

Discriminating Against “Organ Takers”

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In his article, David Steinberg proposes a system that would “reward people who agree to donate their kidneys after they die with allocation preference while they are alive” (Steinberg 2004, 1). A logical entailment of the increased priority for those who “opt in” is a *decreased* priority for those who fail to do so. While Steinberg’s deprioritization of organ takers is more moderate than some other proposals,¹ the effects of this deprioritization could still be substantial. There are, presumably, two different moral defenses that could be given for deprioritization. The utilitarian might argue that the “opt in” system will increase organ supply, perhaps even enough to be responsive to the needs of nearly 60,000 people with end stage renal disease. Even if there were some moral hazards with the deprioritization, they might be countervailed by compensatory moral benefits, such as this increase in supply. And, furthermore, the increase in supply might be enough such as to render the deprioritization irrelevant as everyone could have access to the kidneys they need. Nevertheless, the utilitarian justification would fail to accommodate any *rights* that people might have against deprioritization. This leads to the second defense, and the one most explicitly endorsed by Steinberg, which is that “organ takers” (i.e., those that are willing to receive organs, but not willing to give them) suffer some moral defect on deontological grounds. While Steinberg is not tremendously explicit in this area, we could acknowledge that a maxim such as “I accept organs, but do not contribute them” would, when universalized, conflict with an element of my will (viz., that I receive an organ when I need one). The maxim would therefore be impermissible on Kantian grounds. In these comments, I would like to challenge the notion that organ taking is morally impermissible and to challenge Steinberg’s program on the grounds that it would unfairly discriminate against these people by deprioritizing their claims to the kidney supply. Relatedly, I will argue that Steinberg’s proposal effectively coerces people to opt in, thus calling into question the legitimacy of the consent on which their decisions were predicated.

There are many reasons that someone might prefer to be an organ taker to an organ giver, and not all of these

reasons are entirely nefarious. We might postulate a moral defect in someone who simply maintains that s/he has no interest in donating kidneys but nevertheless would like to receive them—this thinking would run afoul of Kantian law. However, consider an organ taker who ascribes to some religious system which mandates that its practitioners be buried whole: this is certainly a coherent belief system and, furthermore, we might imagine that this religious system takes no stance regarding non-practitioners (including that practitioners must try to convert non-practitioners). The maxim of our practitioner *is* universalizable since the universalized maxim could be “All practitioners may take but not give organs”²—this maxim generates no conflict of will. Could some other criticism be levied against this belief system? Maybe we could say that it is malformed, idiosyncratic, etc., but these same criticisms could be levied against *many* other belief systems which, presumably, we would not want to indict. So the first important result I would like to note is that organ takers do not necessarily violate deontic constraints: they can coherently maintain some (non-homogenous) universalizable maxim which allows organ taking.

In the previous example, I asked that we imagine someone whose religious beliefs mandate organ taking; my motivation for making the example *religious* is that I think that, as members of a liberal democracy, we could be reluctant to penalize this practitioner (through deprioritization) because of some religious system to which she sincerely ascribes. But what if organ taking is not codified in religious belief but simply conforms to some *preference* on the part of the taker? Imagine that I would simply rather not donate organs, but that I would be perfectly happy to accept them. Surely this stance would violate Kantian requirements on universalizability, but I wonder whether Kant should really have the last word. A Humean, for example, would hold that preferences are not subject to rational evaluation,³ and there is at least some plausibility to this claim. If I prefer

*The views and opinions contained in this article are those of the authors and should in no way be construed as representing the views of the American Medical Association.

1. See, for example, Rupert Jarvis’s “Join the Club: A Modest Proposal to Increase the Availability of Organ Donors,” *Journal of Medical Ethics* 21 (1995): 199–204 and Stephanie Eaton’s “The Subtle Politics of Organ Donation: A Proposal,” *Journal of Medical Ethics* 24(1998): 166–170.

2. I take this approach to be different from the “overspecification” of maxim trick that is a superficial critique of Kant’s categorical imperative test since in these examples since the elements of the maxim are actually relevant to its functioning whereas elements of the overspecification cases (e.g., “I, having been born in Virginia, being twenty-eight years old, having a brother named Has, etc. will rob the bank”) are obviously irrelevant to the actual maxim on which the agent acts.

3. Here are the two ubiquitous quotes: “Reason is, and ought only to be the slave of the passions, and can never pretend to any other office than to serve and obey them” and “’Tis not contrary to reason to prefer the destruction of the world to the scratching

apples to bananas, and you prefer bananas to apples, surely neither one of us is being irrational, nor is either of us subject to moral disapprobation. Now imagine that I simply prefer to be an organ taker. Presumably, someone would want to object and say that the preference for apples is dis-analogous to the preference for organ taking, but why? In either case, I prefer a good (apples or kidneys), and that desire is, at least plausibly, basic and insulated from the dictates of reason. Without rehearsing the arguments for Kantian constructivism, we could nevertheless admit that Hume has at least a potential exculpation for the organ taker: desires are fundamental and impervious to rational critique. So, the second important result is that it is at least controversial whether there is anything wrong with organ taking. Ultimately, I think that organ taking could be permitted by the categorical imperative, but I also question whether we should assume these deontic concerns to be relevant.

In the above comments, I have challenged the assumption that organ taking is immoral—if not, then there are problems with a system that deprioritizes these people. But I have a related concern with this deprioritization, namely the psychological pressures that it would place on people to opt into the system (viz., the pressures to *avoid* deprioritization). I assume that Steinberg would welcome these pressures, since they are likely to increase participation in the program and therefore increase organ supply. Nevertheless, I worry that the pressures could be effectively coercive as potential participants will be forced to choose between opting in or deprioritization. The consequences of not opting in could be substantial since the associative deprioritization could presumably be the difference between life and death.

Someone might respond to this objection that, ultimately, the decision “opt in” is still made freely and rationally and that, therefore, coercion does not exist. But this response fails to recognize that the absence of meaningful alternatives is sufficient to establish coercion, and that death is not a meaningful alternative. To take a simpler example, consider someone who is being robbed: the criminal threatens murder unless money is surrendered. If the victim turns over his money, he has certainly been coerced, despite the fact that, in some sense, the decision to pay was made freely and rationally. The reason that coercion exists in this case is because the “freedom” has been compromised because the victim has no meaningful alternative to payment: death is

of my finger.” See Hume’s *A treatise of Human Nature*, 2nd edn., L. A. Selby-Bigge and P. H. Nidditch, eds. (Oxford, UK: Oxford University Press, 1978), II. 3. iii.

not an option that anyone could reasonably be expected to choose from. So, effectively, there is only *one* option (viz., payment), hence the coercion.

If failure to opt in leads to deprioritization (which it does), and this deprioritization leads to death (which it might), then the decision to opt in is effectively coerced. There are several things to be said about this. First, the system itself could be argued to be impermissible on the grounds that it is coercive. Surely we should not have coercive systems for organ acquisition. But, paradoxically, we could also ask whether the system is even coherent. If entrance into the system is coerced, then the consent of the participants would be compromised. And, if we require consent for participation in the system, then the system would not actually have any legitimate participants. I worry that coercion would negate consent, and that the system would not actually be one in which anyone would consent to participate. It might be the case that not everyone would feel these postulated psychological pressures, so maybe *some* of the members of the system would legitimately consent to its functioning? But then there would be epistemic obstacles in determining who is legitimately participating, and these could be insuperable.

In these comments, I have tried to raise two objections to the opt in system. First, I have challenged the deprioritization that the system wields against organ takers; it is simply not clear to me that this is fair or that organ taking is necessarily deserving of moral disapprobation. Secondly, I have concerns regarding the psychological pressures that deprioritization would bestow upon would-be participants. If these pressures exist, we could argue that participation is coerced, and surely this is morally problematic.

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