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Tacitly opting out of organ donation: too presumptuous after all?

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In his latest defence of opt-out organ donation, Ben Saunders argues that opt-out does not depend on presuming consent but instead entails a donor tacitly consenting to making her organs available for transplantation.¹ Consent is implied, not merely presumed, in the absence of a registered objection because consent is always an act—a purposeful action or inaction—not a mental attitude of approval.

Saunders' argument hinges on a strong interpretation of consent as a performative utterance in which the act is sufficient and the mental attitude is unnecessary. Once social conventions have established which (in)action constitutes consent, Saunders argues, a person who has performed the relevant act—whether expressly or tacitly—incurrs the obligations pursuant to giving her consent. The fact that she may have performed this act without intending to consent is immaterial. This last point seems to take us a step too far. Instead of insisting that an act constitutes consent regardless of a person's intention to approve, it seems more reasonable to adopt the view that, under normal circumstances, acts of consent ought to be minimally approval-tracking. We might think a consent procedure to be 'minimally approval-tracking' when the probability of the consenting act coinciding with what the 'consenter' really wants (independently of the procedure) satisfies some threshold value—for example, more than 50%. Or, in comparative terms, we might evaluate two different consent procedures according to how well they appear to track what 'consenters' really want.

Take the familiar example of the chairperson who declares a motion carried if no one voices an objection. A consent procedure that fails to track actual approval is likely to be deemed inadequate, and

participants will rightly call on the chairperson to institute an alternative arrangement. The chairperson who would resist this on the grounds that consent is a mere act, and that mental attitude doesn't matter, would presumably face strong opposition. It is widely accepted that any consent procedure must *ex ante* ensure minimal conditions of access, but the previous point goes further by suggesting that a procedure that systematically fails to track approval *ex post* is equally problematic. Saunders is correct to say that, under stable social conventions, we should regard tacit consent as binding, but this is not because mental attitude has no relevance to consent. Rather, the point is that, under the right sort of circumstances, we have good reasons to think that tacit consent is robustly approval-tracking. This of course means that a consent procedure can only be conditionally justified in view of its approval-tracking properties.

Let us return to organ donation. To figure out who has signed up to become a donor, we face a choice between various consent procedures, including opt-in and opt-out. Which to pick? In line with Saunders' view, we can accept opt-out as a valid form of tacit consent. But this only tells us that those who opt out can be taken to have tacitly consented once opt-out is instituted. The question remains why we should think opt-out is justified all-things-considered? One obvious route is to argue that opt-out boosts the supply of available organs.^{2 3} This consequentialist argument cannot be the correct one to justify a consent procedure, however, for it devalues the importance of consent as such.^{4 5} Viewed from this perspective, opt-out organ donation is just a form of manipulation: by relying on widespread behavioural traits favouring the status quo, opt-out nudges more of us into becoming organ donors.⁶ Critics of opt-out consent condemn this outright reliance on behavioural manipulation under the guise of tacit consent, even in cases where

public knowledge of the procedures and easy registration of one's objection to organ retrieval is assured.

Defenders of opt-out can respond by insisting that they favour opt-out not just because it saves more lives, but chiefly because opt-out better tracks individuals' approval of organ donation.⁷ It is well-known that both opt-in and opt-out are vulnerable to measurement error: in the case of opt-in, we cannot be sure that those who fail to opt-in really refuse to donate, while in the case of opt-out we cannot be sure that all who tacitly consent really intend to donate. However, survey evidence typically shows broad support in favour of organ donation, suggesting the number of mistakes under opt-out will be significantly smaller than under opt-in.^{8 9} Of course, this argument crucially relies on actual consent reliably tracking public opinion in this regard. More importantly, the argument relies critically on giving equal significance to false positives (under opt-out) and false negatives (under opt-in). Against this we could argue that, while a person has a strong negative right to veto the post-mortem use of her body, she has no comparable positive right to determine what happens to her body after death.^{10 11} Those who endorse this asymmetric perspective will insist that opt-in is more reliable for it protects us against the error that really matters—the posthumous use of one's organs without prior approval. Which consent procedure we ought to favour thus depends importantly on what we believe consent is meant to protect.

There exists a further complication. In most countries it is the next of kin who effectively donate the organs of their loved ones.¹² Despite a lack of legal standing, transplant surgeons and procurement agencies in practice often refuse to retrieve the organs of donors without explicit consent of the family.¹³ Moreover, even where donors have not consented under opt-in, families are still asked to consider donating; this further reduces the difference between potential donors under opt-out and opt-in. The existence of a *de facto* family veto is relevant to the choice between consent procedures in cases where opt-in and opt-out schemes have a different impact on families subsequently vetoing organ removal. Imagine you are asked to donate the organs of your deceased brother and you are keen to abide by your brother's wishes. In the case of opt-in you have a clear indication that your brother has signed up to become a donor. Would you be equally convinced

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of your brother's intentions if he had only tacitly consented to donate under opt-out? In the absence of any conversations on this topic, would you think your brother genuinely elected to be a donor or merely forgot to opt-out? It should come as no surprise that, faced with this kind of epistemic uncertainty, family members often struggle and regard vetoing donation as the prudent option.^{14 15} The existence of the family veto makes the case for opt-out much weaker.

Ben Saunders believes he can justify opt-out organ donation without relying on presumptions. While I agree that in individual cases we should accept tacit forms of consent supported by robust social conventions as binding, this does not address the very different question whether the state is justified in moving from opt-in to opt-out. I think here a strong presumption in favour of the approval-tracking properties of consent mechanisms remains firmly in place, and it may well caution against moving to opt-out. More importantly, the strict focus on donor consent itself may be

misplaced in a context where the family veto remains firmly in place.¹⁶

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Opt-out organ procurement and tacit consent

T M Wilkinson

There is much to agree with in Ben Saunders' article.¹ He is right to say that presumed consent is only one, shaky, justification for opt-out organ retrieval. I believe he is also right that the value of altruism is of relatively little importance in morally assessing organ procurement schemes.² But I am not so sure about his opt-out proposal.

Saunders would, I think, describe his proposal as an improvement on the existing system in that it would increase the supply of organs while still securing adequate consent. (I should add that he does not, however, explicitly claim that the supply would increase.) This description invites two questions: (1) would the consent be adequate? and (2) would the supply of organs increase? Before

saying a few things in answer to these questions, I want to make what I think is the most important point in trying to sort through all the tangled debate about opt-in and opt-out systems: the UK system, in common with nearly all other 'opt-in' systems, *does not require the consent of the deceased before retrieving their organs*. I have emphasised the absence of a consent requirement because the persistent refusal to bring it to bear on the debates is so confusing. Regrettably, the opening sentences of Saunders' article are perfect examples of the confusion. He says 'If people do not opt in, then their organs are not used.' He then says 'Sometimes their family may grant consent.' Families may indeed consent when the deceased has not, but that means it is simply false that 'if people do not opt in, then their organs are not used'. As we shall see, the misdescription of the existing system casts doubt on whether his proposal would increase the supply of organs.

To turn to tacit consent, Saunders claims that when in certain conditions people do not opt out of donating, they have tacitly consented to the retrieval of their organs, and tacit consent is genuine consent. To take a common example, when the chair says 'speak now if you do not accept the minutes of the meeting', those present who keep quiet have consented to accept the minutes. I accept that tacit consent can be genuine consent. If we ask what it is about inaction that could constitute tacit consent (as opposed to simply inaction), one requirement may be that expressing dissent should be easy and costless. An opt-out system could meet this requirement by imposing no penalty for opting out and by using frequent approaches, reply-paid envelopes, and web-based opting out.³

What of those people who know about the opt-out system but fail to get round to opting out or those who do not know of the system at all? Could they be said to have consented? Saunders would claim they can. Consent, for Saunders, does not require the intention to be bound or any pro-attitude to the (in)action in question. All that consent requires is the opportunity to opt in or out in favourable choosing circumstances. When people eat in a restaurant, he says, they have

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