

Exploring Non-utilitarian Justifications of Allocation Out of Sequence

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Lifesaving organ allocation decisions often reflect a plurality of substantive ethical considerations, including but not limited to utility. Yet analyses of Allocation Out of Sequence (AOOS) typically presume that only utilitarian principles could support AOOS. Courtwright's (2026) Target Article largely takes the same approach. By contrast, we believe that substantive, non-utilitarian aims should be taken seriously in any ethical assessment of AOOS. Our goal is not to defend AOOS or to argue that non-utilitarian aims are necessary to such a defense. Rather, we more modestly argue that ignoring non-utilitarian considerations might, in itself, be ethically *criticizable*. We also argue that, to the extent that policymakers redesign the allocation process, such redesigns—even when they stress the importance of fair deliberative procedures—should take into account the role of non-utilitarian considerations in AOOS.

Substantive Pluralism in Organ Allocation: Lessons from Allocation *in* Sequence

Waitlist prioritization for Allocation *in* Sequence (AIS) has been designed with reference to multiple ethical objectives, including not only utility but various aspects of fairness (OPTN 2015; OPTN 2021). It should therefore not be assumed that rigid adherence to waitlist order is always the best path to either substantive or procedural fairness. Rather, some departures may be justifiable on fairness grounds.

One prominent conception of fairness emphasizes the *proportional satisfaction of claims to assistance* (Broome 1990). Applied to transplant allocation, this conception grants that every waitlist candidate has some claim to any available and biologically compatible organ. It then holds that allocation should satisfy claims in proportion to their strength. Different specifications of this approach to fairness will assign strengths to claims in different ways; for example, one view may give extra priority to candidates within 250 nautical miles of the donor hospital while others will deem this proximity threshold ethically irrelevant. Even so, an account of this type will hold that when some people's claims are satisfied (to any degree) while others' go completely unsatisfied, the individuals in the second group are treated unfairly. This would support allocation protocols that avoid categorical failures to satisfy comparatively weak claims. If AOOS increases the absolute number of successful transplantations, this ensures that fewer claims to assistance go unsatisfied. In addition to promoting utility, AOOS would also promote this claims-centered brand of fairness.

A different non-utilitarian argument for AOOS involves the goal of not exacerbating disadvantage in opportunities to satisfy one's claim to an organ. The current AIS process permits higher-ranked candidates to decline an offer while still retaining their place in the priority ranking. Being at the top of one offer list correlates, though imperfectly, with the likelihood of

being at the top of the list for other offers in the near future. Patients and providers sometimes rely on this expectation and become choosier about the quality of organs that they accept. The exercise of the entitlement to decline an offer has implications for others farther down the list; for example, it increases cold ischemic time and therefore imposes risks to organ quality. In some cases, AOOS may be permissible in order to mitigate the adverse impact of declinations on those who are not highly ranked on the waitlist.

This argument might alternatively be couched in terms of the value of solidarity. Preserving compatibility with solidarity might require that higher-ranked candidates who exercise their prerogative to decline then accept some correlative risk of being skipped over when a judicious switch from AIS to AOOS would mitigate adverse impacts. A fuller analysis of whether and when AOOS better realizes non-utilitarian aims like solidarity or not exacerbating disadvantage would require a broader analysis of AOOS's impact, both positive and negative.

One potential negative impact is that AOOS might undermine fairness even if it increases the number of successful transplantations. Courtwright claims that when "AOOS leads to organ recovery that would not have occurred in sequence, there cannot be a threat to fairness." We are reluctant to attribute increased organ recovery to the existence of AOOS. Other work suggests that the number of organ recoveries in marginal donors is driven by metrics being used to evaluate organ procurement organizations (OPOs), with AOOS facilitating the placement of organs from these medically complex donors (Alliance 2023). But even were AOOS genuinely necessary for recovery, risks to fairness would persist. Sometimes giving one person an extra organ nobody else could have obtained is utility-improving, yet violates others' claims of comparative fairness (cf. Cohen 1995). Racist directed organ donations (Shupe 2024) offer an extreme example of the general point that Pareto improvements—gains for one candidate that hurt nobody else—are not always fair.

The Role of Substantive Values within Procedural Fairness

Courtwright frames decisions about AOOS as a balancing of "procedural fairness with maximizing transplant-associated goods" (pp. 20-22). But, at least at the stage of policy design rather than implementation, AOOS need not contravene or even conflict with procedural fairness.

Imagine designing allocation policy through a process that optimally realizes all Courtwright's procedural conditions (p. 17ff.). This fair process would still present substantive choices about what policy features to adopt (Rid 2009). Decision-makers facing such choices would invoke relevant, substantive ethical values, including but not limited to utility.

Assuming participants choose to allocate using something like AIS, they then need to decide whether to countenance AOOS as an exception. HRSA—ironically by means that Courtwright rightly highlights as procedurally suspect—defined OPO-initiated AOOS as inconsistent with the statutory and regulatory framework for organ allocation (p. 14-15). Defining OPO-initiated AOOS as lawbreaking puts it into obvious conflict with fair procedure. But policymakers elsewhere or in future, acting through a fair process, could instead explicitly treat OPO-initiated AOOS as a legitimate exception to AIS. Nothing about procedural justice disallows exceptions (cf. Schauer 1991). AOOS implemented within a fair process need not inflict procedural unfairness.

Ultimately, Courtwright's near-exclusive focus on procedural justice as the only counterweight to utility provides little guidance to allocation policymakers deliberating within a fair process. Within such deliberations, further appeals to fair process can accomplish little. We believe empirical predictions of AOOS's utility effects should be an important but not decisive consideration in policy design. Non-utilitarian aims should matter too.

Improving Policy Design in Organ Allocation

Courtwright offers, near his conclusion, an admirable discussion of preference matching in organ allocation. This discussion speaks in part to the worry that allowing potential recipients to consider and then to refuse organ offers risks harm to those who are farther down the waitlist. Courtwright considers whether candidates who are "willing to accept medically complex kidneys could be given higher priority for these organs". Then, "offers could be screened out in advance—as is currently done, for example, with candidates not willing to accept an organ from a hepatitis C donor" (p. 19). He then adds that if in-sequence allocation were revised to incorporate preference matching of this kind, "such changes would be *justified insofar as they resulted from a fair procedure* that included the perspectives of those governed by the policy and endorsed through that process" (pp. 19–20; our emphasis). Non-proceduralist accounts also support preference matching: a documented preference not to accept certain kinds of organs could be viewed as a relinquishment of one's claim to those organs.

We believe there is more to ethically defensible policy-selection than procedural fairness. Policy selection involves cogent substantive ethical justification for a proposed policy, put forward in an arena where fair procedures will then be used to determine legitimately enforceable policy. When only utilitarian ethical considerations are relevant, then cogent ethical justifications will invoke only utilitarianism. But when substantive non-utilitarian considerations are also relevant, no cogent justification will ignore them. And if a procedurally fair policy-selection process *has* ignored relevant ethical considerations, then while the resulting policy may be legitimately enforceable, it will also remain liable to ethical criticism.

The existence of a non-utilitarian argument in support of AOOS does not necessarily mean that AOOS should continue unmodified. An alternative to pure AIS or unchecked AOOS is the creation of a formal expedited placement protocol. Such protocols already exist in other transplantation systems (Assfalg et al. 2024). An expedited placement protocol would direct OPOs to follow AIS until there is sufficient evidence to suggest that an organ is at risk of non-utilization. Once there is enough risk of non-utilization, organs would shift to allocation via an expedited pathway that prioritizes organ placement to candidates, including those who might not have otherwise received the offer. Thresholds for shifting to expedited placement would be established via the standard OPTN policy process, be publically accessible, and apply equally to all OPOs. Such thresholds could balance obligations to fulfil the claims of candidates at the top of the list while ensuring that the claims of those lower on the list are also respected.

Conclusion

AOOS is potentially supportible by non-utilitarian considerations, not merely utilitarian principles. Ethical public policies must be not only procedurally but also substantively fair. A

formal expedited placement protocol could enhance our allocation system's ability to provide both procedural and substantive justice for all patients on the waiting list.

References

Assfalg, V., G. Miller, F. Stocker, et al. 2024. Rescue allocation modes in Eurotransplant kidney transplantation: Recipient oriented extended allocation versus competitive rescue allocation—A retrospective multicenter outcome analysis. *Transplantation* 108(5): 1200–1211. doi:10.1097/TP.0000000000004878.

Broome, J. 1990. Fairness. *Proceedings of the Aristotelian Society* 91: 87–101.

Cohen, G. A. 1995. The Pareto argument for inequality. *Social Philosophy and Policy* 12(1): 160–85.

Courtwright, A. Forthcoming. Justifying Organ Allocation Out of Sequence. *American Journal of Bioethics*. 26(1).

Organ Donation and Transplantation Alliance (Alliance). 2023. Impact of CMS Organ Procurement Organization Certification Changes. URL: <https://www.organdonationalliance.org/insight/impact-of-cms-organ-procurement-organization-certification-changes/>

Organ Procurement and Transplantation Network (OPTN). 2015. Ethical Principles in the Allocation of Human Organs. URL: <https://optn.transplant.hrsa.gov/professionals/by-topic/ethical-considerations/ethical-principles-in-the-allocation-of-human-organs/>

Organ Procurement and Transplantation Network (OPTN). 2021. Ethical Considerations of Continuous Distribution in Organ Allocation. URL: https://optn.transplant.hrsa.gov/media/4778/ethical_considerations_of_continuous_distribution_in_organ_allocation.pdf

Rid, A. 2009. Justice and procedure: How does "accountability for reasonableness" result in fair limit-setting decisions? *Journal of Medical Ethics* 35(1): 12–16.

Schauer, F. 1991. Exceptions. *University of Chicago Law Review* 58(3): 1.

Shupe, E. 2024. Understanding organ stewardship. *Hastings Center Report* 54(6): 30–37.