</sup> The testator bears the burden of complying with testamentary formalities with little or no guidance from the state. Testamentary formalities were thought by courts to safeguard the testator from external influence,<sup>25</sup> but the imposition of obscure formal requirements also tends to deter individuals from commencing the will-making

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20. See Horton, *supra* note 6, at 589.

21. *Id.*

22. See Nat'l Ctr. on Elder Abuse, *Statistics/Data*, U.S. DEP'T OF HEALTH AND HUMAN SERV., <http://www.ncea.aoa.gov/Library/Data/index.aspx> [<http://perma.cc/9DS5-CWF8>] ("In the only national study that attempted to define the scope of elder abuse, the vast majority of abusers were family members (approximately 90%), most often adult children, spouses, partners, and others.").

23. Cf., *In re Pavlinko's Estate*, 148 A.2d 528, 531 (Pa. 1959) ("Once a Court starts to ignore or alter or rewrite or make exceptions to clear, plain and unmistakable provisions of the Wills Act in order to accomplish equity and justice in that particular case, the Wills Act will become a meaningless, although well intentioned, scrap of paper, and the door will be opened wide to countless fraudulent claims which the Act successfully bars."); Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1036 (1994). A handful of states, however, have recently relaxed the execution formalities by adopting the Uniform Probate Code's harmless error rule, found in section 2-503.

24. N.Y. EST. POWERS & TRUSTS LAW § 3-2.1 (McKinney 2014).

25. See Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L. J. 1, 9 (1941) (describing and criticizing the "protective" function of testamentary formalities).

process in the first place.<sup>26</sup> The complexity of testamentary formalities and the testator's burden of compliance exacerbate problems of inertia and procrastination, which at least partly explains why most Americans die intestate.<sup>27</sup>

The powerful influence of inertia and the tendency to procrastinate have also been observed in the context of gratuitous organ donation. In one study, for example, researchers found that requiring donors to undertake affirmative steps to register depressed participation in the process.<sup>28</sup> Therefore, as lawmakers search for ways to tighten the security of registration procedures for compensated organ donation, they should be mindful of inertial forces. Efficient procedures would strike a sensible balance between security and simplicity, perhaps by selectively adopting protective features of the will-making process while minimizing compliance burdens most likely to dampen donor participation.

The primary security goals of donor registration processes are the authentication of the donor's identity and confirmation of the donor's voluntary decision to register. Both security goals could be addressed by enhancing existing donor registration procedures used by state DMVs as part of the application process for obtaining a driver's license. State DMVs have proven themselves institutionally competent to handle organ donor registrations, and the incidental costs associated with additional security measures could be offset by taxing proceeds generated from the sale of cadaveric organs. By maintaining a distinct donor registration process separable from other forms of estate planning, such as wills and trusts, the large population of Americans who die intestate and never engage in estate planning would have an opportunity to register their anatomical intent.

Additional verification procedures beyond those currently in place might include: (1) requiring in-person registration for opting into the compensated organ donation system—similar to what happens when an individual visits the DMV for a new driver's license photograph—rather than permitting registration by mail; (2) requiring periodic re-registration to ensure the continued accuracy of the individual's anatomical intent; (3) eliciting the donor's anatomical intent in a setting conducive to the expression of free will, such as a location on the DMV's premises in which the individual is

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26. See Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 944 (2012) (arguing that “the widespread lapse of testamentary freedom” in the United States is attributable to “the obscurity, complexity, and expense of the will-making process itself”).

27. See *id.* at 887 (surveying empirical evidence suggesting that most Americans do not have a will and yet those who lack a will want to obtain one).

28. See, e.g., RICHARD H. THALER AND CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 178 (2008).

unaccompanied by family members and other third persons; (4) requiring DMV officials to interview the individual for confirmation of anatomical intent before processing the registration; and (5) recording and preserving the individual's oral declaration of intent on video filmed on DMV premises to create an evidentiary record. Unlike will execution formalities that impose legal obligations solely upon the testator, the verification procedures described above would shift most of the cost and burden of heightened security from the donor to the state, thereby facilitating rather than deterring the manifestation of anatomical intent.

The DMV donor registration process, however, should not constitute the exclusive method for manifesting anatomical intent. Individuals should additionally have the option of manifesting anatomical intent through traditional estate planning documents, such as wills. A will beneficiary who has also been designated by the testator or the testator's doctor as the person responsible for deciding whether to continue the testator's life support (a health care agent) faces a moral quandary whether or not the estate includes proceeds from the sale of anatomical remains: the beneficiary is conflicted because the decision to end the testator's life would trigger the transmission of wealth by inheritance. In small estates, however, where a beneficiary-qua-health-care-agent has little to gain from the estate because the decedent owned few or no assets, the addition of proceeds from the sale of anatomical remains would create a conflict of interest that otherwise would not have presented itself. Given the close connection between the delegation of health care decisions and organ donation, perhaps the formalities for manifesting anatomical intent outside the DMV process should at a minimum mirror the formal requirements for executing an advance medical directive or health care proxy designation. In many states, those requirements are similar or identical to testamentary formalities for will execution, so the requirement would impose no additional burden on the will-making process.<sup>29</sup>

### III. DEFAULT RULES FOR ASCERTAINING PROBABLE ANATOMICAL INTENT

A regulated market for compensated cadaveric organ donation must provide for the possibility that many people may die without manifesting anatomical intent. In the absence of an affirmative expression of actual intent,

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29. In New Jersey, for example, a health care directive must be signed by the declarant and two witnesses or notarized. N.J. STAT. ANN. § 26:2H-56 (West 2007). Similarly, a will must be signed by the testator and two attesting witnesses. *Id.* § 3B:3-2.

the law must supply default rules governing whether to permit or prohibit the decedent's estate to sell bodily remains.<sup>30</sup>

The selection of default rules for compensated posthumous organ donation may benefit from insight drawn from the inheritance law context, which deals more generally with the problem of unexpressed donative intent. Most Americans die without a will, so the default rules of intestate succession perform a central function in the disposition of property at death.<sup>31</sup> For the most part, intestacy law operates by ascertaining and employing commonly held preferences as a proxy for the probable intent of intestate decedents.<sup>32</sup> Intestacy law therefore promotes efficiency by adopting “majoritarian defaults” that allow intestate individuals to rely on defaults that are likely to approximate their preferences.<sup>33</sup> As inheritance scholars have argued persuasively, dissonance between a system of intestate distribution and majoritarian preferences would tend to frustrate the donative intent of uninformed individuals who lack knowledge of their state's intestacy rules or the need to contract around the default regime.<sup>34</sup>

The theoretical basis for majoritarian defaults has been most thoroughly developed in the context of contract law, where default rules serve a gap-filling function by supplying terms that a majority of contracting parties would adopt *ex ante* were they to anticipate the entire universe of concerns implicated by their transaction.<sup>35</sup> In theory, majoritarian preferences can be ascertained from empirical observation of contractual interactions in which a majority of parties either opt in or out of a given default.<sup>36</sup> In practice, however, ascertaining

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30. “[A] default rule can be defined as a rule that parties are free to change.” Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S. CAL. INTERDISC. L.J. 389, 390 (1993).
31. See Weisbord, *supra* note 27, at 887-88 (collecting data on the rate of intestacy in the United States).
32. See Richard V. Wellman, *Selected Aspects of Uniform Probate Code*, 3 REAL PROP. PROB. & TR. J. 199, 204 (1968) (“The foundation [of the Uniform Probate Code] is a pattern of intestate succession that is responsive to the idea that the law’s plan should be in line with what the average person wants.”). *But see* Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1081 (2004) (“[S]everal significant rules of intestacy are manifestly out of step with a majoritarian approach to inheritance defaults of either the informed or uninformed variety.”).
33. See Hirsch, *supra* note 32; Wellman, *supra* note 32.
34. See Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319, 323-24.
35. See, e.g., Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 971 (1983) (“Ideally, the preformulated rules supplied by the state should mimic the agreements contracting parties would reach were they costlessly to bargain out each detail of the transaction.”).
36. Cf. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 119 (8th ed. 2011) (explaining this phenomenon).

majoritarian preferences is often quite difficult. Observations of behavioral patterns of contracting parties can be of limited value because a party's decision not to opt out may be attributable to reasons other than agreement with the default rule.<sup>37</sup> In the inheritance law context, observations drawn from the high rate of intestacy are of particularly limited probative value because there is evidence suggesting that most individuals do not affirmatively opt in to the default rules of intestate distribution; rather, it appears that most Americans die intestate because, although they want to opt out of the default regime, they fail to make a will.<sup>38</sup> Ascertaining majoritarian preferences about donative intent with exact precision is further complicated by the fact that decedents who fail to manifest testamentary intent during life cannot be interviewed after death. In the words of Adam Hirsch, "The mind of a decedent is the ultimate sanctum sanctorum. It refuses to yield itself to view."<sup>39</sup> Majoritarian preferences in the inheritance law context are therefore often based on surveys of living individuals who have not executed a will.<sup>40</sup>

In the gratuitous organ donation context, opinion surveys suggest that most Americans strongly support organ donation at death but also believe that individuals should retain the right to decide for themselves whether to donate. A 2012 nationwide survey commissioned by the federal Health Resources and Services Administration conducted more than 3,200 interviews and found that a large majority of respondents—nearly 85%—were either currently registered as organ donors or receptive to becoming an organ donor in the future.<sup>41</sup> However, only 51% of respondents supported a default in which a decedent's intent to donate would be presumed in the absence of an affirmative act of donor registration.<sup>42</sup> Reasons for opposing a presumed intent default included

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37. See, e.g., Lisa Bernstein, *Social Norms and Default Rules Analysis*, 3 S. CAL. INTERDISC. L.J. 59, 70 (1993) ("In transactional settings where informal norms are an important part of the parties' contracting relationship, a party may be reluctant to suggest varying a particular default rule even if the 'direct transaction costs' are low and the variation would make both parties better off.").

38. See Weisbord, *supra* note 27, at 890-91.

39. Hirsch, *supra* note 32, at 1069.

40. For an example of one such study, see Fellows et al., *supra* note 34.

41. 2012 NATIONAL SURVEY, *supra* note 1 at 1. Some 62.3% of respondents reported they had registered as organ donors. *Id.* at 18. In addition, the 37.7% of respondents who reported they were not registered organ donors were asked, "Regardless of whether you have formally granted permission, would you want your organs to be donated after your death?" *Id.* at 24. A majority of those respondents were receptive to the idea of becoming an organ donor: 11.5% answered "definitely yes"; 47.7% "probably yes." *Id.* at 25 tbl.4. A total of 84.6% of respondents therefore were either registered as organ donors (62.3%) or were receptive to becoming an organ donor (37.7% \* (11.5% + 47.7%)).

42. Some 51.1% expressed support or strong support for a system in which individuals would have to opt out of organ donation. *Id.* at 48 fig.11.

respect for personal choice (30%), ethical or religious beliefs (18%), and a desire to avoid violating rights (14%), among others.<sup>43</sup>

In the gratuitous organ donation context, the different possible default rules have come to be known as “actual consent” defaults and “presumed consent” defaults. An actual consent default requires organ donors to opt in; absent an affirmative indication of consent, the law presumes the decedent did not wish to donate.<sup>44</sup> The Revised Uniform Anatomical Gift Act of 2009 adopts an actual consent default.<sup>45</sup> By contrast, a presumed consent default requires non-donors to opt out.<sup>46</sup> Presumed consent defaults are common in Europe,<sup>47</sup> and the 1987 Uniform Anatomical Gift Act incorporated limited aspects of presumed consent.<sup>48</sup> Over a forty-year period, jurisdictions in the United States experimented with various forms of both defaults in governing gratuitous organ donation, but the system of actual consent eventually prevailed.<sup>49</sup>

Unlike in the inheritance law context, where the primary goal is to carry out the decedent’s intent, the prevalence of actual consent in the organ donation context was largely the product of objections to organ donation made by the decedents’ families.<sup>50</sup> Under the 1987 Act’s presumed intent default, a coroner or physician seeking to harvest cadaveric organs was required to undertake “a reasonable effort” to inform the decedent’s family “of their option to make, or object to making, an anatomical gift.”<sup>51</sup> That provision, in effect, allowed the surviving family to override the decedent’s presumed intent to donate. Indeed, in nearly half of cases in one study, family members objected to presumptions favoring organ donation.<sup>52</sup> The 1987 Act’s presumed consent default further unraveled as family members successfully challenged the constitutionality of harvesting a decedent’s organs without affording due process of law to the decedent’s family.<sup>53</sup>

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43. *Id.* at 49 tbl.18.

44. *See, e.g.*, REVISED UNIF. ANATOMICAL GIFT ACT n.2 (2009) (“[A]n individual becomes a donor only if the donor or someone acting on the donor’s behalf affirmatively makes an anatomical gift.”).

45. *Id.*

46. *See, e.g.*, UNIF. ANATOMICAL GIFT ACT § 4(a)(3) (1987).

47. *See* Steve P. Calandrillo, *supra* note 8, at 125.

48. *Id.*; *see also* David Orentlicher, *Presumed Consent to Organ Donation: Its Rise and Fall in the United States*, 61 RUTGERS L. REV. 295, 300 (2009).

49. *See* Orentlicher, *supra* note 48, at 297-300.

50. *Id.* at 309.

51. UNIF. ANATOMICAL GIFT ACT § 4(a)(2) (1987).

52. Orentlicher, *supra* note 48, at 312.

53. *Id.* at 305.

The right of family members to override presumptions or decisions about the decedent's anatomical intent raises more significant questions in the context of compensated cadaveric harvesting. In a regulated market where the value of anatomical remains belongs to the decedent's estate at death, the role of the decedent's family in making decisions about whether to sell the decedent's organs becomes morally problematic. If the decedent's family were permitted to intervene and override the decedent's intent (actual or presumed), then the economic incentives created by the estate's ability to sell the decedent's cadaveric organs would create the potential for immoral and opportunistic decision making. This is because family members who are designated or charged with making end-of-life decisions on the decedent's behalf in cases of cognitive or physical incapacity are also often the decedent's heirs or beneficiaries.<sup>54</sup> A possible solution to this problem might be to disqualify individuals who participate in making end-of-life decisions on the decedent's behalf from sharing in the proceeds derived from the sale of bodily remains in the decedent's estate. This solution, analogous to purging statutes voiding beneficial dispositions of interested attesting witnesses to a will,<sup>55</sup> would mitigate some problems associated with family interference.

In setting presumptions about probable anatomical intent, default rule design must take into account more than just majoritarian preferences favoring compensated organ donation. Given the concerns noted earlier about individual autonomy, privacy, and religious liberty, the law must also reflect minoritarian views of non-donors. This would be especially true if minoritarian preferences opposing compensated organ donation were more intensely felt than majoritarian preferences favoring the practice.<sup>56</sup> Indeed, objections to cadaveric harvesting are often attributable to deeply held religious beliefs, genuine concerns about exploitation, or other strongly held convictions. In many strains of Jewish tradition, for example, the harvesting of organs at death is prohibited unless the extracted parts are used to save

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54. As Horton explains, human organs are most valuable when harvested from a body with a beating heart, so the decedent's beneficiaries would have a financial incentive to declare brain death prematurely to maximize the value of bodily remains. Horton, *supra* note 6, at 587.

55. In a majority of states, the beneficial disposition of an interested attesting witness is purged to preserve the witness's competency while eliminating the potential for biased testimony. See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 3-3.2 (McKinney 2014) (voiding beneficial dispositions in a will in favor of an interested attesting witness).

56. Cf. Orentlicher, *supra* note 48, at 317 (“[T]he harm from an erroneous donation under presumed consent may be greater than the harm from an erroneous non-donation under actual consent.”).

another's life.<sup>57</sup> Respect for minoritarian viewpoints might therefore require sacrificing the potential efficiency gains produced by a majoritarian default.

Another qualitative consideration relevant to default rule selection is the issue of disparate preferences within certain demographic groups. As Horton persuasively argues, individuals at the bottom of the income and wealth spectrum stand to gain the most economically from making anatomical remains alienable at death.<sup>58</sup> Ethnic minorities that are disproportionately affected by wealth and income inequality, such as African Americans and Latinos, are also slightly more likely than Caucasians both to object to organ donation and to die without manifesting anatomical intent.<sup>59</sup> A presumed consent default might therefore serve to compound existing socioeconomic disadvantages and racial biases by overriding strongly held but unexpressed objections to compensated organ donation within minority populations.

The need to respect minoritarian preferences therefore suggests that the preferable approach would be to retain the current default of actual intent, thereby leaving bodily remains untouched unless the decedent, during life, affirmatively manifests an intent to authorize the estate to harvest and sell his organs at death.

## CONCLUSION

In the United States, a regulated market for compensating cadaveric organ donation is likely to be tolerable only if it respects individual freedom of choice to participate or refuse to participate. The accurate manifestation and ascertainment of anatomical intent must therefore be a central consideration in the development of rules, procedures, and presumptions governing commercial markets for transplantable human organs. To facilitate and protect the

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57. See, e.g., Rabbi Aron Moss, *Organ Donation*, CHABAD.ORG, [http://www.chabad.org/library/article\\_cdo/aid/635401/jewish/Organ-Donation.htm](http://www.chabad.org/library/article_cdo/aid/635401/jewish/Organ-Donation.htm) [<http://perma.cc/UFL2-SAE5>] (noting that harvested organs are often used for research rather than transplantation and are sometimes discarded if they cannot be used). For other views within the Jewish faith, see, for example, Rabbi Billy Dreskin, *Are Jews Allowed to Donate Organs?*, REFORMJUDAISM.ORG, <http://www.reformjudaism.org/practice/ask-rabbi/are-jews-allowed-donate-organs> [<http://perma.cc/44U7-JDDM>] (Reform Judaism); and *Frequently Asked Questions About Halachic Aspects of Organ Donation*, HALACHIC ORGAN DONOR SOC'Y, <http://www.hods.org/halachic-issues/faq-halachic> [<http://perma.cc/SSU8-TPWT>] (Orthodox Judaism). Objections to posthumous organ donation are also held within some sects of Islam. See, e.g., Sean R. Fitzgibbons, *Cadaveric Organ Donation and Consent: A Comparative Analysis of the United States, Japan, Singapore, and China*, 6 ILSA J. INT'L & COMP. L. 73, 95 (1999).
58. Horton, *supra* note 6, at 575 (“[M]aking body parts descendible could create new opportunities for those on the bottom rungs of the fiscal ladder to ‘make’ wealth that does not stem from existing wealth.”).
59. 2012 NATIONAL SURVEY, *supra* note 1, at 15, 20.

manifestation of anatomical intent, the law must enhance the security of procedures for donor registration without belaboring the process in ways that deter donor participation. To ascertain and implement probable intent in the absence of donor registration, the law must develop default rules that take into account both majoritarian preferences favoring organ donation and minoritarian preferences opposing organ donation. Registration procedures and default rules should incorporate safeguards against opportunism and biased decision making by family members who stand to gain financially from the estate's increase in value attributable to proceeds from the sale of the decedent's cadaveric organs. These considerations could help to create a carefully calibrated system of donor registration and default rules essential to the emergence of any secure, respectful, and efficient model of organ transfer.

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Preferred Citation: Reid Kress Weisbord, *Anatomical Intent*, 124 YALE L.J. F. 117 (2014), <http://www.yalelawjournal.org/forum/anatomical-intent>.