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CADAVER DONORS ARE THE BEST SOLUTION TO THE ORGAN SHORTAGE

*Raymond Pollak**

Organ transplantation was once an experimental therapy. Today, due to modern immune suppressive drugs, it is an established clinical practice that has caused exponential growth in the waiting list of potential transplant recipients.¹ This list now numbers over 90,000 in the United States alone.²

These drugs have also boosted the demand for organs that are derived from altruistic living and cadaver donors. But living donors cannot fully meet this demand, nor can they provide organs such as the heart. As a result, transplantation must rely on the available pool of medically suitable cadaver donors—donors who are brain dead or have lost their heartbeat.

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1. See United Network for Organ Sharing, UNOS Facts and Figures, <http://www.unos.org/Resources/factsheets.asp?fs=5> (last visited Mar. 3, 2006).

2. *Id.*

Regrettably, there is also a shortage of cadaver organ donors. Family refusal, religious beliefs, superstition, and ignorance contribute to the dearth of cadaver organ donors.³

A greater problem, however, is public mistrust. The organ allocation system must satisfy three principles: equity, justice, and utility. These principles, articulated by ethicists such as Arthur Caplan of the University of Pennsylvania, stress that waiting recipients must have an equal chance to receive a donated organ (the principle of equity), that the most deserving patient must have first priority (the principle of justice), and that the best use must be made of the donated "gift of life" (the principle of utility).⁴

When avaricious transplant programs subvert these principles, they damage the overall effort to encourage voluntary organ donation. To paraphrase Dr. Caplan: "Fairness in allocation drives donation."⁵

The failure of altruism alone to encourage greater numbers of both live and cadaver donations has prompted suggestions for government-funded incentives. These incentives include payment for the funeral expenses of cadaver donors, waiving donors' income or estate taxes, or awarding them compensation and a medal.⁶

Some have gone further and have advocated a free market approach that treats organs as tradable commodities whose value is set by the laws of supply and demand.⁷ Despite legal proscriptions against this approach in a number of countries (including the United States),⁸ the illicit trade in organs is active in several places.⁹ Recent media reports have described organ peddling rings in Israel and South

3. See generally S. Corlett, *Public Attitudes Toward Human Organ Donation*, 17 *TRANSPLANTATION PROC.* 103 (6 Supp. 3, 1985); A. K. Gordon et al., *Surveying Donor Families: A Comparison of Two Organ Procurement Organizations*, 9 *CLINICAL TRANSPLANTATION* 141 (1995).

4. See generally A. L. Caplan, *Problems in the Policies and Criteria Used to Allocate Organs for Transplantation in the United States*, 21 *TRANSPLANTATION PROC.* 3381 (1989).

5. *Id.* at 3387.

6. Robert Arnold et al., *Financial Incentives for Cadaver Organ Donation: An Ethical Reappraisal*, 73 *TRANSPLANTATION* 1361 (2002); Paul Terasaki, Letter, *A Congressional Gold Medal for Transplant Donors and Families*, 5 *AM. J. TRANSPLANTATION* 1167 (2005).

7. Lloyd R. Cohen, *Increasing the Supply of Transplant Organs: The Virtues of a Futures Market*, 58 *GEO. WASH. L. REV.* 1 (1989); L.R. Cohen, *A Futures Market in Cadaveric Organs: Would It Work?*, 25 *TRANSPLANTION PROC.* 60, 61 (1995).

8. National Organ Transplantation Act, 42 U.S.C. §§ 273–274e (2000). 42 U.S.C. § 274e begins: "It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce." *Id.* § 274e(a).

9. Brian Handwerk, *Organ Shortage Fuels Illicit Trade in Human Parts*, *NAT'L GEOGRAPHIC ULTIMATE EXPLORER*, Jan. 16, 2004, available at http://news.nationalgeographic.com/news/2004/01/0116_040116_EXPLorgantraffic.html.

Africa that induced poor Romanians and Brazilians, respectively, to sell their kidneys for meager sums.¹⁰

Many associations that represent the “transplant community” of healthcare professionals have denounced the buying and selling of organs for profit and have threatened sanctions against their members who engage in these practices.¹¹ They note that organs are primarily bought from the poor, who have little recourse if they suffer any adverse consequences from the donation.¹²

The often desperate and vulnerable recipients of organs are also victims. They are required to pay exorbitant sums to acquire an organ, with few safeguards as to the bona fides of the surgeons and physicians involved or the quality of the organ to be transplanted.¹³ The medical literature is peppered with individual case reports of recipients who acquired a disease or experienced a near fatal outcome from a transplant procedure that involved an organ from a paid donor.¹⁴

The free market in organs may also encourage criminal activity, providing credence to the oft-quoted myth of innocents being drugged and abducted only to wake up the next morning in a hotel room with a new flank incision and a missing kidney. Worst of all is the ghoulish specter of physicians becoming complicit in these schemes, undermining the public’s already fragile trust in the emergency care of seriously injured patients.¹⁵

What, then, are the potential solutions to the shortage of transplantable organs that will be legal, ethical, and acceptable to the public?

The expansion of voluntary live donor programs is one approach. But critics point out that live donation is the one circumstance in medicine where a human being is subjected to a potentially mortal

10. *Id.*; see also Fred Kockot, *Kidney Scandal: Call for Changes to Law*, SUNDAY TRIB., Sept. 25, 2005, available at www.sundaytribune.co.za/index.php?SetId=109&fSectionId=160&fArticleId=2890033.

11. See *Commercialisation in Transplantation: The Problems and Some Guidelines for Practice*, 2 LANCET 715 (1985).

12. *Id.*

13. Handwerk, *supra* note 9.

14. See, e.g., Andis Robeznieks, *Man Who Got Transplant After Ads Dies*, AM. MED. NEWS, May 16, 2005; A.K. Salahudeen et al., *High Mortality Among Recipients of Bought Living-Unrelated Donor Kidneys*, 336 LANCET 725 (1990); T.E. Starzl, *Living Donors: Con*, 19 TRANSPLANTATION PROC. 174, 174–75 (1987).

15. See generally Silke V. Haustein & Marty T. Sellers, *Factors Associated With (Un)willingness to Be an Organ Donor: Importance of Public Exposure and Knowledge*, 18 CLINICAL TRANSPLANTATION 193 (2004).

surgical procedure for no personal medical benefit. That is a violation of the Hippocratic admonition to “first do no harm.”¹⁶

The possibility of using xenografts—organs removed from genetically altered animals—remains in the realm of experimental transplantation and is mired in concerns that unknown, new diseases will emerge from these operations.¹⁷ The use of cloning technologies to provide organs for transplantation is similarly handicapped by political considerations.¹⁸

The use of the internet and billboards on public highways to advertise the need of single individuals who plead for directed organ donations has also gained the attention of the public and policymakers.¹⁹ The potential for chaos in the organ donor allocation system in the United States has been highlighted as a result of these well-publicized pleas for donated organs through the medium of advertising.²⁰ Once rare, these kinds of solicitations are becoming more common as increasing numbers of patients wait for longer periods of time for the gift of a life-saving organ.²¹

But curtailing the rights of patients to advertise and discuss their plight in the media raises important First Amendment issues. This conduct also begs the question as to whether other waiting, equally deserving patients should be given equal time, as it were, in order not to be disenfranchised and excluded from the donor pool.²²

Then there is the issue of affordability—will those who can afford the costs of advertising and who are media savvy gain an unfair advantage?²³ This may well be the case and result in organs going preferentially to the wealthy—again a violation of the public mandate and trust implicit in altruistic organ donation.²⁴

16. See, e.g., Thomas E. Starzl, *Will Live Organ Donations No Longer Be Justified?*, 15 HASTINGS CTR. REPS. 5 (1985).

17. Jay A. Fishman & Clive Patience, *Xenotransplantation: Infectious Risk Revisited*, 4 AM. J. TRANSPLANTATION 1383, 1383–88 (2004); see also L.E. Chapman, *Xenotransplantation: Public Health Risks—Patient vs. Society in an Emerging Field*, 278 CURRENT TOPICS IN MICROBIOLOGY & IMMUNOLOGY 23 (2003).

18. Stephen S. Hall, *The Recycled Generation*, N.Y. TIMES, Jan. 30, 2000, (Magazine), at 30; Andrew Pollack, *The Promise in Selling Stem Cells*, N.Y. TIMES, Aug. 26, 2001, at BU1.

19. See, e.g., Matching Donors, www.matchingdonors.com (last visited Mar. 9, 2006).

20. See generally Robert Steinbrook, *Public Solicitation of Organ Donors*, 353 NEW ENG. J. MED. 441 (2005).

21. See *id.* at 441.

22. See generally Robert D. Truog, *The Ethics of Organ Donation by Living Donors*, 353 NEW ENG. J. MED. 444 (2005).

23. *Id.* at 445.

24. *Id.*

The concept of “directed donation” also has the potential for illegal and unethical conduct by middlemen (brokers) and organ procurement personnel at the behest of competitive organ transplant centers.²⁵ These latter individuals, who interview and secure consent from vulnerable next of kin at the time of donation, are in a unique position to influence the decision to donate and potentially to direct the donation to a specific hospital, transplant program, or media-savvy patient.

This new reality and threat to the equitable distribution of organs from both living donors and brain dead cadavers has been addressed as a matter of urgency by the United Network for Organ Sharing (UNOS)—the private entity that, under a federal contract, administers organ procurement and transplantation in the United States.²⁶ In November 2004, UNOS issued a news release and a position statement with regard to the public solicitation for directed donation from deceased donors only.²⁷ In essence, the statement contains language that opposes the public solicitation for organs but leaves the onus on the UNOS “member institution” to discourage this kind of activity—specifically the transplant hospitals and organ procurement organizations in this country.²⁸ The news release also announced the formation of a subcommittee to consider the matter further—particularly the solicitation of living organ donors.²⁹

In these future deliberations, UNOS might consider that directed donations be allowed only for a number of unique circumstances. These include carefully monitored, paired organ exchanges already in place in some parts of the country, or situations where the potential recipient is a family member of the donor. Altruistic organ donations by strangers should be restricted solely to the pool of waiting patients so as not to disadvantage those who have priority on medical grounds. If directed donation is not restricted to these latter circumstances, further chaos could result if, for instance, donations are dictated by the religion or ethnicity of the potential recipient.

Finally, because Medicare and private health insurers foot the bill for the procurement and eventual transplantation of the donated or-

25. Steve P. Calandrillo, *Cash for Kidneys?: Utilizing Incentives to End America's Organ Shortage*, 13 *GEO. MASON L. REV.* 69, 89 (2004).

26. United Network for Organ Sharing, <http://www.unos.org> (last visited Mar. 8, 2006).

27. Press Release, United Network for Organ Sharing, OPTN/UNOS Board Opposes Solicitation for Deceased Organ Donation (Nov. 19, 2004), *available at* <http://www.unos.org/news/newsDetail.asp?id=374>. The Organ Procurement and Transplantation Network agrees with this position.

28. *Id.*

29. *Id.*

gans,³⁰ the public, health insurance policyholders, and 90,000 waiting patients have a vital interest in the fair and equitable distribution of donated vital organs—regardless of whether the donor is living or deceased.³¹

Thus, in the short term, cadaver donors must provide the organs. A recent study published in *The New England Journal of Medicine* suggested that the potential pool of brain dead cadaver donors in the United States varies from 10,500 to 13,800 per year—more than enough to meet the demand for liver, lung, and heart transplants and to make a sizeable impact on the kidney transplant waiting list.³²

New strategies are urgently needed to ensure that all potential cadaver donors become actual organ donors. The public must be continuously educated through campaigns similar to those that have been used to promote the wearing of seatbelts in cars and the use of condoms to prevent HIV and AIDS. Similarly, professionals who have unique opportunities to encourage organ donation—estate planners, nurses, emergency and intensive care physicians—must be recruited into the effort. In Spain, large, acute care hospitals have made donor advisers available on site—a strategy that has markedly increased the number of cadaver donors.³³

In the long run, renewed efforts must be made to find acceptable solutions to the dearth of donated human organs. So doing, desperate patients will be given an equal opportunity to receive the gift of life and benefit from the modern miracle of organ transplantation.

30. 42 C.F.R. § 482 (2004).

31. See James F. Childress, *Ethical Criteria for Procuring and Distributing Organs for Transplantation*, 14 J. HEALTH POL. POL'Y & L. 87 (1989).

32. See generally Ellen Sheehy et al., *Estimating the Number of Potential Organ Donors in the United States*, 349 NEW ENG. J. MED. 667 (2003).

33. See generally George J. Chang et al., *Expanding the Donor Pool: Can the Spanish Model Work in the United States?*, 3 AM. J. TRANSPLANTATION 1259, 1259–60 (2003); see also Rafael Matesanz, *Factors Influencing the Adaption of the Spanish Model of Organ Donation*, 16 TRANSPLANT INT'L 736 (2003).