

*No Consent Means “No”*

One week ago, the Dutch government narrowly passed “opt-out” organ procurement [legislation](#), joining about 25 other countries that implement this model. While opt-out models include [required refusal](#) and [presumed consent](#), and [soft](#) and [hard](#) versions (the former permitting organ removal only with family consent), what they all have in common is that they sanction the taking of a person’s organs without consent. Compare this with the opt-in model used in the United States, which requires donor or family consent. According to the U.S. Department of Health and Human Services (HHS), there are more than 125 million registered organ donors. While Americans [overwhelmingly support](#) organ donation or “anatomical gifts,” [less than half](#) are registered as organ donors. Exacerbating the problem is that only about three in 1,000 registered donors will have transplantable organs when they die. As a UNOS spokesperson [explains](#), this is because only two percent of people “die in a way that keeps oxygenated blood flowing through the organ.” As of mid-2017, 120,000 people in the United States were awaiting organ transplants. Of those, about 10% will die before receiving an organ due to organ supply shortages. As a result, America’s opt-in model is coming under increasing scrutiny. But, should the United States move to the opt-out model that other countries have adopted? The short answer is: No.

Organ donation [rates](#) are said to be “typically exceeding 90 percent in opt-out countries and failing to reach even 15 percent in opt-in countries.” Claiming success based on numerical statistics, however, does not tell the entire story. These numbers do not reflect the narrow voting margins by which these bills passed in legislatures, the fierce public opposition and backlash in many of these countries, or the [low rates of donation](#) in some opt-out countries. While many claim overwhelming increases in organ procurement as a result of opt-out laws, a [2012 study](#),

accounting for variables such as family override of organ procurement, only found an 18% increase in organ procurement as a result of the opt-out model. Even Spain, an opt-out country lauded as having a successful organ donation program, credits [trained transplant coordinators and staff](#) rather than the opt-out model itself.

In 2016, Congress unanimously passed [H.Res. 343](#). While its purpose was to address China's violation of international medical standards, at the outset Congress set forth a critical tenet of organ donation in the United States: "*voluntary and informed consent is the precondition for ethical organ donation.*" Consent is a precondition for ethical organ donation. Legally, a donation – or a gift – is a voluntary, uncoerced, intentional transfer of property from a donor to a recipient. It requires donative intent, and acceptance by the recipient. This is the guiding principle of the [Uniform Anatomical Gift Act](#) and the [Revised Uniform Anatomical Gift Act](#). Both sought to increase organ donation, in part, by making it procedurally and practically easier for individuals to donate organs and by allowing families, as surrogates, to consent to donation on a family member's behalf. Respecting individuals, donative intent, and consent remained steadfast principles of organ donation.

Opt-out laws contradict these fundamental principles. They sanction an unauthorized intrusion on a person's body and dignity. The [Fifth Amendment](#) provides that "no person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be *taken* for public use, without just compensation." It aims to protect government deprivation of liberty and property, and to limit the government's ability to "take" a person's private property. The [Supreme Court](#) has addressed this law of eminent domain, and held that the government can take and transfer the private property of one private person to another private person *only* if the

*public* is provided a future *use* of property. It also required just compensation for such taking.

Comparatively, opt-out laws take and transfer organs from one person to another person for *personal* use, without any compensation. If people find the law of eminent domain objectionable (which they do), they should find the taking of organs under opt-out laws repugnant. If opt-out laws are acceptable to us, then we have become a society that places a higher value on, and grants greater protections to, a person's land than we do an individual's liberty, person, and dignity.

Opt-out proponents' arguments include "supply and demand" and "an individual's obligation to society," but there is more to consider. Inherent in opt-out systems is a value judgment that if a medical need can be met, even at the expense of others, it should be. And though the Supreme Court has held that there is no [fundamental right of access to medical treatment](#), opt-out models are based on the notion that all individuals on a waiting list have a fundamental right to receive an organ, at the expense of the individual fundamental liberties of others.

One should consider that the shortage of organs is, in part, the result of medical advances. As transplantation procedures and results of transplants improve (as seen with the use of Cyclosporine), we perform more transplants and, in turn, need more organs. To obtain more organs, opt-out countries treat people as a means to an end, and take their organs without consent. Is it ethically justifiable to allow advances in science to dictate the fundamental, personal liberties of American citizens? We need to stop such [technological determinism](#), where science influences our lives in ways that offend human dignity and push us "heedlessly into ethically troubled waters."

Supporters of the opt-out model say that [an individual has a choice](#), because he has “an opportunity to empower [his] anti-donation preference.” The only choice to be made by an organ donor is that set forth by Justice Broussard in his dissent in [Moore v. Regents of California](#), where he stated that an individual has the “right to determine, before a body part is removed, the use to which the part will be put after.” This honors the respect for persons, human dignity and [liberty](#), and [autonomy](#) that American society greatly values.

The practical issues with the opt out model should also be considered. First, utilizing only [paper mail](#) is inherently problematic. Additionally, how do we ensure we reach everyone, such as people who are not literate, have language barriers, who are undocumented, or who relocate. Even if a person properly opts-out, what safeguards will prevent data entry errors and delays, hacking, system failures and downtime? What happens if (and inevitably, when) those safeguards fail? This does not even include issues of recourse and liability.

The truth is that opt-out laws could backfire. [Moving](#) to an opt-out system can result in a decrease in organ donations not because people are “against donation but because they’re against government control of their bodies.” Opt-out laws could increase the [growing mistrust in medical care](#). A [significant](#) portion of the public is opposed to donation on grounds of mistrust of the medical community in general, and 50% of respondents in a [recent survey](#) indicated they fear that doctors would not try to save their lives if they knew they were organ donors. Fears of doctors hastening death to [harvest organs](#) will surely be intensified under opt-out laws.

The opt-in system in the United States [needs improvement](#). But, moving to an opt-out model is not the answer. So, if not opt-out, what? Do we throw our hands up and give up on meeting the needs of those awaiting transplant? Of course not. There are [numerous](#) many options to explore, which include:

- Significant investment in public campaigns, education and outreach programs to educate the public about organ donation and the existing organ shortage, and to clarify [misconceptions](#) around required donor health or age.
- Do not allow families to veto the wishes of those who have registered as organ donors.
- Increase the number of ways to register to include IRS filings, higher education applications, voting booths, libraries, religious institutions, courthouses, and primary care physicians offices.
- If organ donation is in line with their faith, [enlist clergy](#) and rabbis to preach to their faithful about the importance of organ donation.
- Focus on the [accompanying factors](#) that appear to be increasing rates, such as the trained transplant coordinators which Spain credits for its success.
- Invest in advancements in technology which [extend the viability](#) of organs outside of the body to reduce the underutilization of available organs.
- Place greater investment into science to reduce the need for human organ donation, such as artificial or synthetic organs or organoid research.
- Expand the preferred status and allocation priority given to donors if they are ever listed on a registry as a recipient.
- Reevaluate payment of [financial compensation](#), such as direct monetary payments or tax credits, or insurance benefits or premium subsidies, to incentivize donors.

These options are not perfect. They may work, and if they don't there are other approaches we can try. We should invest time, resource and effort to encourage people to become organ donors, but should never take their organs without consent. Consent means Yes. No consent means No.