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# The Silver Bullet to Ontario's Organ Shortage: The Case for Presumed Consent for Post-mortem Organ Donations

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# **The Silver Bullet to Ontario's Organ Shortage: The Case for Presumed Consent for Post-mortem Organ Donations**

## *Abstract*

Today Ontario is facing one of the worst organ shortages in the developed world. Meanwhile, every year hundreds of Ontarians die awaiting an organ transplant while thousands of healthy organs from individuals who are in favour of organ donation, but failed to register as organ donors, are disposed of instead of transplanted. This situation is tragic, preventable and continues to worsen as the demand for organs increases and the supply flatlines. In this essay I apply a Libertarian Paternalist policy lens to the organ shortage in order to argue that the Ontario government ought to amend the law to presume that Ontarians want to be registered organ donors unless they choose to opt-out of being registered organ donors. I discuss and discard 4 other alternative solutions (organ conscription, organ markets, mandated choice and social marketing) because of their low efficacy or infeasibility in the current political climate. Then I raise and dismiss common objections to presumed consent. Many of the common objections to presumed consent are groundless in an Ontarian context.

## *Key Words*

Libertarian Paternalism; Organ Donation; Presumed Consent; Mandated Choice

## The Silver Bullet to Ontario's Organ Shortage: The Case for Presumed Consent for Post-mortem Organ Donations

Over 85% of Ontarians would like their organs to be donated after they die.<sup>1</sup> Yet strangely, less than 25% of Ontarians are registered organ donors and Ontario law assumes that unless the deceased registered to be an organ donor prior to their death they did not want their organs to be donated after their death.<sup>2</sup> As a result, every year, hundreds of Ontarians die awaiting an organ transplant while thousands of healthy organs from individuals who are in favour of organ donation, but failed to register as organ donors, are disposed of instead of transplanted.<sup>3</sup> This situation is tragic, preventable and continues to worsen as the demand for organs increases and the supply flatlines.<sup>4</sup> In this essay I am going to draw on libertarian paternalism to argue that the Ontario government ought to amend the law to presume that Ontarians want to be registered organ donors unless they choose to opt-out of being registered organ donors. To defend my thesis I am first going to explain the state of organ transplantation in Ontario (section one) and then outline possible improvements to the system (section two). Afterwards, I will argue that presumed consent ought to be implemented because it is politically feasible and the most libertarian paternalistic option (section three) and respond to objections against presumed consent (section 4). Section five will conclude.

### 1. The State of Organ Transplantation in Ontario

In Ontario, the Trillium Gift of Life Network is a provincial government agency mandated to “help save and enhance lives by maximizing organ and tissue donations for transplantation.”<sup>5</sup> The Network encourages Ontarians to register as organ donors and manages a provincial waitlist for organ and tissue transplants. As of 31 December 2001 (the earliest year with public data) there were 1332 individuals waiting on the Ontario organ transplant waitlist.<sup>6</sup> Over the next decade and a half demand for organ transplants in Ontario steadily increased but organ donation rates hardly increased.<sup>7</sup> So, as of 30 September 2014 (the most current public data at the time of writing) there

were 1558 individuals on the Ontario organ transplant waitlist.<sup>8</sup> However, it is important to keep in mind that the Ontario organ shortage is even larger than the organ transplant waitlist makes it appear because not all Ontarians who need an organ transplant or would benefit greatly from one are on the waitlist. For example, as of June 2009 only 13% of Ontarian dialysis patients were put on the Ontario organ transplant waitlist for a kidney.<sup>9</sup> Patients are dissuaded from applying to waitlists when they are long and some medical staff dissuade needy patients from applying to the organ transplant waitlist if they think patients are ‘morally unworthy’ of receiving a scarce organ.\*

Compared to the other Canadian provinces, and other developed countries such as the United States of America, the U.K. and Spain, the Ontario organ shortfall is one of the worst.<sup>10</sup> The median wait time for an organ transplant list in Canada is 6.1 years but 8 years in Ontario.<sup>11</sup> Like Ontario, other jurisdictions have faced a similar increase in demand for organs over the last 15 years. However, other jurisdictions face a less serious shortage in organs or no shortages in organs (e.g., Iran) because they have increased their supply of organs available for transplantation via a variety of methods.

Currently, Ontario relies on a presumed consent system. Ontarians must take the positive step of filling out an organ donation form electronically or physically and submit it to Service Ontario to become a registered organ donor. Ontarians that do not complete this form, regardless of their expressed preferences, are under the law not considered to be registered organ donors. Once a registered organ donor dies medical staff evaluates the cadaver to see if the deceased’s organs are healthy enough to be transplanted. If they are, medical staff must still get consent from

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\* Rightly or wrongly, many people believe that patients who are personally responsible for their organ’s damage or have engaged in social undesirable behaviour should receive less priority for transplantable organs. Please see [Ubel, Peter A., et al. "Allocation of Transplantable Organs: Do People Want to Punish Patients for Causing their Illness?" *Liver Transplantation* 7.7 (2001): 600-7.] for a more detailed explanation of this phenomenon.

the deceased's next of kin to transplant the deceased's organs. About 10% of the time family members veto medical staff's request to transplant the deceased's organs.<sup>12</sup>

If a person dies in Ontario as an unregistered organ donor medical staff may evaluate the deceased's organs to determine if they are healthy enough to be transplanted. If one or more of the deceased's organs are healthy they will ask the deceased's family members for permission to transplant the deceased's organ(s) and must obtain consent to extract the deceased's organ(s). In cases like these family members refuse to give consent roughly 50% of time, regardless if their kin was a vocal organ donor and just never bothered to register.<sup>13</sup>

Hitherto, the Ontario government has mainly tried to increase the organ supply by encouraging Ontarians to become registered organ donors. Ontarians are asked to register as organ donors when they renew their driver's licence or health card. As well, the province has launched "Recycle Me", "Be a Donor" and other social marketing campaigns to encourage Ontarians to register.<sup>14,15</sup> Despite these efforts, the percentage of Ontarians who are registered organ donors has hovered around 23-26%.<sup>16</sup> The demand for organs in Ontario will continue to grow as the population ages, so the only way to solve the organ shortage is to increase the supply of organs.

## 2. Options to Increase the Organ Supply

The Ontario government could implement many different solutions to increase the supply of organs. In this section I will discuss five popular options in descending order of efficacy: conscription, organ markets, presumed consent, mandated choice and social marketing. By efficacy I mean their effectiveness in increasing the supply of transplantable organs.

- i. **Conscription (AKA routine removal):** The Ontario Government could pass a law giving them the property right to the organs of dead Ontarians and Ontarians that are in certain hopeless conditions (e.g., Ontarians that are brain dead with no chance of recovery). If the government legally owns the organs of all dead Ontarians and some near dead Ontarians

they could legally remove their organs without needing anyone's consent. This option could quickly solve the organ shortage because it is estimated that at least 2000 Ontarians die every year in hospital whose organs could be transplanted.<sup>17</sup> Conscriptio for all organs is not used by any jurisdiction but several American states have greatly increased the supply of corneas, and hence cornea transplants, by instituting conscription for corneas.<sup>18</sup>

- ii. **Organ Markets:** In Ontario the buying and selling of organs is prohibited under provincial legislation, not by federal legislation.<sup>19</sup> So the provincial government has the power to repeal the law prohibiting the trade of organs and establish an organ market. Living Ontarians would be more inclined to part with their organs if they could be paid to do so<sup>†</sup> and offering payment to the family members of the deceased for their deceased kin's organs would incentivize family members to sell their deceased kin's organs. Iran operate a legal organ market for kidneys that has been incredibly successful at increasing the supply of kidneys. It has made Iran the only country in the world that does not have a shortage or a waiting list for kidneys!<sup>20</sup> Similar success could be emulated in Ontario.
- iii. **Presumed Consent (AKA opt-out):** Instead of assuming that all Ontarians do not want to be organ donors unless they register as organ donors the law could be changed to assume that all Ontarians do want to be organ donors unless the complete a form stating they wish not to be an organ donor. The Ontario Government could use the same infrastructure (i.e., Service Ontario locations and government websites) to record a list of registered non-donors as they currently use to record a list of registered donors. Presumed consent models can be 'hard' or 'soft'. Under a hard presumed consent model the family members of the deceased cannot override the deceased's decision to be a donor or non-donor but under a soft

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<sup>†</sup> Currently, living organ donors can receive some modest compensation for the additional expenses and lost income they incur by donating an organ but they cannot 'profit' from donating an organ. Even after receiving government compensation most living organ donors incur a financial loss by donating an organ and all incur an opportunity loss (they miss out on the highest valued opportunity they could have done if they did not donate an organ).

presumed consent model family members can override the deceased's decision. For the purpose of this essay, I will mean hard presumed consent when I say 'presumed consent'.

Since the overwhelming majority of Ontarians are in favour of being organ donors<sup>21</sup> but just never bothered to register as organ donors it is plausible that few Ontarians would register as non-donors and the supply of organs would significantly increase.

- iv. **Mandated Choice:** Under a mandated choice model Ontarians would face a sanction if they did not make the choice to explicitly choose to be a donor or non-donor. The Ontario Government could implement a law that requires Ontarians to choose between being a donor and a non-donor in order to renew their health card. Again mandated choice models can be 'hard' or 'soft' and for the purpose of this essay I will focus on hard mandated choice models. Similarly to presumed consent, implementing mandated choice will likely increase the supply of organs because if Ontarians are forced to make a choice and most prefer to be organ donors, most will choose to become registered organ donors.
- v. **Social Marketing:** The Ontario government could launch another social marketing campaign encouraging Ontarians to register as organ donors. Past campaigns have been ineffective at increasing the supply of organs but a new campaign could take the insights from libertarian paternalism to make a more effective campaign. Richard Thaler and Cass Sunstein note that people are inclined to do "what most people think it is right to do" and "what most people actually do."<sup>22</sup> So the government could make a new more effective advertising campaign by stressing that most Ontarians think being a registered organ donor is the right thing to do and once a majority of Ontarians are registered as organ donors they could stress it is what most people do.

### 3. Evaluating Potential Options

Options (i)-(v) are all logistically feasible and would all help alleviate the organ shortage in Ontario but I believe (i) and (ii) should both be rejected because they are politically infeasible. Conscriptio (i) would be unpopular with the public because it violates the generally accepted principle that, within some constraints, “individuals should be able to decide what is to be done with and to their bodies.”<sup>23</sup> The official opposition, the Ontario Progressive Conservative party, and Sun News would have a field day critiquing the government over this policy and it would cause division even within the ruling Ontario Liberal party. Furthermore, state governments in the United States that have enacted conscription policies for corneas faced countless constitutional challenges before the United States Supreme court eventually concluded that conscription for corneas was constitutional.<sup>24</sup> Although many legal scholars think that Canada’s supreme court would follow suit and declare conscription constitutional, if the Ontario government enacted conscription they would still subject themselves to years of work litigating constitutional challenges.<sup>25</sup> Conscriptio remains a politically unattractive option because the current Ontario government would face most of the costs of enacting conscription and might not stay in power to realize its benefits.

Organ markets are politically infeasible in the currently politically context because senior leadership in the Ontario and the federal government are dead set against them. Deb Matthews, former Minister of Health and Long-Term Care and current Deputy Premier, and Dr. Eric Hoskins, current Minister of Health and Long-Term Care, are firmly opposed to the buying and selling of any human bodily parts.<sup>26,27</sup> Minister Hoskins recently introduced Bill 21, *Safeguarding the Health Care Integrity Act*, which, if passed, will prohibit providing payment for blood or plasma donations, thereby further restricting potential organ markets. Even if the Liberal Ontario government were sympathetic to the idea of organ markets and repealed the sections of the *Trillium Gift of Life Network Act* that prohibited organ markets, the Federal government would likely block their attempt. In the



last several years there have been three bills introduced to make it illegal for Canadians to buy or sell organs abroad.<sup>28</sup> Although all three bills died on the order paper the introduction of the bills shows that the federal government thinks they have the jurisdiction to criminalize organ markets and are generally opposed to organ markets. In the presence of a legislative vacuum in Ontario the federal government would have a strong incentive to finally pass a law criminalizing organ markets in Canada.

Options (iii)-(v) are all politically feasible. The Liberal Ontario government has previously considered all three options. In 2006 the Liberal Ontario government introduced bill 61 to implement mandated choice and in 2012 a bill was introduced into the Ontario legislature to implement mandated choice but both bills died on the order paper. As well, both Conservative and Liberal provincial governments have launched social marketing campaigns over the last two decades. Despite the political viability of social marketing campaigns (v) I believe they ought to be discarded as a potential solution to the Ontario organ shortage because of their low efficacy. The Ontario government's past attempts to boost organ donation registration rates through social marketing campaigns have been unsuccessful. A new social advertising campaign using the insights of libertarian paternalism would likely be more effective than past campaigns but still fail to meaningfully address the problem. The state of Illinois launched a social advertising campaign using the insights of libertarian paternalism that was more effective in getting denizens to register as organ donors than conventional campaigns.<sup>29</sup> However, Illinois eventually implemented mandated choice because their advertising campaign was not increasing the amount of registered organ donors enough.

Consequently, the two most efficacious options that are politically feasible are presumed consent and mandated choice. I argue that presumed consent is superior to mandated choice because it is more libertarian paternalistic than mandated choice. Libertarian paternalism is a policy

philosophy that tries to preserve both liberty and welfare. It is libertarian in the sense that it states policies should leave people “free to choose” and impose minimal costs on people who want to exercise their freedom.<sup>30</sup> It is paternalistic in the sense that it states it is legitimate for policies to influence people to try to influence choices to make choosers better off, “as judged by themselves.”<sup>31</sup>

Presumed consent is more libertarian than mandated choice is because it imposes fewer costs<sup>‡</sup> on the public than mandated choice does in two ways. First, presumed consent only imposes a small cost (i.e., the several minutes it takes to complete the opt-out form) on the small minority of the population that do not want to be organ donors. In contrast, mandated choice imposes a cost on virtually every Ontarian. It requires everyone who wants to receive a health card to make the decision to be a registered organ donor or a registered organ non-donor. Some people will carelessly check a box, others will spend time extensive time deliberating, but all incur a cost by being forced to choose. It especially inconveniences those people who did not know it was requirement and need to renew their health card in a rush. Further, mandated choice is worse than the status quo because explicit consent only imposes a cost on the vast majority of the public who wants to be registered organ donors. Explicit consent does not impose a cost on those who wish not to be registered organ donors. All else being equal, governments should choose policies that impose the least amount of costs. So, presumed consent’s relatively low cost is a point in its favour.

Second, presumed consent would impose fewer monetary costs on the public than mandated choice would. Ontario’s healthcare system is publicly funded through taxation and organ transplantations cost time and money. In the short term organ transplants increase the province’s healthcare expenditures but in the long-run they actually decrease them.<sup>32</sup> For example, ~69% of Ontarians on the organ transplant waitlist are in need of a kidney.<sup>33</sup> While they wait for a kidney, the

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<sup>‡</sup> Unless otherwise specified by ‘cost’ I mean opportunity cost, not monetary cost.

province provides them with costly dialysis treatments and prescription drugs until they die. However, if they receive a kidney transplant the province only pays the upfront costs of the transplant and the cost of anti-rejection drugs for a short time after the transplant. Consequently, giving everyone on the organ transplant waitlist an organ transplant is estimated to save the Ontario government between USD\$0.3 to 1.0 million dollar per patient on the waitlist.<sup>34</sup> Presumed consent would facilitate more organ transplants than mandated choice would so presumed consent would require the province to tax Ontarians less than mandated choice would.

I am going to argue presumed consent is more paternalistic than mandated choice because it will make more individuals better off, as judged by themselves, than mandated choice will. But first I will clarify that presumed consent and mandated choice are both only paternalistic on a macro, not a micro, level. On a micro level neither presumed consent nor mandated choice are paternalistic because they both makes individuals worse off as judged by themselves. Strictly speaking, if the law assumes that a particular individual wants to be an organ donor that individual receives virtually no benefit from being an organ donor<sup>§</sup> and must incur a cost if they eventually decide to opt-out of being an organ donor. Similarly, forcing a particular individual with a threat of a sanction to choose between being an organ donor or non-organ donor makes them worse off because they incur the cost of choosing and receive virtually no benefit no matter what they choose. However, on the macro level, both presumed consent and mandated choice are paternalistic. By changing the law to assume that everyone wants to be an organ donor unless they opt-out, or changing the law to force individuals to choose between be an organ donor or non-organ donor, the number of organs donated will increase. It is in (virtually) everyone's best interest, as judged by themselves, to be

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<sup>§</sup> Some individuals may derive altruistic pleasure from knowing that they may help save someone's life after death or enjoy truthfully flaunting that they are a registered organ donor but for most, these benefits do not outweigh the meagre cost of registering to be an organ donor. If Ontarians thought the benefits of registering to be an organ donor clearly did outweigh the costs of registering to be an organ donor many more Ontarians would be registered organ donors than currently are. I discuss super-natural benefits and costs of organ donation in the second objection in section four.

healthy and it is possible for everyone to need an organ transplant. So, both presumed consent and mandated choice are in (virtually) everyone's best interest, as judged by themselves, because both policies will increase the supply of transplantable organs and further everyone's interest in good health.

Although both policies will make Ontarians better off than they are under the status quo, presumed consent will make them better off than mandated choice will because presumed consent will increase the supply of organs more than mandated choice will. One of the key insights from libertarian paternalist research is that default choices have a large impact on people's preferences and choices.<sup>35</sup> Contrary to *homo economicus*, humans often stay with the default choice, even if choosing to move from the default choice would give them a high benefit and only incur them with a small cost. Hence, an explicit consent default rule tends to produce low rates of registered organ donors, as you see in Ontario, and a presumed consent default rule tends to produce high rates of registered organ donors, as you see in Austria (99%).<sup>36</sup> Mandated choice produces higher rates of registered organ donors than explicit consent but lower rates than presumed consent.<sup>37</sup> When jurisdictions enact mandated choice less citizens choose to be registered organ donors than previously said they would like to be registered organ donors, because forcing people to make decisions in which they may not have had the time consider properly can invoke negative reactions.<sup>38</sup> However, enacting presumed consent does not cause this same phenomenon because citizens do not face the threat of a sanction if they refuse to make a decision and most people display adaptive preferences and come to like the default option whether it be opt-out or opt-in.<sup>39</sup> Since presumed consent imposes the fewest costs on people and makes them best off, as judged by themselves, it is the most libertarian paternalist option and the best solution to Ontario's organ shortage.

#### 4. Objections to Presumed Consent

Now that I have made my positive argument for presumed consent I will make a negative argument by explaining and then refuting five common objections to implementing presumed consent in Ontario. First, there is the objection that presumed consent would trick some people into post-mortem organ donation because if Ontario law transitioned from explicit consent to presumed consent some people who did not want to be organ donors would not realize the law has changed. But if Ontario sticks with explicit consent or institutes mandated choice there is no risk of Ontarians being tricked into post-mortem organ donation because they must willingly choose to be a registered organ donor in order to be an organ donor. This objection would only carry weight if the Ontario government suddenly or secretly transitioned to presumed consent—but no one is suggesting they do that! If the Ontario government chooses to adopt presumed consent they should follow the example of other presumed consent countries by publicly changing the law and notifying the public of the change far in advance. If Ontario notifies the public of the change far in advance then anyone who sincerely does not want to be an organ donor would incur the small opportunity cost needed to opt-out.

Second, there is the objection that presumed consent would violate some individuals' freedom of religion. Some religious groups (e.g., Gypsies) believe that individuals need to be buried with their organs in order to achieve salvation or enjoy a pleasant afterlife.<sup>40</sup> So presumed consent is wrong because at worst it would condemn some individuals into damnation by tricking them into being organ donors and at best it would inconvenience the public's quest for salvation, a pleasant afterlife, or both. This objection holds little weight. While it is true that some religions believe that individuals need to be buried with their organs to achieve salvation or a happy afterlife they are a small minority.<sup>41</sup> The major religions all encourage or permit organ donations.<sup>42</sup> Similarly to my first response, presumed consent would not violate some individuals' freedom of religion because it does

not force or trick anyone into becoming post-mortem organ donors. The government would notify the public about the change to presumed consent before the law was changed and give the public ample time to register as non-organ donors if they so wished. If individuals sincerely believed that becoming organ donors would prevent them from achieving eternal salvation they would not hesitate to incur the small cost it takes to register as non-organ donors.

The rejoinder that presumed consent is illiberal because it inconveniences some religious groups from achieving salvation but not others is not effective either. Governments must choose a default option. Even under mandated choice governments have to choose a default option for those who refuse to make a choice. Unfortunately, some minority religions require adherents to be organ donors (e.g., the Jesus Christians) and other minority religions require their adherents not to be organ donors (e.g., Gypsies), so no matter what default the Ontario government chooses they will inconvenience some small minority group in achieving what they conceive to be salvation. Presumed consent does regrettably inconvenience some Ontarians in reaching salvation but it does not *prevent* anyone from reaching salvation because individuals have the freedom to opt-out. All in all, presumed consent makes the public the best off from a religious standpoint, as judged by themselves, because there are more Ontarians whose religious beliefs require or encourage organ donation than Ontarians whose religious beliefs prohibit or discourage organ donation.<sup>43</sup>

Third, there is the objection that presumed consent, unlike mandated choice or explicit consent, lacks an altruistic element. The Law Commission of Canada has stated that altruistic organ and tissue transfers “nurture community bonds and generosity” and “become the material and symbolic gifts of life that bond strangers in our communities.”<sup>44</sup> They have further said that “a society will be a better human community in which giving and receiving is the rule, not taking for the sake of good to come.”<sup>45</sup>

This objection is spurious. A case might be made that a person who opts-in to being a registered organ donor acted more altruistically than an individual who knew the law presumed she was an organ donor and chose not to opt-out, because the former exerted more effort to accomplish the same altruistic result. However, it is not fair to say that the latter individual's action was devoid of altruism; her decision to not opt-out was influenced in part by her knowledge that not opting out might save a stranger's life. Further, the Law Commission exaggerates the bonding effect organ donations have on communities. Even in countries with successful explicit consent systems (e.g., USA and UK) only a tiny fraction of the population actually receives an organ transplant, is a living organ donor, or knows someone who donated or received an organ. (No registered organ donors ever find out if their organs are actually transplanted after they die). Presumed consent countries such as France, Sweden, Switzerland, Denmark, and Austria are all stable despite their presumed consent systems. So, it cannot be the explicit consent system which singlehandedly bonds societies together.

All else being equal, a society may be better if built on "giving and receiving" instead of "taking for the sake of good to come." But in reality, these principles cannot be simply substituted for one another without drastically changing a society. The public's general welfare would be worse off if the government did not 'take' taxes to fund social services for the less fortunate and just relied on members of the public to 'give and receive' amongst one another. If Ontarians accept the government coercively collecting taxes to help improve the welfare of the less fortunate they should have no objection to the government persuading some citizens to help improve the welfare of vulnerable Ontarians with failing organs. Presumed consent just nudges individuals into being registered organ donors. It does not force them to be organ donors or restrict them from being altruistic. It is altruistic for individuals not to opt-out of being a registered organ donor and

jurisdictions with presumed consent still have plenty of opportunities for individuals to pro-actively do altruistic actions.

Fourth, there is the objection that doctors kill registered organ donors in order to use their organs in transplants or will not work as hard to save their lives of registered organ donors as non-organ donors. Therefore, presumed consent endangers individuals' lives until they opt-out. According to the Trillium Gift of Life Network, this is one of the Ontarian public's most common objections to becoming a registered organ donor and to presumed consent.<sup>46</sup> This objection is baseless in an Ontarian context but nonetheless holds considerable weight with the public. Even if it were true that doctors killed or denied care to registered organ donors so their organs could be used in transplantations this objection would not weaken presumed consent (although it would be a strong blow against conscription). That is because if an individual sincerely believes being a registered organ donor would endanger their life they could opt-out of presumed consent before the law was changed and therefore face no risk to their life. Thankfully in Ontario, and Canada as a whole, there have been no recorded cases of doctors killing patients or denying them care because they were a registered organ donor. There has been only one recorded allegation of a doctor killing a patient to procure an organ for transplant in North America but that case was in California and the doctor was acquitted.<sup>47</sup> Furthermore, 43% of Ontario doctors are registered organ donors yet only ~25% of the general Ontarian public are registered organ donors, implying that those with more knowledge of Ontario's medical system are less worried about this objection than the less knowledgeable public.<sup>48</sup> I do recognize that organ-snatching and denying care to registered organ donors have been issues in other jurisdictions such as China and India but this is not a relevant objection to presumed consent in Ontario.<sup>49</sup>

Fifth, there is the antithetical objection that presumed consent will not increase the number of organ transplantations in Ontario because when some countries such as Spain transitioned from



explicit consent to presumed consent the number of organ transplantations each country was able to perform barely increased.<sup>50</sup> This objection is flawed because Spain is not analogous to Ontario. Having a transplantable organ available is necessary but not sufficient to conduct an organ transplant. Many things are necessary in order to successfully complete an organ transplant: medical staff, an operating room, anti-rejection and anesthetic drugs, a system to match transplantable organs with patients in need of organ transplants, etc. If any of the necessary conditions are not satisfied than an organ transplant cannot occur. In the case of Spain presumed consent did increase the number of transplantable organs available but did not increase the number of organ transplants performed because Spain lacked an effective system to match transplantable organs with patients needing organ transplants. \*\* This is not a criticism of presumed consent *per se*. It is a criticism of Spain's lack of organ transplant infrastructure. In Ontario the bottleneck to organ transplantations is a shortage of organs.<sup>51</sup> Ontario already has the Trillium Gift of Life Network to match organs with patients. So, in Ontario, presumed consent will not only increase the supply of organs, it will also increase the number of organ transplants, thereby saving and enriching lives.

## 5. Conclusion

In the coming years Ontarians' demand for organs is going to increase as the average age of Ontario's population increases and Ontarians develop more health issues. If the Ontario government continues with explicit consent and the occasional social marketing campaign supply will continue to flatline and the organ shortage will continue to grow. It is unacceptable for the Ontario government to continue on with the status quo when there are other viable alternatives that could save money and lives. Conscription, organ markets, presumed consent or mandated choice would each be a significant improvement from the status quo. It is unrealistic to expect the Ontario government to implement conscription or organ markets in the current political climate. So, instead,

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\*\* Spain adopted presumed consent in 1979 and then created a national transplant organization to match donors with recipients in 1989.

I have argued that the Ontario government should implement presumed consent because it is more efficacious and libertarian paternalistic than mandated choice.

Although there are many objections to presumed consent, none make a strong case against implementing presumed consent in Ontario. Many of the objections against presumed consent try to misrepresent presumed consent as conscription but they are distinct policy options. Presumed consent nudges, conscription coerces. In-and-by-itself, presumed consent does not save the lives of patients with failing organs. But it is proven to increase a jurisdiction's supply of organs<sup>52</sup> and a lack of organs is the factor limiting organ transplantations in Ontario. Presumed consent could potentially eliminate the entire Ontario organ transplant waitlist but it is unknown if it actually would. If it could, it would avoid the difficult question of organ allocation: 'how do we decide who does and does not receive an organ transplant?' If it can't, it will at least shrink the size of and the average wait-time on the waitlist, and make the difficult question of organ allocation less tragic. It is worth giving this silver bullet a shot.

## Notes

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- <sup>1</sup> Trillium Gift of Life Network. Accessed: 3 November 2014. <<http://www.giftoflife.on.ca/en/>>.
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