



Opt-out organ donation without presumptions

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ABSTRACT

This paper defends an 'opt-out' scheme for organ procurement, by distinguishing this system from 'presumed consent' (which the author regards as an erroneous justification of it). It, first, stresses the moral importance of increasing the supply of organs and argues that making donation easier need not conflict with altruism. It then goes on to explore one way that donation can be increased, namely by adopting an opt-out system, in which cadaveric organs are used unless the deceased (or their family) registered an objection. Such policies are often labelled 'presumed consent', but it is argued that critics are right to be sceptical of this idea—consent is shown to be an action, rather than a mental attitude, and thus not something that can be presumed. Either someone has consented or they have not, whatever their attitude to the use of their organs. Thankfully, an opt-out scheme need not rest on the presumption of consent. Actual consent can be given implicitly, by one's actions, so it is argued that the failure to register an objection (given certain background conditions) should itself be taken as sign of consent. Therefore, it is permissible to use the organs of someone who did not opt out, because they have—by their silence—actually consented.

At present, organ procurement in the UK requires would-be donors to register their consent to the posthumous use of their bodily organs. If people do not opt in, then their organs are not used. (Sometimes their family may grant consent, but more usually the family's role is restricted to a veto—thereby further reducing the likelihood of donation.)^{1 2} This arrangement leads to a shortfall in the supply of organs, which results in many people who need organs dying while on waiting lists, as well as much suffering (for instance, people being forced to wire themselves to dialysis machines while awaiting a kidney transplant). Although a 2008 report by the UK's Organ Donation Taskforce decided against a switch to an opt-out system, this decision has come in for criticism.³

This article will defend such an opt-out regime, in which the default position is that we can use a deceased person's organs unless they have registered an objection. Such systems are often referred to as 'presumed consent'.^{4–6} This is unfortunate, because it suggests that the policy—that people's organs may be used unless they have registered an objection—rests on one particular, rather shaky, moral foundation. An opt-out policy could, however, be justified in other ways. It might be thought legitimate to take cadaveric organs on the grounds that the dead have no right over their bodies, so consent is not necessary.⁷ This might make it puzzling why people should have the option to opt out, but it is consistent to give

people a choice even if they have no right to it. Alternatively, one might appeal to some other justification, such as 'normative consent', which claims that we can treat people as if they had consented, even when they have not actually done so, if they are under a duty to consent.⁸ This, combined with the belief that explicit refusal of consent still has force, would provide a neat justification for an opt-out policy, but the notion of normative consent is controversial.^{9 10} This article presents an alternative justification for an opt-out scheme, which avoids making controversial claims about 'presumptions' of consent. Rather, it will be argued that—providing certain conditions are met—those who do not opt out have actually consented (implicitly) to the use of their organs. An opt-out system, therefore, respects the need for (genuine) consent.

THE VALUE OF DONATION

I assume that increasing the supply of organs is, uncontroversially, a morally laudable aim—the issue is simply to show that the means of doing so are not morally objectionable. It is sometimes suggested that some measures designed to increase the supply of donor organs undermine the expressive value of altruism in their donation. The primary value of organ donation, however, is instrumental, rather than expressive, and this value is not threatened by the donor's motives.³

We can appeal here to the values of choice identified by Scanlon.¹¹ He argues that being able to choose is valuable in at least three ways. First, choosing may be instrumentally useful to getting what you want. If we are in a restaurant, for example, then you are probably best placed to know what you like, both in general and on that occasion, so you would ordinarily be best satisfied if you choose your own dish from the menu. Second, there may be expressive or representative value in making the choice. Your partner may be able to satisfy his desires better with his own money than you can, but there is value in you choosing a gift for him, and this would be lost if you simply gave him the money or vouchers to spend for himself. Third, there is symbolic value in being recognised as someone capable of choosing for yourself, rather than being treated like a child.

Instrumentally, what matters is getting what you want, almost regardless of how you get it (at least, unless the means itself has instrumental effects). If I need an organ transplant, then what matters to me is getting the organ. It makes no difference to me, from the purely instrumental perspective, whether I do so as a result of altruism on the part of the donor, or whether they only part with the organ in exchange for money, or even if they donated under duress (say, at gunpoint). From

an instrumental perspective, we should simply choose whichever of these methods maximises organ donation.

Of course, we care about more than merely maximising the supply of organs. We think it would be wrong to extract organs forcibly from people against their wishes, because people have rights—expressible as ‘side constraints’ or ‘trumps’—that restrict what we can do to them, even for the social good.^{12 13} I shall argue, in the latter part of this paper, that opt-out systems do not violate such rights.

It has often been thought desirable that people donate their organs altruistically, as a gift. I do not deny that it is. A society in which people need no inducement to help each other, because all are virtuous, is morally preferable to one in which inducements are necessary. I deny, however, that this should be our primary concern. People are not suffering or dying simply as a result of a lack of charity or altruism in society, but because of the shortage of donor organs. We may be able to do little about the former, but we can address the latter problem, so we should do so. Concerns about expressive value are all very well, but they must be appropriately balanced against our other needs, and in this case the need for organs seems more urgent.

It may be that introducing the mechanisms necessary to increase the supply of organs would suggest a lack of virtuous donors, but that is clearly already the case or we would not be facing such a shortfall. Moreover, there is no reason to assume that institutions designed to increase organ supply—such as incentive schemes or an opt-out system of donation—will in any way worsen the problem of moral motivation. While these schemes are generally designed to make the moral course of action (donation) less costly, that need not undermine its morality.

Some, following a line of thought in Kant, seem to think that morally worthy action ought to be difficult. If you only do something because it is easy, then it is unclear whether your action is really morally good or merely resulted from inclination. It should not, however, be assumed that it cannot be morally good. The problem here is merely an epistemic one: it is difficult to know whether you would have done the right thing had it been harder or more costly for you. Many people find helping the needy intrinsically rewarding, rather than a chore, but this does not diminish the worth of their action, even aside from its instrumental value. What matters is the counterfactual—whether they would still have done the right thing even had it been costly to do so. This does not mean that an action must actually be costly to have moral worth.

One way to challenge the intuition that donating ought to be costly, in order to ensure that donors are properly motivated, is to ask whether we should we take measures to make organ donation more difficult or costly?¹⁴ We could make organ donation more burdensome in a variety of ways. For instance, we could require would-be organ donors to pay a fee, increase the bureaucracy involved in registering as a donor, or mandate any would-be donors to go through a series of invasive health checks, in order to determine the fitness of their gift. These measures would, of course, lead to a predictable decline in donation rates, but they would serve to ensure that donations came only from those really motivated by duty. If we care more about moral worth, or expressive value, than increasing the supply of organs then we should be willing to consider such proposals, in order to ensure that donors really are acting for moral reasons.

I take it that proposals to make donation more difficult are absurd. We would not want to reduce the supply of organs in order to ensure that the supply we had was donated for unimpeachable moral reasons. Why, then, should we resist making

donation easier? Someone willing to defend the status quo would need to adduce reasons to believe that we currently have exactly the right balance between the instrumental concern to increase organ supply and the expressive concern with people’s moral character. I think that there are powerful reasons to say that we ought to prioritise the former.

Offsetting the costs attached to morally desirable actions will not, I grant, increase the amount of moral virtue exhibited. Those who only donate when it is easy for them to do so do not show moral worth. Nonetheless, that donation is made easier does not diminish the moral worth of those who would have donated, even if it had been more costly. There is no loss of moral worth. Moreover, there is an increase in the supply of organs, which is itself morally desirable, even if it has not come about in a virtuous manner. What matters is simply that it has not come about in a morally objectionable way—that is, that no one’s rights have been violated. This will be the focus of the remaining section of the paper.

THE MEANING AND IMPORTANCE OF CONSENT

It is generally accepted that it is wrong to take someone’s organs without their consent. This supports the present opt-in system, which ensures that someone’s organs can only be used if they have given a clear sign of their consent, such as signing up on the donor register and carrying a donor card. A shift to an opt-out system is often identified with ‘presumed consent’^{4–6}—that is, with the idea that we can simply assume, from people’s silence, that they consent to the use of their organs and that this licences us to take them as if the people in question had in fact consented.

This move is problematic, for people may in fact have objections that they fail to register for various reasons, such as ignorance. Moreover, this approach suggests that consent is simply a mental attitude—something like approval—rather than an act. If consent is something that must be given, then it cannot simply be presumed when no such act has taken place. It is necessary, however, to discuss the different forms that consent may take.

Consent may be express or implied.¹⁵ The clearest cases of consent are what we may call ‘express’ or ‘explicit’ consent, as when a patient signs a consent form or an organ donor register. In these cases, providing that certain conditions are met (for instance that the patient is competent, informed and not under duress) it is quite clear that consent has been given and is normatively binding. These cases can be contrasted to ‘tacit’ or ‘implied’ consent, in which the patient’s actions indicate that they consent, although no express signal is given. For example, if the doctor says to a patient ‘you need an injection—hold still’ then the patient, by not withdrawing their arm or objecting, can be said to have implied their consent. I am not recommending this as general medical practice. One problem would be proving consent later, but, as will be shown below, inaction can be a sign of consent in appropriate conditions, which I believe can be satisfied in the case of organ donation. Moreover, implicit consent is still actual consent and the doctor does no wrong in taking it as a licence to proceed.

Although the distinction between express and implicit consent is familiar, it is not easily drawn. Although clear examples of each can be identified, it is not clear what makes the difference. Is it, for instance, that express consent is verbal while implicit consent is not? I do not think so, because one might consent explicitly by ticking a box or nodding one’s head. Nor is it that express consent is necessarily more active than implicit consent, although the ‘action’ may be inaction. All consent is in

a sense a reaction to another's initiation, and acts that imply consent can be active. The difference, I believe, is that explicit consent is an action that is solely—or primarily—an act of giving consent, rather than serving any further purpose. There is no reason to sign a consent form, save to signal one's consent. Implicit consent, conversely, occurs when some other action is taken as consent, although it may also serve further purpose. Voting, for instance, is sometimes taken as a form of implicit consent to the state. One may have reason to vote even if one does not consent, but doing so may be taken as a sign of consent.

It should be noted that both explicit and implicit consent involves an action of sorts. Although the former is termed 'express' consent, it should not be thought that the patient's consent was something, like an attitude of approval, that existed independently and merely had to be communicated (expressed). If this was so, then the doctor would do no wrong in operating on a willing patient who had not yet communicated his willingness (although, of course, she could not know that her action was permissible, unless she could read minds). Giving consent, like promising, is what may be termed a 'performative utterance'.¹⁶ To express consent is to give it and without the expression there is no consent.

This should be clearer if we consider hypothetical consent. Sometimes, a patient cannot give their actual consent, even tacitly—for instance, because they are unconscious. In these cases, doctors usually consider what they would (counterfactually) have consented to, if they were in a position to do so. It is ordinarily assumed that rational patients would consent for doctors to act in their best interests, particularly when that involves administering urgent life-saving treatment. (When treatment can wait and the incapacitation is only temporary, it is generally accepted that doctors should wait so they can gain the patient's actual consent.)

If consent was simply an attitude of approval or willingness, then many cases that we are inclined to regard as ones of hypothetical consent would in fact be actual (although non-expressed) consent. In this case, hypothetical consent would only have application when a patient could not form the necessary mental attitude. In other words, there would be no need to invoke a patient's 'hypothetical consent' for something she endorses or accepts, if this mental attitude was itself the consent. Rather, we should say that she did consent; she merely had not expressed it.

This is, as I have been arguing, a faulty understanding of consent. Consent is sometimes identified with a mental attitude,¹⁷ but consent is not a mental attitude, but an action. It can be given tacitly, but it must actually be given (when possible). This explains why the notion of 'presumed consent' is problematic. It is often alleged that those who favour an opt-out system of organ donation are presuming that those who do not explicitly object (opt out) are consenting.

I do not, however, think it is necessary for an opt-out system to presume anything about consent. If consent was simply an attitude of acceptance, then perhaps it would be reasonable to presume that non-objectors consented. If consent is an action that has to be performed or given, then it cannot be presumed. It is absurd to 'presume' that people have given consent, when they clearly have not in fact done so. An opt-out system need not, however, be identified with presumed consent, which would merely be one possible (and, I believe, inadequate) justification for it.

Rather than presuming the presence of consent, we can simply appeal to the familiar idea of tacit consent. As was noted above, an opt-in system ensures the express consent of all

donors. We do not ordinarily believe that consent, to be valid, must always be explicitly given. In many cases, consent is implied by people's actions. For instance, the chairperson of a meeting may declare a motion carried if no one voices an objection, in which cases it is clear that silence implies acquiescence.¹⁸ Similarly, one who walks into a restaurant, orders and eats a meal, does not usually explicitly promise to pay for it, but we say that her actions signify her consent to do so. Given our social conventions, it is clear how her actions would be understood, and it would be no more reasonable for her to protest that she had not meant to give her consent than to say that she had not meant to consent in signing a consent form (language meaning, after all, is also a matter of social convention).

This highlights the other side of my claim that consenting is an action, rather than a mental attitude. It is not simply that the action is necessary and the mental attitude insufficient. It is also that the action is sufficient and mental attitude unnecessary. Someone who has performed the relevant consent action—whether that be signing an explicit declaration or some action understood as tacit consent—cannot escape their obligation simply by saying that they did not mean to give their consent. Their intentions are irrelevant to what they in fact did. Perhaps, if it is not too late, they may be allowed to withdraw their consent, but they cannot change the past.

What has this to do with organ donation? Well, once an opt-out system is in place, we can then say that those who do not opt out are in fact consenting tacitly to the use of their organs. There is no need to presume their consent, because it is in fact actually (albeit implicitly) given by their actions, irrespective of their feelings on the matter. Of course, this makes certain assumptions about the workings of the system.⁸ If such consent is to count as informed, it must be clearly communicated to all involved that this is how their silence will be interpreted. Moreover, it must be possible for people to opt out without facing unreasonable costs for doing so. These conditions, however, seem satisfied by most opt-out schemes, provided that the system is well publicised and no additional costs are attached to opting out. (This may be a reason to resist calls to refuse organs to those who opt out, although the merits of such a proposal cannot be discussed.)

One common objection to tacit consent, however, has been that there is no such thing as a 'natural' act of consent.¹⁹ We cannot infer, for example, that someone consents to the laws of the land from the fact that they walk down the highway. Tacit consent can only be operative when there is some clear statement or understanding of what action will be interpreted as consent to what. Thankfully, I do not need to assume any natural act of consent. It is up to an appropriate authority to determine what counts as consent in a given context. In a board meeting the chair (or constitutional rules) may specify that consent is shown by the raising of one's hand, saying 'aye', or even silence. Similarly, assuming that the state is a legitimate authority, then it is up to the state to specify how consent can be shown. Different states legitimately have different procedures, concerning donor registers, family vetoes and so on. If the state declares that not opting out of an organ donation scheme will be interpreted as consent then those who do not opt out implicitly consent.

Once such an opt-out scheme is in place, and is publicly known to be in place, those who do not opt out can be said to have tacitly consented, irrespective of their feelings on the matter. It may be that someone does not intend or regard their silence as consent, but consent is not about subjective intentions, so this case is no different from that of someone who signs a consent form without intending to consent. The fact is that

their action is one of consent, irrespective of their feelings, so there is no need to presume anything about people's attitudes towards organ donation.

It may be objected that this still involves a presumption that all are aware that silence will be interpreted as consent. This is true, but this presumption is different from a presumption of consent. First, it is in keeping with the general position that ignorance of the law is no excuse, and second we can assume that public information campaigns will be accompanied by awareness-raising efforts from groups opposed to donation, such as religious communities. Special care will, however, be necessary in managing any transition from an opt-in to an opt-out system. Provided that the necessary background conditions are met, those who fail to register dissent do in fact consent by their silence.

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