Commentary

A Proposal For Ethical Organ Donation

by Charles J. Dougherty

The current system of organ donation in the U.S. does not supply all the organs that are needed, even though transplantable organs exist. Estimates of those who need kidney transplants in the U.S., for example, run from 6,000 to over 20,000 persons; those who die under circumstances which make them potential donors probably number around 20,000. Thus the number of potential donors is large enough to match the need (by twice, since the kidney is a paired organ), but only some 15 percent of these potential donors' kidneys are actually transplanted.[1] Similar circumstances prevail regarding the heart, liver, cornea, pancreas, and other transplantable organs; need far outstrips supply, yet the potential supply exists.[2] And, as organ transplantation becomes more medically routine, the demand for cadaveric organs in the future will likely increase dramatically. However, there is little reason to expect that the "voluntary opt in" system, where donation of cadaveric organs for transplantation requires a voluntary act of donation either by the donor while he or she was alive or after death by the next of kin, will keep up with the demand.

Two factors help account for the present and predictable failure of the current system. Most of us, for deep-seated psychological and cultural reasons, are unwilling to contemplate our own deaths and the circumstances of our bodies after death. Consequently, too few people take the steps necessary while alive to plan for donation of organs at death. This means that appeals for cadaveric organs must then be made to the decedent's next of kin. But asking the next of kin for a voluntary choice to donate the body parts of a loved one in what are often tragic circumstances, accidental death of an otherwise healthy mate, for example, can be exceptionally difficult. From the relatives' perspective such a request can be devastating. By way of illustration, one woman described herself as "astounded and utterly appalled" when asked to donate her late husband's kidneys. "To make such a decision for oneself is hard enough," she reported, "but to be asked to make it on behalf of another, while one is so shocked and grief stricken is both harrowing and cruel."[3] In sum, the

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problems with the current system stem from personal reluctance to consider one's own death and from the poignant circumstances in which next of kin are often placed at the time of a request to voluntarily opt into donation of a recently dead loved one's body parts.

Market Competition Or State Control?

Several proposals have been made to address these problems. Two suggestions are especially extreme. The first proposal is to give people an economic incentive to donate organs by creation of a market for buying and selling body parts. The second extreme suggestion is to give the state the authority to take needed body parts, at least in circumstances where relatives do not initiate objections to this taking. Both proposals would likely increase the supply of organs suitable for transplantation, but both are, I think, ethically unacceptable.

As different as various market schemes are, they share in common an attempt to give an exchange value to body parts, to make a human organ a commercial commodity.[4] Considered from the point of view of the priceless moral dignity of persons, this alternative is unacceptable on its face. Furthermore, commercialization of organ transfer would likely be prejudiced against the poor, may lead to quality problems (let the buyer beware), would provide an economic incentive to shorten human lives, and would likely tend over time to drive out genuinely charitable giving.

The other extreme proposal to increase the supply of cadaveric organs is to institute a government sanctioned taking, an eminent domain among the dead, at least in cases in which the next of kin do not initiate objections. This is not just a proposal, but the system in place legally in France, Denmark, Austria, Switzerland, Poland, Czechoslovakia, and Israel.[5] Though in practice there is often deference to relatives' wishes, the official policy in these nations is to presume consent and to salvage whatever organs are needed.[6] And there are American precedents of sorts for a state interest in the corpse. These include state authority to determine the proper preparation of the body for burial or disposal, to examine the body to determine cause of death, and to perform autopsies in cases of criminal investigation, where certain communicable diseases may be present, and to settle insurance claims.[7]

But it is unlikely that such a system of state taking would be tolerated in the U.S. It is probably unconstitutional for due process and freedom of religion reasons.[8] Even in nations where the law allows organ taking, actual practices appear to soften the law's impact. In France, for example, where such legal authority exists, it is seldom used. Generally, the decedent's family is informed of the intent to salvage cadaveric organs and if an objection is lodged no organs are removed.[9] This deference to the next of kin can be given an ethical justification. Robert Veatch argues, for

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example, that family members have moral responsibilities to their own dead. These include the duties to honor the wishes of the decedent; to fulfill commitments to them; to protect the integrity of the corpse, including preventing mutilation and exposure to assault; to provide a fitting removal of the body from society; and to offer responsible service to those left behind.[10] An effective policy of government taking of organs would conflict with some or all of these duties.

Realistic Alternatives For Reform

If these two extreme proposals for the commercialization and pricing of organs and for government sanctioned taking of organs are ethically unacceptable, must we tolerate the weakness of the present system? Not necessarily, since there are two more moderate alternatives for reform. The first is a system of required request for donation. The second is one of routine removal of organs, but with the right of informed refusal by the next of kin.

A required request system would have one or both of two features. The first would require a response to the question of organ donation by all adult citizens, perhaps by a mandatory checkoff on a driver's license application, a tax return, or into some ad hoc national registry.[11] The state of Colorado now mandates such a choice during application for a driver's license.[12] This response would then be made available to medical personnel at the time of death. The second feature would require that in all cases of the death of a potential donor, a request for organ donation be made directly to the decedent's family by someone on the medical team. Laws mandating request for donation are now in place in twelve states.[13]

With respect to the first element of required request, experience with the Uniform Anatomical Gift Act in the U.S. and with government sanctioned taking in France suggests that medical personnel will still likely turn for approval to the next of kin, regardless of the existence of the decedent's checkoff authority to salvage organs. And there is the practical concern that a forced choice for or against donation outside of any pertinent context may not result in an increase in organ donation. With the sense of others' needs and the inevitability of one's own death only theoretical realities at the time, it is just possible that this choice will not receive the thoughtful attention that it deserves. Further, since the choice will be forced, resentment may well develop, issuing in more refusals to donate than proponents of this scheme expect.

The other element of required request is probably the more feasible of the two, and it has met with some considerable success in the states where it is the law.[14] But required request to the next of kin does nothing to help deal with the apparently shocking cruelty of such a request to the family that is not prepared, that has never discussed this issue in advance

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of tragic events. Thus, required request will probably still produce many instances of refusals born out of the pathos within which an affirmative choice to donate must be made. It is therefore unlikely that required request will allow the supply of cadaveric organs for transplantation to keep pace with increased demand.

The second option, routine removal with a right of informed refusal, has a better chance of success.[15] This approach would reverse the burden of proof in organ donation, from the present one in which a voluntary choice must be made to opt into donation to one in which a voluntary choice would have to be made to opt out. At death, each person would be presumed to be a willing organ donor unless he or she was carrying a card indicating otherwise, was a member of a religion or group known to oppose organ donation, or the next of kin refuses permission to remove organs. This last qualification is of major significance because, unlike the system of government sanctioned taking, routine removal with a right of informed refusal would require that the next of kin be alerted to three things before any organ removal takes place: First, the next of kin must be told that it is standard procedure in these cases to remove suitable cadaveric organs for transplant to needy others. Second, unless he or she refuses to allow removal, needed organs will be removed in this case. And third, he or she can refuse permission for donation for any reason or for no reason at all, and such a refusal will be respected without penalty or prejudice.

This system would still be charitable since the transfer of organs would be neither a selling and buying nor a simple taking; it would remain an act of giving. It would still be voluntary because in every case the next of kin would be given the option to prevent donation in a free and informed manner. The advantage this system would have over the present voluntary opt in system and the required request approach is that next of kin acquiescence rather than active preference would suffice to secure needed organs for transplant. This would make the psychology of approaching bereaved next of kin easier and a decision on their part to allow donation less burdensome as well. Rather than presenting a shocking and potentially cruel request for a loved one's organs, under this system medical personnel would merely be seeking passive acceptance of doing what would then be normal. From the next of kin's point of view, this system would ask them only if they refuse or they believe that the deceased would have refused to do what is usually done. The vexing question of whether or not donation is or would have been actively preferred would be put aside by a public presumption in favor of routine removal.

No doubt approaching a grieving next of kin would still be difficult, but it would surely be easier than the approach mandated under required request schemes. If it is in fact easier for all involved, it would

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likely lead to an enhanced supply of needed cadaveric organs for transplant. In France, where in spite of the law allowing government sanctioned taking, something like a system of routine removal with a right of informed refusal is practiced, less than 10 percent of families approached raised objections.[16] This would likely mean a dramatic increase in the supply of transplantable organs in the U.S. Given the figures cited earlier, a 90 percent rate of access to suitable cadaveric organs would more than satisfy all present need and might adequately anticipate future need for transplantable kidneys. This system would still be respectful of individual freedom as it would allow anyone to opt out for any reason. And it would enhance the common good because it would create an institutional presumption in favor of people helping people in one of the most intimate ways possible.

But some, perhaps many, will not agree. They will reject this proposal on its fundamental assumption, that the burden of proof can be reversed so as to presume everyone's willingness to donate their organs after death. Isn't this to assume, they might well ask, that the public has some claim over an individual's body? Even if an individual or next of kin can override this claim by an informed refusal, isn't it wrong to allow even a presumptive public claim over such a private entity? If anything is intimately and privately a person's and only a person's, isn't it his or her own body?

Certainly there is a truth here. We very much are our own bodies. They are the foundations of our privacy. And if it even makes sense to separate ourselves from our bodies enough to meaningfully say this, our bodies are our most intimate possessions. Yet there are equally compelling social dimensions to the human body. Our bodies represent the genetic achievements of generations of human and prehuman ancestors living together socially. We are each the immediate result of the union of two other human bodies. Each of our bodies has been a beneficiary of the many medical advances made possible by the sacrifices of countless others and of the social institutions which have sustained medical research, prevention and treatment of disease, rehabilitation, and care for the sick and dying. Because many are unaware of these social debts does not make them any less compelling. It seems fitting in light of these very real debts to others in general, and to the institutions of health care in particular, to presume a willingness to contribute to others after death. And a system of routine removal with a right to informed refusal provides ample protection of individual freedom.

It is time to give this alternative careful consideration. The future will surely bring increased demand for transplantable organs and a public seeking policies to effect this. If required request does not allow us to meet future organ needs, the unacceptable alternatives of buying and selling human organs and of government taking will become more attrac-

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tive in spite of themselves. Routine removal with a right of informed refusal is a policy alternative that can satisfy genuine human needs without turning our bodies into commodities or surrendering them to the government.

NOTES

1. Arthur Caplan, "Organ Procurement: It's Not in the Cards," *Hastings Center Report* 14 (October 1984).
2. Arthur J. Matas, John Arras, James Muyskens, Vivian Tellis, and Frank J. Veith, "A Proposal For Cadaver Organ Removal: Routine Removal With Right of Informed Refusal," *Journal of Health Politics, Policy, and Law* 10 (Summer 1985): 231.
3. Ibid., 233.
4. See generally, Clifton Perry, "Human Organs and the Open Market," *Ethics* 91 (October 1980): 63-71.
5. Howard Schwartz, "Bioethical and Legal Considerations in Increasing the Supply of Transplantable Organs: From UAGA to 'Baby Fae'," *American Journal of Law and Medicine* 10 (Fall 1985): 421.
6. Caplan, "Organ Procurement," 11.
7. Matas et al., "Routine Removal," 242.
8. Alfred and Blair Sadler, "A Community of Givers, Not Takers," *Hastings Center Report* 14 (October 1984): 8.
9. Caplan, "Organ Procurement," 11.
10. See Robert M. Veatch, *Death, Dying and the Biological Revolution* (New Haven: Yale University Press, 1976).
11. Caplan, "Organ Procurement," 12; and Arthur Caplan and Mark Seigler, "Risks, Paternalism, and the Gift of Life," *Archives of Internal Medicine* 145 (July 1985): 1190.
12. Schwartz, "Increasing the Supply," 420.
13. "The Latest Word," *Hastings Center Report* 16 (June 1986): 46.
14. Ibid. Reportedly, donations in New York have doubled and in Oregon they have increased by at least 50 percent after required request became law.
15. See generally, Matas et al., "Routine Removal."
16. Caplan, "Organ Procurement," 12.

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