Organs at a Funeral

Organ transplantation is the process of removing a healthy organ from a donor who may be living or dead and implanting that organ in the body of a patient with organ failure. In the United States alone there are over 100,000 people with some stage of organ failure on the transplant waiting list. “On average 20 people die every day from the lack of available organs for transplant.” Although most people support organ donation, most do not choose to register as organ donors. To address this apparent disconnect, on March 20, 2020, England enacted Max and Kierra’s Law which transitions their system of organ donation from opt-in to opt-out.

An opt-out system of organ donation presumes that, upon death, people would automatically consent to donating their organs to another person unless they had previously stated otherwise. In a presumed consent system one can still refuse to donate their organs but must explicitly opt-out. This contrasts with the opt-in model whereby one is presumed to refuse donation of their organs unless they have expressly consented to such a donation by registering as an organ donor. In 1979 Spain became the first country to adopt an opt-out system of organ donation. Spain now has the world’s highest rate of organ donation.

Over the last 40 years many countries across the EU, Oceania, and South America have moved from requiring expressed consent to presumed consent and have seen significant increases in organ donation. However, some opt-out countries such as Luxembourg and Bulgaria have unusually low rates of organ donation. This has led some to suggest that the general correlation between presumed consent laws and increased donation rates is indicative of a third causal factor and not a case of the law, per se, strongly improving donation rates. According to some such critics, “In the absence of strong evidence, time and effort spent on legislative change misses the opportunity to focus on nonlegislative action, which could have greater impact.” Examples of such non-legislative action include building a more robust procurement system including additional facilities, staff, and medical personnel trained and focused on recognizing potential organ donors.

Even granting evidence that suggests at least modest improvements in donation under presumed consent models, such systems raise questions about how, when, and why people may opt-out. For example, there is substantial disagreement about so-called “first person consent.” Under first person consent families cannot override the patients’ consent (presumed or express.) For example, “In Austria, the rate of donation quadrupled within 8 years of a presumed-consent policies being introduced. Under Austrian legislation, organs can be recovered irrespective of relatives' objections.” This is in stark contrast to the situation in other countries. For example, “Even if you are on the Australian Organ Donor Register donation won't proceed without your family’s consent.” The difference in these countries policies make a substantial difference to some individuals and families.

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