

Revisiting “Presumed Consent”

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Awareness about the existence and public health considerations of the black market for human organs has resurfaced due to the recent arrests of 44 people in the State of New Jersey. The arrests came as a result of a federal investigation into a scheme devised by prominent members of the community, including state legislators, government officials and some rabbis, to launder money received from the trafficking of human organs, specifically, kidneys.¹

The New Jersey arrests have forced us to confront the desperation felt by those citizens in need of a transplant, the lengths to which they would go to preserve their lives, and, more importantly, the fact that the available resources and legal alternatives have failed to meet their demands. Furthermore, they have made us face the truth that, despite great efforts, the United States is vulnerable to such a market. Perhaps it is time to rethink presumed consent.

The Black Market

The existence of a black market for kidneys, as well as other human organs, has been known for years. The reasons for this illegal trade can be explained by the laws of supply and demand, the increase in individuals’ life spans, and with respect to kidneys, better diagnosis of kidney failure and the increased surgical success for high-risk patients.² The shortage of human organs for transplantation is alarming as evidenced by the following statistics:

- More than 103,000 persons in the United States are currently waiting for organ transplants and a new name is added to the national waiting list every 12 minutes.³
- In 2008, 6,627 transplant candidates in the U.S. died while awaiting transplantation. Eighteen people die every day waiting for a transplant. As of August 21, 2009, the national waiting list included 1,765 children younger than 18 years old.⁴

¹ *Illegal Organ Trafficking, A Universal Problem*, HUFFINGTON POST, July 24, 2009. http://www.huffingtonpost.com/2009/07/24/illegal-organ-trafficking_1_n_244688.html.

² Jeneen Interlandi, *Not Just Urban Legend*, NEWSWEEK, Jan. 10, 2009, <http://www.newsweek.com/id/178873>.

³ Tennessee Donor Servs., *Stats and Facts: Facts about Organ and Tissue Donation*, available at <http://donatelifetn.org/cms/Stats+and+Facts/49.html> (last updated Aug. 26, 2009).

⁴ *Id.*

- “Each year in the United States, approximately 11,000 people die under conditions that make them medically suitable potential organ donors. In 2008, only 7,990 of those who died in the United States became organ donors.”⁵

Clearly, organ supply from cadaveric and living donations has not satisfied current demand in the United States. To make matters worse, the World Health Organization (WHO) believes the black market for human organs is increasing, with brokers charging between \$100,000 to \$200,000 to organize transplants for those who can afford it. Most of the donors involved in the market are “frequently impoverished and ill-educated” and may receive only \$1,000 for a kidney that will be sold for \$5,000.⁶

The illegal trade has required governments to take action. China, for example, has been severely criticized for its alleged participation in the black market and the harvesting and later use of organs of executed prisoners for transplantation.⁷ The Chinese government, perhaps in response to such critics, has launched a new organ donation system, in the hopes that easing donation amongst the population will dissuade the spread of the black market.⁸ Only time will tell if this initiative will be successful. In the United States, efforts by the federal and state legislatures to breach the gap of supply and demand for human organs have fallen short.

Organ Donation in the United States and Texas

Human organ donation and transplantation in the United States is governed by the National Organ Transplant Act (NOTA) of 1984.⁹ NOTA prohibits the acquisition, receipt, or other transfer of human organs for valuable consideration for use in human transplantation if “the transfer affects interstate commerce.”¹⁰ Violators under the statute are subject to penalties which vary from a fine of \$50,000 to imprisonment for not more than 5 years, or both.¹¹

In January 2008, NOTA was amended by the Charlie W. Norwood Living Organ Donation Act.¹² The amendments except from the law the “paired donation” of human kidneys, as defined in section 274(e)(c)(4), whereby two donor and recipient pairs who can not donate to each other due to blood type or HLA mismatch are matched with each

⁵ *Id.*

⁶ Clare Nullis-Kapp, *Organ Trafficking and Transplantation Pose New Challenges*, 82:9 BLT OF THE WHO 639 (Sept. 2004), available at <http://www.who.int/bulletin/volumes/82/9/feature0904/en/index1.html>.

⁷ American Univ., Case Study: 632, *Illegal Human Organ Trade from Executed Prisoners in China*, (Jan. 2001), available at <http://www1.american.edu/TED/prisonorgans.htm>.

⁸ *China Hopes Organ Donor System Stops Trafficking*, CNN.COM, Aug. 26, 2009, available at <http://www.cnn.com/2009/WORLD/asiapcf/08/26/china.organ.donation/>.

⁹ Pub. L. No. 98-507, 42 U.S.C. § 273 *et. seq.* (2009); Approved October 19, 1984 and amended in 1988 and 1990, provided for the establishment of the Task Force on Organ Transplantation; authorized the Secretary of HHS to make grants for the planning, establishment, and initial operation of qualified OPOs; and established the formation of the Organ Procurement and Transplantation Network (OPTN) and Scientific Registry of Transplant Recipients (SRTR).

¹⁰ 42 U.S.C. § 274(e)(a) (2009).

¹¹ 42 U.S.C. § 274(e)(b) (2009).

¹² Pub. L. No. 110-144, H.R. 710, 110th Cong. (2008).

other.¹³ Through this amendment, Congress allowed persons willing to make a living organ donation to another to bypass any incompatibility hurdle by permitting them to enter into agreements with other persons intending to do the same. The amendment had the effect of decriminalizing such agreements by removing concerns regarding the applicability of the term “valuable consideration” to what constituted an exchange of human organs.

Some states have followed the federal government’s efforts to promote the donation of human organs for transplantation. The State of Texas is an example of active involvement in this altruist venture. In 1989, the 71st Legislature passed the Texas Anatomical Gift Act¹⁴ – an endeavor to design and promote organ donation through an “opt-in” program which has allowed many people to express their willingness to become donors. The 76th Legislature approved Senate Bill 673, which established the Anatomical Gift Education Program,¹⁵ designed to educate Texas residents about anatomical gifts. Additionally, lawmakers passed Senate Bill 862 which required the Texas Department of Health to establish a “public multidisciplinary task force on organ allocation.”¹⁶ These events were not in vain. By December 2000, the Senate Bill 862 Task Force had submitted its report and recommendations to the Governor and the 77th Legislature. The report included several recommendations for legislative action, including the creation of a “presumed consent” law.¹⁷

The Task Force report prompted the 77th and 78th Legislatures to actively engage in proposed legislation relating to organ donation. The 78th Legislature’s efforts were remarkable. Eight bills relating to kidney transplantation were filed and four of those approved.¹⁸ One of those bills that did not pass, House Bill 2111,¹⁹ would have established the system known as “presumed consent.”²⁰

Why change our system to “Presumed Consent”?

¹³ 42 U.S.C. § 274(e)(c)(4) (2009).

¹⁴ TEX. HEALTH & SAFETY CODE ANN., ch. 692 (Vernon 2009).

¹⁵ S.B. 673, 76th Reg. Sess. (Tex. 1999).

¹⁶ S.B. 862, 76th Reg. Sess. (Tex. 1999).

¹⁷ Carey Eskridge for Rep. Glenda Dawson, Texas Legislative Council, Research Division, *Facts at a Glance, Kidney Transplantation in Texas* (May 2004), available at <http://www.tlc.state.tx.us/pubspol/kidneytransp.pdf>.

¹⁸ *Id.* The following bills became law: House Bill 89 (paid leave for state employees who serve as organ donors), Senate Bill 160 (related to, amongst others, education to health care providers and attorneys regarding anatomical gifts), Senate Bill 1225 (removal of organ or tissue from deceased under circumstances requiring inquest) and Senate Bill 1226 (related to formation of kidney-sharing pool).

¹⁹ H.B. 2111, 78th Reg. Sess. (Tex. 2003). The legislation would have, in part, amended the Texas Anatomical Gift Act to create a presumption that, upon the death of a state resident, over the age of 18, his or her body (as well as parts thereto) would belong to certain state agencies.

²⁰ *Id.*

“Presumed consent” is a principle pursuant to which a deceased person is classified as a potential donor unless such person has expressed opposition to donation prior to death.²¹ This system is used in most of continental Europe, and contrasts with ours, in which a person must manifest the intent to donate organs before passing.²²

Studies have shown that countries with presumed consent legislation have higher rates of organ donation. Yet, some argue that a presumed consent system, which would increase the supply of cadaveric organs for transplantation, could reduce the supply from living donors or that unless the system is properly enforced, consent of family members will control.²³ But, why should these issues be of concern? The current system does not guarantee availability of organs from living donors, and, sometimes even after a person has manifested its intent to become a donor, family members are given the opportunity to consent to the donation. Enforceability may be a problem under any system. The only guarantee we have is that not every death results from defective organs. Therefore, presumed consent legislation should, in theory, dramatically address the demand of the organ supply.

In turn, an increase in organ supply under a presumed consent system could lessen or lay to rest some of the controversies surrounding the different alternatives being used or proposed for the proper allocation of certain human organs in a market constrained by a lack of supply. Debates regarding whether to follow the system based on how long a person has been on a waiting list, Zenios’ various approaches regarding the maximization of scarce resources,²⁴ or the “Life Years From Transplant” (LYFT) approach which intends to maximize the life of transplanted kidneys by making them available to the most medically appropriate recipients,²⁵ all tend to exacerbate the anguish for those in need and opens the door to allegations of discrimination.²⁶

The Texas Legislature, from a procedural standpoint, should not have difficulty in designing an “opt-out” system that would provide for the protection of the integrity and dignity of the human body and which would allow citizens the right to request to opt-out at any given time (just as they may revoke their intent to donate under the current statute). In fact, providing citizens with this opportunity to opt-out at any time prior to their deaths will serve to accommodate certain constitutional concerns regarding an

²¹ Alberto Abadie and Sebastien Gay, *The Impact of Presumed Consent Legislation on Cadaveric Organ Donation: A Cross-Country Study*, 25:4 J. OF HEALTH ECON. 599-620 (July 2006), available at <http://www.nber.org/papers/w10604>.

²² *Id.*

²³ *Id.*

²⁴ Science Daily, *How to Cut Kidney Transplantation Waiting List Death Rates by One-Third, Dramatically Reduce Instances of Discarded Organs*, Jan. 4, 2007, available at <http://www.sciencedaily.com/releases/2007/01/070103201355.htm>.

²⁵ Thomas D. Mone, *Viewpoint: The Advantages of a LFYT Kidney Allocation System*, RENAL BUS. TODAY, Aug. 12, 2009, <http://www.renalbusiness.com/articles/advantages-lfyt-system.html>.

²⁶ Serena Gordon, *Almost Half of Those Over 60 Die While Waiting for a Kidney Transplant*, U.S. NEWS & WORLD RPT., June 18, 2009, <http://health.usnews.com/articles/health/healthday/2009/06/18/almost-half-of-those-over-60-die-while-waiting.html>.

individuals' substantive due process right to personal freedom,²⁷ including those of a religious nature.

It would be unreasonable to argue that the State of Texas, in approving legislation in favor of a presumed consent system for organ donations, would not be pursuing a legitimate state interest that could surpass constitutional challenges. By securing an increase in the supply of cadaveric organs available for transplantation, the Legislature would be protecting the lives of many citizens in need of organs by shortening their waiting time and reducing their medical expenditures. This in turn would deter expansion of the black market and alleviate the burdens faced and the costs incurred by many hospitals in screening donors to try to detect if a donor is receiving valuable consideration for an organ. All of these could be accomplished while respecting the wishes of those voluntarily opting not to participate. Texas and other states should make these changes now, before the black market becomes even larger.

Health Law Perspectives (October 2009)

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²⁷ Elaine A. Lisko, and Sarah Brandoff, *Should Donative Intent Be Presumed To Increase The Number of Organs Available For Transplantation?*, HEALTH L. PERSPECTIVES., June 9, 1998, available at <http://www.law.uh.edu/healthlaw/perspectives/Bioethics/980609Organ.html>.