

The UK Government is holding a consultation on a proposed change to the law on the use of organs from dead donors, so called 'deceased transplants'.¹ The headline issue is whether England should move from an 'opt-in' system of organ donation, where my organs will be used if I have given prior consent, to an 'opt out' system, which will require me to register a prior objection if I do not wish to be a posthumous donor. Both possibilities come in 'hard' and 'soft' options, a soft option giving relatives a final say.

The main arguments for changing to opt-out is the reasonable hope that it should increase the number of organs available for donation. This is a powerful consideration in view of the suffering and mortality in those awaiting transplants. In the UK 1000 people die every year while waiting for a donated organ. It would be good to reduce this number. The actual reduction expected from such a change is less clear though. Studies from countries changing to an opt-out system show an increase in organ availability, but also suggest that factors such as greater public awareness and greater acceptability of discussing donation with bereaved relatives may account for much of this.²

However, a change to an opt-out system would be contentious. Two issues often get confused. The first is the ethical issue of our duties to the dead. But, second, there are emotive issues that affect the living. There may be no perfect solution to the issue of deceased transplants, but any system must come to terms with the interwoven realities of both issues.

Where a potential donor has not made their views known before death, much of the ethical debate has centred on the problem of consent. This stems from an appropriate commitment to respect a person's autonomy. Ethicists advocating opt-out systems have therefore proposed notions such as 'presumed consent' or 'deemed consent' where a person has not taken action to opt out, or 'normative consent' as a recognition of a proper moral default action, and so on.³⁻⁵ However, I suggest talking about consent after a person's death is to make a category error. Where there are no indications of wishes prior to death both consent and autonomy can no longer properly be considered as relevant considerations, for there is

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no longer a person present capable of self-rule. And there is no longer a way of knowing what their wishes might have been. This is an echo of Epicurus' view that *'where I am death is not, where death is I am not'* — without a living individual there can be no self-rule and thus no consent. In an opt-out system respect for autonomy is shown while that autonomy is still present by allowing a person to opt out of donation. I am not suggesting that the dead do not have interests, or that the dead themselves or dead bodies should not be respected. This is a different matter, as networks of human relationships continue and *'... the flourishing of the family as a whole is part of our own individual good as well'*.⁶

I agree that donation *should* be a gift. So if consent is impossible after death should we rule out donation, or might alternatives to a gift be permissible? We all *should* make a will, but many do not. Imagine if the law stated that without a will the deceased's property must be destroyed, their savings cremated with them, their house buried. This would be absurd. Where there is no will society accepts norms as to how the property should be re-distributed. And this is backed by the state, via the law. This thought experiment has its limits. Human bodies are not property in any ordinary sense. But might it be legitimate for others to take over limited possession of bodies if there are strong reasons to do so, when autonomy no longer exists?

If the dead donor debate is not about autonomy or consent then the most cogent arguments may relate to the views of the family, the possession of the body, the respect due for a human body, and the degree of benefit from increased donation.

HOW DO WE BALANCE OUR DUTY TO RESPECT THE DEAD WITH OUR DUTY TO BENEFIT THE LIVING?

What about arguments against an opt-out system that are not about consent? Austria and Singapore have adopted a 'hard opt-out' system. If the potential donor has not registered any objection then the family cannot prevent donation. This seems to me insensitive, perhaps even cruel, with respect to family sensibilities. The biggest threat to successful organ donation would be if it were to lose the confidence of the public.⁷ This was seen in the German organ donation scandal of 2012 (where available organs were distributed unfairly), where donation dropped by 40%.⁸ In general, however, soft opt-out systems have been running in 24 European countries for up to 32 years (including Wales for the past 2 years) with remarkably few problems.⁹

Some have objected that opt-out implies the state is taking over ownership of our bodies after death, even moving towards a totalitarian state. But is it proportionate to see opt-out as an unwarranted or sinister move by the state? Donation can hardly be totalitarian while there is an opt-out option. Moreover, the state already has some legal authority over bodies, via the Coroner and other authorities. We accept this is reasonable because the person is dead and their consent is no longer needed, thus other considerations may take priority.

Might it not be more measured to see opt out as a way of our community, rather than the state, pursuing the good of its members? As Campbell reminds us: *'... gifts from the dead are not necessarily gifts by the dead'*.¹⁰ Over 80% of our UK community approve of organ donation, but only 40% have taken

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steps to opt in to donation.¹¹ This is not an argument for 'presumed consent'; rather, it suggests a general acceptance of donation coupled with a squeamishness regarding oneself. Is it that we do not trust the state to oversee an opt-out system? We may have limited trust in our politicians, but at its best the state is the formal expression of our common will, and is under the law. We trust the state to collect our taxes, to provide our security, to uphold law and order. In some matters we lose more when we mistrust the state than we might gain by trusting it judiciously, and surely organ donation may be such a case?⁷

If there is no perfect solution to the problem of donation where no prior will has been expressed, perhaps a 'soft opt out' with legal protection of the family's wishes may be the least bad system and may lead to some increase in organ availability in a morally permissible way. But the greatest benefit will come from increased public willingness to engage with the issue.

I recommend that you consider your own view carefully and take two actions. First, like me, please fill in an organ donor card unless you have a genuine objection to doing so. Second, please respond to the UK government's consultation, which closes on 6 March 2018 (<https://engage.dh.gov.uk/organdonation/>).

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Provenance

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