

# The Case for Presumed Consent to Transplant Human Organs After Death

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A NECESSARY condition for the lifesaving uses of the organs of a human body after death is the permission of those who have rightful authority over the body in question. Each of us is the possessor, master, of our own body, and therefore (it is almost universally agreed) we have wide moral authority to give or withhold permission for the use of our body after death.

Just rules for the disposition of human bodily remains therefore must respect individual autonomy in that disposition. Autonomous expressions of will regarding the posthumous disposition of one's organs are most often not made while alive, and therefore a decedent's autonomous judgments are rarely known with certainty. After death, authority over the body is commonly thought to rest with the decedent's family, who are likely to represent best the true will of the decedent. But even they cannot exercise the decedent's autonomy, since no one can do that.

## PRESUMED CONSENT

A great change in our national system of organ procurement, a change grounded in the moral foundation of human autonomy, is now called for. Current American practice tacitly assumes that, absent specific notification to the contrary, decedents are best protected if we act as though they had autonomously willed that their organs not be donated for transplantation. Organ procurement therefore now relies utterly upon consent expressly given (by the decedent before death, or by his family after death) that rebuts this presumption. I argue that this system of rules, formal and informal, ought to be wholly reformed; the underlying assumption that ought to be made is the very opposite of the one now made. To protect the autonomous wishes of decedents we ought to assume that they did will or would have willed their organs for beneficent medical uses. Expectations would be reversed under the reformed system; the normal pattern would be one in which lifesaving transplants of cadaveric organs proceed as a matter of course unless consent for such uses had been expressly refused. Absent express refusal, no permission for the donation of organs need be sought from any party, no discussion of any kind being required save that called for by purely medical considerations. Presumed consent is the name commonly given to the system here proposed.<sup>1</sup>

This is certainly not a new idea; it was first brought to wide attention by Dukeminier and Sanders in 1968,<sup>2</sup> and has since been entertained by a number of others, sometimes only halfheartedly or as a possible recourse to which our need for cadaver organs unhappily drives us.<sup>1,3-6</sup> I submit, however, that a system in which consent is pre-

sumed is not merely expedient or advantageous; it is also just. Such a system is good because it maximizes benefits for all concerned. Because it best protects the autonomy of decedents it is also right, more right than the system now employed.

## NEEDS AND GOODS

What is good for society is largely a function of what its members need. We need a great many more organs for transplant than are presently procured. The gravity of that need, and the likelihood that it will increase as the years go on, I take to have been established by others, at this conference and elsewhere. Therefore, the existing system of organ procurement depending utterly upon express consent, almost always sought from the decedent's family at the time of the loved one's death, is not very good and certainly is not good enough.

The enlargement of organ supply required to meet these compelling needs does not appear feasible within the current framework of express consent, whether that consent be sought voluntarily or the request for consent be required by law. Whatever the reasons for this—the failure of young persons to express their judgment while healthy, the psychological stress upon families at the time of the dying of a loved one, the reluctance or awkwardness of physicians and administrators in making donation requests as patients are dying, or others—long experience teaches that circumstances commonly conspire to block the needed express consent for the donation of the organs of a decedent. In sum, the need for organs is great and will increase, while the present system of procurement through express consent fails and almost certainly will continue to fail to meet that need.

We may conclude without serious doubt that overall human well-being will be substantially improved if some way were found, within the boundaries of morally right conduct, to increase greatly the supply of human cadaver organs for transplantation. A system of presumed consent would very probably increase the supply of needed organs vastly. This is the outcome one would expect, and it is confirmed by experience with presumed consent in other countries,<sup>4</sup> although even where presumed consent is

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operative the needs for cadaver organs are not fully met.<sup>7</sup> The disadvantages of presuming consent are minimal, nearly nil. On balance, therefore, an organ procurement system founded upon presumed consent is almost certainly good.

#### WHAT IS RIGHT TO PRESUME?

For utilitarian moralists, therefore, the justifiability of the proposed reform is plain. But for those of us whose deepest moral principles are not grounded in utility, serious moral questions remain. Is the presumption of consent right? Principles of right conduct ought not be sacrificed to improve the balance of results. Can a system of presumed consent be fully reconciled with the autonomous disposition of human organs by those having rightful authority over them? The answer is yes.

Putting the question in that way, however, suggests that there is some difficulty in the reconciliation. Suppose the critical question were posed in this way: How can we most fully realize most persons' autonomous wishes concerning the disposition of the organs of their own bodies after their death? While healthy, most persons do not confront the matter; while dying most cannot decently be asked their preferences; when dead all are silent. In the great run of cases, therefore, we do not learn what we would most like to know at the time we need to know it: the actual desires of persons whose body organs are at issue. Therefore, under any system whatever, we are forced to make some very general presumptions concerning the wishes of persons about the uses of their organs after their deaths. And under any system we must receive and implement autonomous expressions of preference that do not conform to the general presumption.

That is the form of what we do now, but the present substance is problematic. We presume now for all persons that there was a will not to donate; then under some circumstances we seek express consent to do what we had presumed would not have been wanted. That express consent we most often seek from the family of the decedent, there being no other resource.

The consequences of presuming in this pattern are often gravely unfortunate; familial distress is commonly caused by the mere request for consent, and the refusal of it often results in the loss of human lives that might otherwise have been saved. But in addition to its unfortunate results, the present system is wrong, wrong because it undermines in practice the very principle upon which it was supposed to have been built. As it must, it incorporates into law and practice a presumption about what people generally want to happen to the organs of their bodies after death, but the presumption thus incorporated is one now known to be inconsistent with the actual wishes of most persons, at least, of most persons in these times in the United States. We honestly aim to protect autonomy, but by our current practice we commonly vitiate it.

The majority of people now heartily support the concept

of organ donation. Most persons, when asked, express without qualification their willingness to donate their own organs after death. As early as 1968, support in the United States for organ transplantation from cadavers was shown to be strong and widespread.<sup>8</sup> By 1975, still an early date from the perspective of organ transplantation, a majority of those even in rural and relatively unsophisticated areas expressed positive support for organ transplantation.<sup>9</sup> In regions more sophisticated, in Los Angeles County, for example,<sup>10</sup> and in Houston,<sup>11</sup> those supporting organ donation (even back in 1975) were more than three fourths of the whole. In Liverpool in 1979 that figure was 93%.<sup>12</sup>

Some who support transplantation are nevertheless uneasy with the vision of the donation of their own organs. Every person conscious of his own will has some difficulty in picturing his own death. But what most Americans would say in their most rational moments, and (if they were in a position to be asked) would most likely say about the lifesaving uses of their own bodily remains, is clear: Yes, our organs may be used by others, if this will save lives. The present system, depending entirely upon the express consent of the decedent's family after death, thus errs in its empirical underpinning, and by that error promotes a great moral mistake.

All too frequently the spouses and children of dying patients respond negatively to the request for donation. But families are thus being obliged to answer a question terrible, at the moment it is being asked, for the very reason it must then be asked. And they are being asked at that moment to override what is widely presumed. Under such circumstances the responses of families often do not reliably reflect the autonomous wishes of decedents. We ask the wrong persons, at the worst possible times, what they should never have been asked at all.

As a matter of morality, our weightiest obligation here is to decedents, about whose wishes we (usually) must make some presumption. To best realize their autonomy we should presume what we have strong empirical reason to believe was in fact their wish, that if their organs might be used to save another life, they ought to be so used.

Presuming general consent to organ donation is therefore the right thing to do; that is the chief reason, and a very powerful reason, to turn the present system right side up. At the moral core of this matter lies autonomy, of which consent in the disposition of one's body is one manifestation; presuming consent for beneficent transplantation of organs is the best, imperfect but still the best, realization of autonomy in any population like ours that strongly favors the donation of cadaveric organs.

#### OTHER GOOD CONSEQUENCES OF PRESUMED CONSENT

By this morally right presumption we may improve and prolong the lives of persons who would otherwise have died. But other great goods also ensue. Grieving families are given enormous relief. Many people who, when rational and calm, would donate their own organs without

qualm, want not to think about the matter when not obliged to do so, and when forced to make that decision for others at moments of despair and stress, are agonized. At the very moment when the removal of a loved one's vital organs is most dreadful to contemplate, when feelings of guilt or helplessness are most likely to distort calm judgment, grieving families need not confront the matter. Moreover, this resolution of the matter by an earlier, and universally understood presumption, would be a service not only to the bereaved, but also to physicians and nurses who are relieved of the need to ask questions laden with pain and doom, as grief-ridden families are relieved of the need to answer them.

#### PROTECTING THOSE WHO OBJECT

The operational details of a system of presumed consent would be important, of course, but they present no insuperable difficulties. Some persons do not wish to have their organs removed for any purpose, even to save lives after their deaths. To them it must be said, without hesitation or rancor, "as you wish." Giving to every person the opportunity, while alive, freely to opt out of the system of general donation is a social obligation entailed by respect for individual autonomy, and an obligation readily fulfilled. Any individuals, *for any reason or without reason*, must have and will have the right and the fullest opportunity to cancel the presumption in their own case, and that simply by registering this wish, without need for justification or argument or delay, or for any other judgment by any other person.

Once the system of presumed consent has become widely understood (and probably even when first introduced) those who opt out will be a minority, and the interests of that minority must be carefully respected. A national computerized registry will be required, to which there will be appropriate access by authorized individuals and by hospitals, so that those who do object may record their wishes in ways that will protect the autonomy of their judgments. In short: any person's exercise of the option to demur, for any reason whatever, must settle the matter for that person's remains. No one else need ever be asked anything.

#### TRANSITIONAL MATTERS

The transformation of the present system of organ procurement into one of presumed consent (with ready option out) must take place in ways that will not result in surprise or disadvantage. Of no one may it later be said that objections would have been registered if only the rules had been known. Wide public education must therefore precede the reversing reform, and the revised presumption must be openly and clearly expressed in ways that all may fully grasp. That is surely within our power. The twice-annual shift from standard to daylight saving time and back is infuriating to many, and more coercive than the shift proposed here, but (I observe) very few are they who, the

very next day, do not know the correct time. When there is a widespread understanding that human organs are an absolutely priceless resource, wasted only at the cost of life, most persons will be proud of this shift. But for those who remain troubled by it the fullest opportunity to opt out must be given, their recourse made simple, convenient, and always revocable. In less time than we now may think, I hazard, most will wonder how ever it could have been any other way. Did once people need to give express permission in order that another's life be saved by what would otherwise soon rot? Did once people commonly presume that some must die because others were in psychological distress? It was that way once, but that was back in unenlightened times.

#### AUTONOMY AND THE FAMILY

Until the presumption of consent has become widely understood and assimilated, objections to the donation of organs by the decedent's next-of-kin will have to be respected. This family veto is likely to reduce the supply of needed organs at first, but authorizing it will smooth passage into the new system. Eventually, I believe, we will come to regard the authority of the family to block donation as more a burden to the decedent's autonomous will than a safeguard of it.

On the other hand, if any individuals while competent register an affirmative expression of their will that their organs be donated if they prove usable after death, by this act converting a presumed consent into consent expressly given, the will so expressed ought not be subject to contravention by the will of any others, even that of family members.

Presumed consent has been criticized by some as insensitive to the ethical demands of bereaved families,<sup>13</sup> but this complaint misconceives the ethical issue. The psychological well-being of bereaved families must be safeguarded, of course, and will be. But at bottom the moral authority for consent to donate organs lies only with the person whose organs they are, or were. Families properly enter, in this as in other proxy contexts, to represent the will of those who cannot speak for themselves; however good their motivation, family members ought not to be permitted to contravene the wills of those with genuine moral authority in the matter.

In spirit and in detail an organ procurement system should aim to realize the will of the donor while alive, and to preclude the frustration of that will. With very few exceptions, imposed in special circumstances, we are properly sovereign over our own bodies while alive, and our wishes concerning the uses of our organs after death deserve continuing respect. Autonomy ought to be the ruling principle in this sphere; under a system of presumed consent it will be, and if not perfectly realized at least autonomy will be more fully realized than it is now.

## OBJECTIONS AND REPLIES

Objections of three kinds have been registered to systems of presumed consent. Some are mechanical, some sociologic, some moral; all fail.

1. Mechanical or technical objections are raised to the workings of the system. The registry of those opting out would become too complicated, it is said, or some might fail to get ready access to it, and so on.<sup>14</sup> Others are troubled by the fact that maintaining uniformity across state boundaries will present a problem.<sup>15</sup> Such objections are essentially insignificant. If a change to presumed consent is fundamentally wise we can surely make it work, and we can devise the needed machinery to smooth its operation in practice. Occasional breakdowns there will be under any system, of course; in a few cases, especially at the outset, the presumption of consent may result in some organs being used that should not have been. But when the common presumption made is consonant with the common will on the matter, misfire is much less likely than when (as under the present system) it is dissonant. Moreover, while the lifesaving use of organs that ought not to have been used cannot be right, it is at least a wrong more tolerable than the wrong of not using organs that should have been used. In choosing between the two approaches, each subject to some operational failure, it is surely wise to implement the one whose failures are likely to be fewer and whose results are certain to be better.

2. What I call "sociologic" objections are rooted in the fear of attitudes or practices that the new system will (allegedly) promote. The fears are various:

- A. That organ farms or other macabre fantasies will be encouraged by a system of presumed consent.
- B. That the spirit of voluntarism will be undermined.<sup>14</sup>
- C. That the distrust of physicians will be increased because, as the routine harvesters of organs, they will come to be viewed as persons in whose hands a very sick person cannot be safe. Or that hospitals will by this change be transformed in the popular imagination into places of bodily mutilation and brutality. May<sup>16</sup> writes:

"While the procedure of routine salvaging may, in the short run, furnish more organs for transplants, in the long run, its systemic effect on the institutions of medical care would seem to be depressing and corrosive of that trust upon which acts of healing depend."

Such dismal speculations, and others like them, and the objections to which they give rise, have no good empirical foundation. Anecdotal horror stories, in a context of antipathy toward medical researchers and hospitals, are magnified by imagination into what may be called anticipatory speculative condemnation. Anxiety and mistrust of the same sort long accompanied the development of recombinant DNA technology, we will recall, and commonly arise when changes in old ways are proposed. The real empirical consequences of presuming consent, of which we cannot now be certain of course, are in fact as

likely to support humane care as to undermine it. The life-enhancing possibilities of organ transplantation, the change of focus from those dying to those who may yet live, may bring a fuller appreciation of the gratitude of organ recipients and their families, and may prove a great boon for humanity, celebrating as it does the most wholesome and productive of human values. Widespread recognition of the goods achieved by organ transplantation may do more to enhance the spirit of voluntarism than to erode it. All such claims are speculative; the fears have as little foundation as the hopes. We ought not to treat ungrounded speculations as rational objections to a presumption about the common will that we know to be correctly applicable to most people.

Those who find the removal of organs from a cadaver to be frightening, or self-seeking, or otherwise unscrupulous, will of course attack any system that promotes organ transplantation as brutal. Those who make of physicians common objects of abuse will feel threatened by any proposal appearing to enlarge their authority. Ghastly misbehaviors in the handling of dead bodies are of course possible under any system whatever. Avoiding the ugly, the abusive, and the insensitive is a matter of wise and intelligent administration. Wisdom and intelligence may on occasion prove wanting, but their want is in no case likely to be the consequence of the presumption made about the will of decedents. And what is most insensitive after all, even macabre, is watching persons die whose lives could and should have been saved, but were not.

3. Finally, account must be taken of two genuinely moral objections:

- A. The first is based on the moral conviction that the process of harvesting human organs is intrinsically wrong. Some (but not all) Orthodox Jews, seeking to respect Divine command, and some who hope for a resurrection of their bodies in the afterlife have this conviction. The religiosity of such objectors we must respect, but their convictions cannot be allowed to block an otherwise justifiable change in the presumption of consent, so long as these persons and all others are clearly free to reject the presumption of consent effectively in their own case, and are unhindered in doing so. With those who hold such views no contest is in order, nor any effort to persuade or bring pressure. Convictions about the history of the body after death, or other supernatural beliefs causing organ removal to be thought unacceptable, are not the business of the community at large. We may all believe what we please, and all must be free to work our own will regarding our own organs, without objection or obstruction.

- B. A second moral objection rests upon what is claimed to be a critical difference between consenting and not objecting. If we rely upon express consent we realize autonomy (this critic holds), but if we rely only upon the absence of objection we may fail to do so. Hence a procurement system built upon express consent is

always morally sound even if clumsy, while one built upon the presumption of consent could not be reliably sound even if it were expeditious.

Wrong. There is a difference between express consent and not objecting, but that difference cannot guide us in a moral choice between the one presumption and the other. If persons do in reality object to the use of their organs (but never register that objection) a system that requires express consent will protect his autonomy more surely than the revised system here defended. But with the presumption reversed, the very same point can be made in reverse: if one does in reality consent to the use of one's organs (as most of us do, although never registering that consent) a system that presumes *consent* will protect his autonomy more surely than the present system can.

The difference in focus here is that between positive acts (expressly consenting or expressly refusing consent) and negative acts (refraining from refusing or refraining from consenting). This is an operational difference, not a moral one. It can have moral consequences, but the merit of proceeding in the one way or the other depends largely upon what we believe to be the general inclination of those about whom one of those presumptions must be made. If we knew that only 1 or 2 persons in 10 would autonomously donate their organs, a system that presumed consent, protecting 10% automatically but obliging the other 90% to register their objections to make their will effective, would be unfair. But if we have good reasons to believe that 7 or 8 of 10, or even 6 of 10, would in fact choose to donate their own organs for lifesaving uses after death, a system that presumes the absence of consent (what we have now) similarly protects a minority and obliges the majority to register their views expressly, and it is then unfair.<sup>6</sup>

Whether we require consent to be expressed, or require refusal to be expressed, should depend upon what we believe the majority would have done in fact, if all had registered their views. We may presume one way, or presume the other, but presume we must. Either way we

place a heavier load upon those for whom the presumption made is incorrect. Moral principles by themselves give no indication which presumption is the fairer. Acting justly requires respect for the autonomous judgments people would actually have made, or (if we are unsure of that) what we may most reasonably suppose they would have made. That reasonable supposition we can reliably make. Therefore, presuming that consent would have been given is in fact fairer, more protective, and more likely to realize autonomy than presuming (as we do now) that it would not have been given.

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