

Public Policy Through the Lens of Necessity: Post-Death Organ Donation

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ABSTRACT

The supply of organs available for transplant does not meet the demand. Attempts to increase the supply through policy initiatives that alter the system of explicit consent in post-death organ donation must rely on sound ethics and philosophy. Presumed, implicit, and normative consent each pose problems in liberal, pluralistic society where autonomy is highly valued. This paper explores whether the elements of necessity as a legal defense would supply the moral heft to justify an opt-out policy in light of the organ shortage.

Keywords: Organ Donation, Necessity, Normative Consent, Presumed Consent, Implicit Consent, Informed Consent

INTRODUCTION

Necessity can drive people's behavior to extremes, and at times, can provide an excuse for otherwise criminal, illegal actions that, under normal circumstances, would be morally wrong. The law can be somewhat generous. In *Regina v. Dudley and Stephens*, a British court held that you cannot kill someone to eat him despite dire need.¹ Mercy or clemency was left to the crown. Necessity is not a defense to homicide except in cases of self-defense or a just war. Yet, other necessity cases show there is some room for leniency in crimes and that necessity may provide a partial or total defense in tortious wrongdoing. Maybe you can steal a piece of bread or damage property to save a life that is in imminent danger.

While most agree, organ donation is not an area where the medical community should allow or encourage someone's life to be taken for the sake of saving another, post-death organ donation is an arena where some suggest necessity, or at least high demand, should shape policy, and provide a moral defense for

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policies that normally would offend a sense of freedom, individuality, and autonomy. Some may categorize organ donation as an area where there is a moral duty to act, while others may find it superfluous, an extra kindness beyond that which is morally required. If it is morally compulsory, does moral compulsion justify creating a legal obligation? Analyzing organ donation through the lens of the traditional requirements of necessity sheds light on the issue of whether necessity could morally justify acting without explicit donor prior consent. Is organ retrieval ever a justifiable trespass to save a life? While an opt-out system entered freely, by vote or referendum, speaks to rules that people agree to for the sake of living in liberal society, it is also problematic given the American notions of personal choices and liberty.² This paper argues that necessity does not provide enough moral heft to switch to an opt-out or mandated donation system, and that organ donation is a moral good although not necessarily a moral requirement. Undertaking a system that does not require opting in poses a risk to individualism in pluralistic liberal society, something recognized under the current system of organ procurement.

ANALYSIS

Evidence suggests that countries with opt-out policies have a donor rate of 25 to 30 percent higher than that in countries requiring explicit consent, yet the reason for increased rates is multifactorial.³ Generally, opt-out policies would further the public health community's priority of procuring more organs to meet the needs of those waiting.⁴ One problem with explicit consent requirements is that more people wish to donate than actually register, creating an unfulfilled potential in opt-in programs. To divide organ procurement into two broad categories, there are programs that operate with explicit consent (opt-in, the current US system) and programs which are essentially opt-out, presumed consent programs (any programs that do not require explicit consent). While the moral and ethical distinctions and the logistics may vary, the distinctive feature in the programs not requiring explicit consent is that government or society sees post-mortem organs as something available for use as a public good, or for the common good, making explicit consent unnecessary or even immoral.⁵ Those attempting to justify opt-out programs within the bioethics concepts of autonomy and informed consent offer presumed, implicit, or normative consent as acceptable to override a need for explicit consent.

Many countries justify their program based on presumed consent, the prevailing theory whereby consent is presumed unless a person explicitly expressed opposition to donation.⁶ Presumed consent is based on the concept that most would agree, while it acknowledges that some may not agree, placing the burden on them to opt out.⁷ Some argue that presumed consent is justified because removing an organ from someone who does not wish it to be donated is no worse than failing to remove one from someone who does wish to be a donor.⁸ The argument is weak as arguably leaving a body alone should not be compared to the unwanted invasion post death. In many circumstances, organs are not appropriate for transfer due to health of the tissue, incompatibility with realistic recipients, or if the circumstances of the death do not allow for procuring the organs. There is no right to donate.

Some argue that implicit consent (inaction is the consent) is a better rationale for opt-out programs.⁹ Implicit differs from presumed consent in that with implicit consent there is evidence the person was aware and had the opportunity to voice objection. The failure to object is consent where with presumed consent, inaction is not actual consent, but merely a substitute for it.

The philosophy of normative consent¹⁰ holds that because consenting to donate organs is the morally right action, consent is unnecessary—normative consent theory would compel actions based on social norms presupposing that all (or most) agree that withholding the consent is morally wrong. That is, withholding consent would be considered void and society's need for the organs would prevail in accordance with social norms. Normative consent, like presumed and implicit, is controversial. Normative consent goes the furthest in compelling a behavior deemed morally right and makes the broadest assumption about prevailing beliefs.

None of presumed, implicit, or normative consent apply well to the US where choice and autonomy are embedded in the legal structure. Several states have addressed the possibility of presumed consent policies, but none have adopted opt-out policies.¹¹ A 2019 study found that in the US, 34 percent would opt out if an opt-out system were implemented.¹² In Colorado, 56 percent opposed adoption of an opt-out system.¹³ Recommended policies vary: in some countries, people's rights arguably do not include the right to control what happens to one's body after death. One extreme would be assuming no people want to donate other than with explicit consent, like the US, or forbidding organ donation, as technically a theocracy might. The other extreme would include forcing everyone to donate without exceptions for philosophical or religious objections, a seemingly totalitarian option. Most opt-out programs fall in between, offering the ability to opt-out and various ways to register one's choice.¹⁴

The devastating shortage of organs provides the moral impetus to publicize and promote organ donation. It is a moral good but the degree to which it is a moral good varies and is personal. One study shows that in the US, people view organ donation as "extraordinary altruism" rather than ordinary.¹⁵ Under some views, acting as a good Samaritan is a moral requirement where other actions are superfluous, and go beyond that morally required. Some jurisdictions have good Samaritan laws protecting those who undertake dangerous altruistic actions, and a few jurisdictions have laws creating a duty to rescue. Ethics literature distinguishes morally compelled acts from superfluous morally good acts that go above and beyond the ordinary.¹⁶ The debate that compares rescuing a drowning child (a clear moral duty) to donating to humanitarian aid (a debated moral duty) is relevant in that the public categorizes organ donation both ways.¹⁷ Because many see a duty to donate organs as extra rather than a moral duty, and generally donations are seen as going to an unknown person in need rather than a friend, relative, or neighbor (there is no other relationship supporting a moral duty), societal necessity could supply a potential justification for a change of policy. But as a society, adopting a policy would depend on how we see helping unknown people in need, and whether altruism, even when it is morally compelled, should be legally compelled.

The immediate question is whether the elements of legal necessity could justify an opt-out policy, or any intrusion on the body of a silent or undesignated potential post-death donor. This analysis asks whether necessity could be used to eliminate the need for consent altogether.

A. The Lens of Necessity

In *Regina v. Dudley*, the starving people lost at sea killed and ate their fellow shipmate thereby saving their own lives. Acting out of necessity, the defendants committed murder and received no reprieve from the court. In the US, necessity is not a defense to murder.¹⁸ Yet, necessity is applicable to many crimes and torts, absolving guilt or acting as a partial excuse counteracting the full force behind awarding damages. Necessity can act as a mitigating circumstance under the law.

Analyzing the moral impetus for an opt-out policy or required organ donation through a lens of necessity poses several issues concerning the imminent danger to those waiting for organs, the alternatives, and the nature of the act of using a body part after death (is it property or something more special?) without the explicit consent of the donor or a legitimate proxy.

The situation of necessity looks like this: Person A encounters danger X and does Act Y which deliberately imposes on Person B (harming person or property) to avoid danger X. The legal elements of necessity as a defense generally include *a threat of imminent harm, an action that would prevent the harm and cause a lesser harm, and the absence of a less intrusive or a legal alternative to prevent the imminent harm*.¹⁹ The role of necessity varies by jurisdiction in the US. Courts have found prisoners may not use the necessity defense of escaping poor conditions,²⁰ yet generally escaping a prison fire would be a good use of the defense. In criminal necessity, prior to *Roe v. Wade*, doctors used saving the life of a woman as a necessity defense to performing an illegal abortion.²¹ In tortious necessity, examples could include using someone

else's well water to put out your own fire; driving a bus into a building to avoid going off a cliff (damaging property to save lives); or burning someone's land to stop a spreading wildfire (saving lots of land or furthering a public good by harming a small plot of privately owned land).²² The wildfire example is similar to organ donation because it involves addressing a public shortage by way of a personal intrusion.

In the organ procurement arena, Entity A (the government through policy, the hospital, or the doctor) does Y (extract or keep the organs viable without explicit permission) harming B (the dead donor's family, the dead donor's former autonomous self, society) to avoid danger X (a death from the inability to procure an organ in time).

- i. Without the policy (or the individual organ) would the harm to the potential organ recipient be imminent?

The necessity itself is the dire need for the organ, but also could be the societal emergency need for many organs as the shortage is substantial.²³ Private health necessity would be more like the necessity defense as it exists in legal structures where the excuse is based on immediately meeting the need of the person waiting for the organ. Necessity is theoretically relevant to public health needs as well. A need for an organ is an imminent emergency. Yet, the link between public policy and one person's organ is muddled. In a case of private necessity, many things could stand in the way of the organ going to a defined recipient. In the public health context, there is necessity, but the imminence runs to the entire public. Public policy is not about saving each life, rather it tends to concern large numbers, creating a system that works for all and ranks recipients. Some potential recipients can be kept alive other ways and decreasing demand for organs is an important strategy as well. In other imminent public policy contexts, solutions are not sparked by similar necessity. For example, many would argue gun control legislation or universal access to quality health care would save many lives, but the imminence we look to for emergency powers is not met. For COVID-19 policies, imminence did allow state governments to act out of necessity.

- ii. Difficulty defining the harm

The harm to the unwilling or silent donor must be defined so that it can be compared to the harm (possible or definitive death) of the potential recipient. With an eye on proportionality, the breach of integrity against the dead donor's wishes or the dead donor's body is significant. Generally, to use the defense of necessity, the defendant would need to show the act is necessary to avoid a larger or more serious harm, e.g., destroying property may be necessary if it is the only way to save a life, and that no greater harm would come from the act. Necessity as a basis for a legal defense would require demonstrating that saving a life trumps the risk of violating the wishes of the donor. Analyzing the breach relies on how a body post death is valued. If its parts become property, and a nonconsensual taking of it is just a property violation (a crime or a tort), arguably it does not amount to an equal or greater harm than the harm of the potential recipient's death. Most people would agree that saving a life trumps improper use of someone's property, making the necessity defense appropriate as far as weighed harms. However, using a heart after death is quite different from using personal property, like the dead person's watch. Some may argue that a body, after death, is really just abandoned property in the absence of an advance directive declaring bodily intactness as a personal value. If a dead body is something more special than ordinary property, preventing harm to it may be more important than using it to save a life.

In liberal society, there is a long-presumed moral right to decide what becomes of one's body after death. It is something many people include in a will, and those who do not would be subject to the wishes of family members, or, in the absence of them, the government may provide guidance and even cremation and burial. Bodies, alive or not, are considered sacrosanct even to secular people, governments, and organizations. Individuals vary greatly on whether they would allow any intrusion; many opt for cremation to avoid embalming or intrusion. I would argue that, for some people, dignity during life includes direction of one's own body after death. The organs, which could be property of the family of the deceased, must also be evaluated in terms of bodily integrity. While many argue that a person cannot be harmed after

death,²⁴ the harm is not danger to the body, it is danger to dignity. An opt-out system pursuant to which silence itself would equal willingness to donate poses risks to those who wish not to donate but have not successfully opted out. Additionally, after death, estates often address harms to reputation or actions that go against the deceased person's wishes. The risk that someone who meant to opt out did not could be evaluated as fundamental, and as something to which an estate could rightly object. Or, is a body, after death, just abandoned property, in the absence of an advance directive declaring bodily intactness as a personal value? While many agree it becomes more of an object than a person, *i.e.*, that personhood is special and the body is not, the risk is that for some, the post-death body is sacred but the paperwork to opt-out was not finished is too strong to ignore.

The nonconsenting dead donor could be someone who explicitly stated an opposition to allowing organs to be harvested and donated or someone who spoke against organ donation broadly, someone who opposed opt-out systems and failed to opt-in by designating himself a donor on a driver's license or in a public registry, or someone whose family is acting as proxy and opposing. In evaluating opt-out policies, or any policy to go ahead when consent is not attainable after death, the harm to society must be weighed. While death to someone awaiting donation is devastating, I argue that public policy must consider the combined affront to individual choice, flourishing, bodily integrity even after death, and the plurality of reasons to forgo donating organs, which, from the perspective of some individuals, could trump the ability to save someone's life. Educating the public about the process of organ retrieval and the importance should vastly increase the number of donors without a need to presume consent.

Organ donation should be free and fair, not a result of coercive government action. While it may be easier to see the value in continued life for the recipient and the harm in the failure to procure an organ in time to save the life, the risk of the esoteric harm in violating wishes not to donate or misinterpreting silence on the issue touch on a fundamental liberty interest. Opt-out policies vary in rigor, but they open the possibility of an intrusion that deeply affects how society values individuals and their control of their post-death bodies. Smaller intrusions for public health are permissible (rules on shipping, storage, and burial), but opt-out policies send the signal that government has a large role in what are for some deeply personal issues, something objectionable to many people in the US.

iii. Alternatives and promoting health

If there were alternative solutions that would solve the need for organs, there would not be a necessity argument. For now, the requirement of legal necessity that no other alternatives exist is met. However, the search for alternatives to organ transplantation may be pushed forward due to the ongoing shortage of organs. Organs created in labs through ectogenesis, medicines to make organs unnecessary (like Synthroid makes a thyroid unnecessary), and long-term health and lifestyle improvements may alter the demand for organs and move society toward a healthier future. While in many current cases, there is a lack of alternatives, the future should bring technological advances and good health decreasing the demand for organs.

CONCLUSION

While the doctrine of necessity cannot quite support opt-out systems where liberty interests are heavily valued, necessity does provide a moral impetus to become an organ donor. In a system with pluralistic views, liberty to make a wide variety of personal choices, and bodily integrity that extends to one's ability to choose what becomes of one's body post-death, explicit consent is the acceptable platform for organ donation. While, to many of us, it is arguably morally compulsory to donate organs, to some it is not. Organ donation may violate some people's personal beliefs, philosophy, or religion. Necessity would be a solid argument to nudge individuals to behave in the preferred way – helping someone in need is a moral good, whether deemed morally compulsory or an act of extraordinary altruism.

Necessity is not quite able to justify a pure opt-out policy—whether it could justify an isolated instance of imposing on the body of an unwilling or silent donor after death should be addressed case by case. Necessity in the post death arena may include leaving an injured or dead body behind on a hiking trail in the wilderness if it is impossible to survive while carrying it. If someone wants my organs, be sure to wait until I am dead. And, if it comes down to a Donner Party situation, I think I would taste best grilled.

¹ Regina v. Dudley and Stephens, 14 Q.B.D. 273 (1884).

² Data from Colorado where opt-out has been discussed indicate that many would opt out of donation.

³ Alejandra Zúñiga-Fajuri, “Increasing organ donation by presumed consent and allocation priority: Chile,” *Bulletin of the World Health Organization* 2015;93:199–202. doi: <http://dx.doi.org/10.2471/BLT.14.139535> The World Health Organization supports opt-out policies. The Chile experience also attributes success to offering the donor’s family priority on waitlist for organs. *But see* Glazier A, Mone, T. “Success of Opt-In Organ Donation Policy in the United States.” *JAMA*. 2019;322(8):719–720. <https://jamanetwork.com/journals/jama/article-abstract/2748178> doi:10.1001/jama.2019.9187 arguing opt-out systems do not improve organ donation rates. See <https://www.statista.com/statistics/624834/state-designated-organ-donors-among-us-adults-by-state/> for data on the number of registered donors by state. Rates vary from 32 percent (Texas) to 69 percent (Colorado). See “‘Opt Out’ Policies Increase Organ Donation” Stanford University, SPARQ, <https://sparq.stanford.edu/solutions/opt-out-policies-increase-organ-donation> citing Davidai, S., Gilovich, T., & Ross, L. (2012). *The meaning of default options for potential organ donors*. *Proceedings of the National Academy of Sciences*, 15201-15205, -stating 90 percent register as donors in opt-out policy countries.

⁴ The reasoning presented also applies to policies that would keep organs vital without explicit consent or to the use of temporary organ preservation technologies. Verheijde, Joseph L et al. “Presumed consent for organ preservation in uncontrolled donation after cardiac death in the United States: a public policy with serious consequences.” *Philosophy, ethics, and humanities in medicine: PEHM* vol. 4 15. 22 Sep. 2009, doi:10.1186/1747-5341-4-15. Additionally, organ perfusion technology to save organs ex vivo as well as any effort to preserve organs in the body post-brain death invoke similar moral quandaries.

⁵ Ethics of Deceased Organ Donor Recovery Without requirement for explicit consent or authorization, HHS White Paper (December 2016) <https://optn.transplant.hrsa.gov/resources/ethics/ethics-of-deceased-organ-donor-recovery/> Paper notes the current culture of individualism is reason to continue the explicit consent donor system we have.

⁶ Dalal, Aparna R. “Philosophy of organ donation: Review of ethical facets.” *World journal of transplantation* vol. 5,2 (2015): 44-51. doi:10.5500/wjt.v5.i2.44

⁷ Ethics of Deceased Organ Donor Recovery Without requirement for explicit consent or authorization, HHS White Paper (December 2016) <https://optn.transplant.hrsa.gov/resources/ethics/ethics-of-deceased-organ-donor-recovery/>

⁸ Gill, Michael B. “Presumed consent, autonomy, and organ donation.” *The Journal of medicine and philosophy* vol. 29,1 (2004): 37-59. doi:10.1076/jmep.29.1.37.30412

⁹ Saunders Ben. “Opt-out organ donation without presumptions.” *Journal of Medical Ethics* 2012;38:69-72.

¹⁰ Saunders, Ben. “Normative consent and opt-out organ donation.” *Journal of Medical Ethics* vol. 36,2 (2010): 84-7. doi:10.1136/jme.2009.033423

¹¹ Dalal, Aparna R. “Philosophy of organ donation: Review of ethical facets.” *World journal of transplantation* vol. 5,2 (2015): 44-51. doi:10.5500/wjt.v5.i2.44 See also Glazier A, Mone T. Success of Opt-In Organ Donation Policy in the United States. *JAMA*. 2019;322(8):719–720. doi:10.1001/jama.2019.9187 (nine states have considered amending Uniform Anatomical Gift Act (UAGA) to an opt-out system. UAGA is based on gifting rather than consent.)

¹² <https://www.donatelifecolorado.org/blog/presumed-consent-or-opt-out-what-does-it-mean/>

¹³ <https://www.donatelifecolorado.org/blog/presumed-consent-or-opt-out-what-does-it-mean/>

¹⁴ In New York, in 2010 a Motor Donor Bill that would provide the ability to opt-out on the driver’s license application failed to pass. Under that approach, applicants who do not decline would be automatically registered. NYS Assembly Bill 9865, February 4, 2010. In 2017, an executive order compelled state agencies to provide opportunities to register donors, modernized the donor registry, added organ donation registry to the insurance marketplaces, and allowed 16- and 17-year-olds to register at the time of applying for driver’s licenses. So far, all opportunities to register reflect explicit consent and are not opt-out.

https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_171.pdf

¹⁵ “‘Opt Out’ Policies Increase Organ Donation,” Stanford University, SPARQ. <https://sparq.stanford.edu/solutions/opt-out-policies-increase-organ-donation> citing Davidai, S., Gilovich, T., & Ross, L. (2012). *The meaning of default options for potential organ donors*. *Proceedings of the National Academy of Sciences*, 15201-15205

¹⁶ Dalal, Aparna R. "Philosophy of organ donation: Review of ethical facets." *World journal of transplantation* vol. 5,2 (2015): 44-51. doi:10.5500/wjt.v5.i2.44

¹⁷ James, Scott M. "Good Samaritans, Good Humanitarians." *Journal of Applied Philosophy*, vol. 24, no. 3, 2007, pp. 238–254. *JSTOR*, www.jstor.org/stable/24355041. Accessed 23 Jan. 2021.

¹⁸ Theoretically, there is a limited exception that could allow the murder of one or two to save many, e.g., a civilian killing a mass shooter although that is more likely analyzed as an extension of self-defense.

¹⁹ Toledano, Enbar. "Necessity." *The Encyclopedia of Criminology and Criminal Justice*, Jay S. Albanese, Wiley, 1st edition, 2014. <http://ezproxy.cul.columbia.edu/login?url=https%3A%2F%2Fsearch.credoreference.com%2Fcontent%2Fentry%2Fwileycacj%2Fnecessity%2F0%3FinstitutionId%3D1878>. Accessed 22 Jan. 2021.

²⁰ U.S. v. Bailey, 444 U.S. 394 (1980) (held prison escapees may not use the defense of necessity having escaped poor conditions and failed to surrender thereafter.) See 409-415 for when necessity may justify the prison escape and the requirement to surrender oneself when the danger is rectified.

²¹ Toledano, Enbar. "Necessity." *The Encyclopedia of Criminology and Criminal Justice*, Jay S. Albanese, Wiley, 1st edition, 2014.

²² *Id.*

²³ 109,000 people in the US are currently waiting for transplants. <https://www.organdonor.gov/statistics-stories/statistics.html>

²⁴ Glazier A, Mone T., Success of Opt-In Organ Donation Policy in the United States. *JAMA*. 2019;322(8):719–720. doi:10.1001/jama.2019.9187