Protecting Autonomy in Organ Procurement Procedures: Some Overlooked Issues

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VERSIONS OF THE 1968 MODEL UNIFORM Anatomical Gift Act[1] (UAGA) are now law in all 50 states and the District of Columbia. Most state UAGAs follow the Model Act in giving paramount authority to individuals to decide whether their medically acceptable bodies or parts shall be made available after death for research, education, therapy, or transplantation. These statutes declare that if an individual has validly signed a donation instrument, or given prior notice of objection to serving as a posthumous donor, the person's positive or negative declarations concerning personal donation cannot be vetoed by his or her family.

Despite the first authority given by the UAGA to individuals to control the use of their own bodies or parts after death for various medical purposes, organ retrieval in the United States is carried out in a manner that fails to give due recognition and protection to this paramount right of individuals. This is illustrated in two ways. First, procurement staff routinely ask families of brain-dead potential donors for permission to remove organs from these individuals, whether they have signed donor cards or not. In most cases, families of registered

[1] Model Uniform Anatomical Gift Act, *Uniform Laws Annotated,* master ed., vol. 8A., 1983. St. Paul: West.

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donors (i.e., those who have signed donation documents) are not even informed of the legal rights of these donors and the corresponding rights of donees that are controlling in the situation. Second, while the UAGA declares that organs shall not be taken from the bodies of those who before death have given "actual notice of contrary indication" concerning donation, current procurement policy provides no effective means for objectors to register dissent so as adequately to protect themselves against unwanted removal of their body parts after death.

In the first section of this article, I show that pre-UAGA American case law has been indecisive on the question of whose wishes take precedence when there is a conflict between the premortem declarations of a decedent concerning the posthumous disposition of his or her body and the wishes of that individual's family. In the following section, I demonstrate that the UAGA settles this issue with respect to organ donation by giving paramount authority to individuals to control postmortem organ removal and transfer from their own bodies. I argue that this legal right of individuals plausibly rests on the deeper theoretical claim that a person's body is his or her property in a significant sense. This warrants the further assertion that the person has first right to control its disposition before and after death. This places a weighty burden on procurement personnel to justify continuing current retrieval policy that regularly ignores this right under the UAGA.

I then examine a number of plausible explanations and justifications of current rights-ignoring retrieval policy and attempt to isolate the strongest set of considerations that could support it. I conclude that these considerations are not weighty enough to justify continuing present policy that blindly disregards the rights of declared donors and donees.

In the final section of the article, I offer two policy proposals. One is designed to effect a more appropriate balance between three principal competing values at stake when a decreased potential donor has authorized posthumous donation: (1) the rights of the donor and donee generated by this formal authorization, (2) the needs of the declared donor's grieving family to pay proper respect to the body of their loved one, and (3) the general interest of society and the medical profession in maximizing the number of lives saved through organ transfer. The other proposal is aimed at providing better protection than is available

under current procurement policy to those who do not wish to serve as posthumous donors.

Family versus Decedent's Wishes Concerning the Disposition of the Body in Anglo-American Common Law

A principal aim of the 1968 Model Uniform Anatomical Gift Act (UAGA) was to increase the availability of cadaveric organs and tissues for transfer to end-stage organ disease (ESOD) victims facing imminent death absent these replacement body parts. In developing this model legislation, drafters were faced with the task of balancing this interest in saving lives against a variety of competing interests, including respecting the wishes of individuals concerning the postmortem disposition of their own bodies, the state interest in conducting autopsies in cases of suspect deaths (coroner's inquiries), the interests of families in possessing the bodies of dead relatives for the purpose of burial, etc. The particular balance among these interests achieved by the UAGA may be fairly said to represent a consensus concerning the relative weight of these interests that had emerged in American case law by 1968. Some of this pre-UAGA legal history needs to be understood to appreciate fully the seriousness and complexity of the issue that is the principal focus of this inquiry, namely, current procurement policy's routine failure to acknowledge the paramount authority vested in individuals by the UAGA to control the disposition of their own bodies and body parts after death. I have rehearsed elsewhere (Peters 1985) details of the history of the treatment of cadavers in English and American law. I will simply summarize here some of the main principles and interpretive trends that have emerged since the seventeenth century in adjudicating conflicts between a decedent's premortem declarations concerning the disposition of his or her corpse and claims of the decedent's family.

Rules Governing the Treatment of Cadavers in English Common Law

The eminent jurists Coke (1552–1634) and Blackstone (1723–1780) are usually credited with establishing in English common law the

rule that dead bodies are not a type of commercial property.[2,3] That is, a cadaver is not the kind of thing with respect to which anyone could have property rights—rights which permit the "owner" to dispose of a body, abandon it, maintain exclusive possession of it, etc. The genesis of this rule appears to be partly explained by the fact that in seventeenth-century England matters pertaining to burial and sepulture were under the jurisdiction of ecclesiastical courts established during the reign of William the Conqueror (1028–1087). These courts comprised a separate judicial system from the temporal courts which held exclusive power of review over property disputes. Coke's reasoning seems to have been that since the treatment of corpses was not by convention within the cognizance of civil courts, corpses could not be commercial property.

In an early English grave-robbing case, the court ruled that theft of or tampering with a corpse is not a crime. On the other hand, the court declared that stealing or disturbing burial accouterments like tombstones or grave-clothes is a crime. These items are bonafide property. They belong to those who laid the decedent to rest.[4] In a later case, a "Resurrectionist" who disinterred and removed a body for the purposes of dissection was convicted on the charge of offending public decency rather than for property theft.[5] While the court makes no reference to the "no property" rule concerning dead bodies, a later court inferred from the absence of a larcency charge in the case that the original court tacitly accepted this rule.[6]

A further implication of the rule that corpses are not property in a commercial sense was enunciated by a nineteenth-century English court which ruled that a person has no legal right to direct by will the disposition of his or her body after death. The court declared that the executor of a person's estate was legally empowered to possess the decedent's body for the purpose of burial.[7]

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[2] 3 Coke *Institutes* 203.
[3] 4 Blackstone *Commentaries* 236; 2 *Commentaries* 429.
[4] *Rex v. Haynes*, 12 Coke Reprints 113, 77 E.R. 1389 (1614).
[5] *Rex v. Lynn*, 2 TR 733, 100 E.R. 394 (1788).
[6] *Rex v. Price* 12 Q.B.D. 247, 254–55.
[7] *Williams v. Williams*, XX Chancery 659 (1882).

Rules Governing the Treatment of Cadavers in American Common Law

No ecclesiastical court system like that in England was ever established in this country. Matters pertaining to the disposition of the dead always came under the jurisdiction of American civil courts. These courts took over, with some modifications, the basic tradition of English common law.

One prominent and far-reaching American modification of British legal tradition occurred in a landmark mid-nineteenth-century case where the court expressly rejected the English principle that the executor of a decedent's will has primary authority to possess the body for interment. The court ruled that this authority is vested in the decedent's *family*.[8]

American common law reflects its English heritage insofar as the right of family members to possess a relative's corpse for burial is not considered to be a property right in a commercial sense.[9] Rather, the right is described as a "quasi-property" interest in the body,[10,11] a right conferred on the family pursuant to the exercise of its *duty* to provide the deceased with a decent burial.[10,12] This family duty is, in turn, generated by the *decedent's right* to a decent burial.[11] Courts have frequently spoken of the family's right to possess the body of a dead relative as grounded on natural affection and moral obligations, on the "sensibilities of the living."[11]

One of the most vexatious problems in American law pertaining to the treatment of cadavers has been the problem of deciding whose interests take precedence when there is a conflict between the premortem directives of a decedent concerning the posthumous disposition of his or her body (e.g., concerning the manner or place of burial) and the wishes of the surviving family. Courts have regularly and vigorously asserted that first authority concerning the disposition of a dead body rests with the person whose body it is. The antemortem wishes of an individual concerning the treatment of his or her corpse should

[8] *In re Widening of Beekman Street*, 4 Bradford 503 (N.Y. 1857).
[9] *Larson v. Chase*, 47 Minn. 307, 50 N.W. 238 (1891).
[10] *Koerber v. Patek*, 123 Wis. 453, 102 N.W. 40 (1905).
[11] *Pierce v. Swan Point Cemetery*, 10 R.I. 227 (1872).

be respected if at all possible.[9,12] However, in many cases in which a decedent's declarations concerning the posthumous disposition of his or her body have been challenged by surviving kin, courts have found some reason, however feeble, to side with the family's petition.[13] The testamentary directives of decedents concerning the manner or place of their burial have been upheld against family objections in cases where state statute expressly grants individuals the right to control by will the posthumous disposition of their bodies.[14] The safest generalization that can be made concerning the authority granted by American common law to the stated premortem wishes of individuals concerning the disposition of their bodies after death is this: Case law rhetorically affirms the paramount authority of individuals to control the treatment of their dead bodies (within the standards of public decency), but in absence of statutory authority, individuals cannot be confident that their expressed desires concerning the treatment of their corpses will prevail over the contrary views of relatives if the controversy is brought before a court of equity.

The provisions of the Model UAGA are founded on the frequently enunciated but also frequently excepted principle in American case law that a person has paramount authority concerning the disposition of his or her body after death. This author is unaware of any case that has been litigated since the adoption by states of the UAGA in which a decedent's positive or negative declarations concerning posthumous donation have been opposed by the decedent's family.

In the next section I will show that the text of the UAGA is unequivocal in giving individuals paramount authority to decide whether their organs shall be available for specified medical uses after death. The Act gives families no legal power to veto deceased relatives' decisions concerning this matter. Given the explicit provisions of the UAGA and the textual clarifications provided by drafters in the com-

[12] *Pettigrew v. Pettigrew*, 207 Pa. 313 (1904); *Wood v. Butterworth & Sons*, 65 Wash. 344, 18 P. 212 (1911); *Estate of Henderson* 13 Cal. App. 2d 449 (1936); *In re Johnson's Estate*, 169 Misc. 215, 7 N.Y.S. 2d 81 (1938).

[13] *Enos v. Snyder*, 131 Cal. 68, 63 P. 170 (1900); *Fidelity Union Trust Company v. Heller*, 16 N.J. Sup. 285, 84 A.2d 485 (1951); *In re Estate of Angela C. Kaufman*, 158 N.Y.S. 2d 376 (surr.); *Holland v. Metalious* 105 N.H. 290, 198 A.2d 654 (1964).

[14] *In re Eichner's Estate* 173 Misc. 644, 18 N.Y.S. 2d 573 (1940).

mentary portion of the Model Act, it is hard to imagine how a family's veto of a dead relative's written declarations concerning posthumous donation (whether positive or negative) could be granted legal validity without patent interpretive legerdemain. Nevertheless, the history of American case law on the disposition of cadavers hardly gives reason for optimism concerning the ultimate triumph of decedent's wishes over family objections under judicial review.

Provisions of the UAGA Concerning the Use of Bodies and Body Parts and Current Procurement Policy

Statutory Priority of Decedent's Antemortem Declarations over Family Wishes

The anatomical gift acts adopted by all 50 states and the District of Columbia by and large duplicate in wording and substance the provisions of the Model Uniform Anatomical Gift Act drafted in 1968 by representatives of the American Bar Association and the Commissioners on Uniform State Laws. The following interpretation of sections of the Model Act pertaining to the paramount authority of a decedent's premortem declarations concerning the use of his or her body or body parts after death applies then to most current state versions of the model legislation. I intend to show that the current practice in most United States hospitals of *asking permission* of next of kin to remove organs from a brain-dead individual when that individual has properly signed a donation document is contrary to both the spirit and the letter of the Model Act and all state versions of it that retain in unqualified form the specific provisions of the Model Act discussed below.

Section 2 of the Act identifies those persons who may execute an anatomical gift. Listed first (Section 2(a)) is "any individual of sound mind and 18 years of age." Such an individual "may give all or any part of his body for any purpose specified in Section 3, the gift to take effect upon death." Listed second, (Section 2(b)), and in descending order of priority, are various classes of individuals related to the decedent by legal and blood ties. Section 2(e) declares: "The rights of the donee created by the gift are paramount to the rights of others except as provided in Section 7(d)."

This provision states that once valid consent to provide a body or body parts is given by a donor, this consent confers on the donee, that is, the institution or individual authorized to receive the gift, the right to possess the gift for those uses specified by the donor. This right of the donee is "paramount to the rights of others" and is preempted only by the rights of coroners, medical examiners, and physicians to conduct autopsies under conditions described in the state's death laws, the substance of Section 7(d) of the Model Act. Of particular importance here is the commentary on Section 2(e) supplied by the drafters of the original act: "Subsection (e) recognizes and gives legal effect to the right of the individual to dispose of his own body without subsequent veto by others." There can hardly be a stronger assertion of the first priority granted to a person's own premortem declarations concerning the disposition of his or her body after death.

Section 3 specifies, among other things, persons who may become donees, i.e., accepted recipients of anatomical gifts. Subsection (c) of Section 4—"Manner of Executing Anatomical Gifts"—speaks to the usual circumstance of organ donation:

> The gift may be made to a specified donee or without specifying a donee. If the latter, the gift may be accepted by the attending physician as donee upon or following death. If the gift is made to a specified donee who is not available at the time and place of death, the attending physician, upon or following death, in the absence of any expressed indication that the donor desired otherwise, may accept the gift as donee. The physician who becomes a donee under this subsection shall not participate in the procedures for removing or transplanting a part.

In other words, if an individual has validly signed a donation document, and has not specified a particular organization or individual to be the recipient of his or her body or parts, the attending physician (a category expressly excluding any physician removing or implanting a body part from the deceased) is legally empowered to function as donee. The rights of a donee include the right to *accept* or *decline* the gift (see Section 2(c)). Taken together, these provisions yield the following conclusions.

First, once an individual has validly signed a donation document, that positive declaration of donative intent *cannot be overruled by the*

person's family. Official consent to donation by the individual confers on the donee (whoever that might be) the right to take the person's body or parts for the purposes indicated by the donor. This right of the donee is preempted only by the rights of coroners, pathologists, and physicians to conduct an autopsy under certain statutorily defined conditions.

Second, the donee's right of access to the body or parts of a decedent who has, prior to death, authorized the bequest, may be *waived by the donee*. If, for example, the tissues or organs of the decedent are not medically acceptable for transplant because of infection, injury, malignancy, etc., the donee is prohibited from accepting them (see, e.g., Section 2(d)). If the donee is aware that the family of a consenting donor disapproves of organ or tissue removal from their brain-dead loved one, presumably the donee is permitted to waive his or her right of access to the authorized donor's body or parts in deference to the opposed wishes of the family. (Whether the donee has a moral obligation to defend and uphold the legal-moral rights of a registered donor against a dissenting family is another matter.) But it is important to understand what actually takes place in such a circumstance. The appropriate description of what happens is that the donee waives legal right of access to the authorized donor's body or parts for those purposes specified by the donor. The family is not nullifying the donation by exercising some supposed right it has to override the premortem declarations of the deceased. The family has no such right under the provisions of most state UAGAs.

Current Procurement Policy's Failure to Acknowledge the Paramount Legal Rights of Declared Donors

Despite the paramount authority given by the UAGA to an individual's decision to be a posthumous donor (which confers on the donee a corresponding right of access to the individual's organs after death), current procurement procedure routinely overlooks the interlinked rights of declared donors and donees. Procurement personnel approach surviving families of declared donors in the same way they approach families of potential donors who have not signed donor cards; they ask families for permission to excise organs from their deceased loved ones. Relatives of declared donors are seldom even *informed* about the

legal rights of these kin (and of the donees) that are applicable in the situation. Families are given the impression that they have final legal authority to control the removal and transfer of body parts from dead relatives, even when the latter have expressly authorized this in writing before death. By not apprising families of registered donors of these rights, and by regularly asking such families for permission to remove organs from such individuals, hospital staff lead these families to believe that signed donor cards function simply as nonbinding expressions of what their loved ones "would have wanted," i.e., as mere "advisorial" documents, which families should consider as they decide whether to grant the request for organ removal from their deceased relatives. Under present policy, then, the interlinked rights of declared donors and donees are ignored completely.

How serious is this problem? Of those interviewed in a recent survey, only 14 percent carried signed donor cards. Six percent of the respondents had never heard about organ transplanation, and of the 94 percent who had, only 19 percent carried completed donor cards (Manninen and Evans 1985). One might conclude from this data that the problem of recognizing and protecting the rights of registered donors is not an issue of particular importance.

Three replies can be made to this assessment. First, the number of declared donors may increase in the future, even if they never comprise a majority of the population. "Blitz" recruitment campaigns such as were conducted in April 1985 by the American Council on Transplantation and the National Kidney Foundation during Organ Donor Awareness Week met with some success in enlisting additional registered donors, though the overall yield was probably small (*Medical World News* 1985). Other recruitment efforts have had impressive results, however. Sixty percent of the licensed drivers in Colorado are designated donors according to a recent report (Overcast et al. 1984). In Washington, D.C., the number of people signing donor cards in conjunction with driver's license application or renewal has risen from 25 a month in 1982 to 600 a month in 1985 (Levine 1985).

A second and more telling reply to the claim that the rights-protection issue we are considering is insignificant is this: The gravity of rights violations is not appropriately measured by reference to the incidence of occurrence of these violations. In the next section, I argue that the legal rights of declared donors and objectors under the UAGA plausibly rests on the premise that a person's body is his or her property

in a significant sense. This premise licenses the further claim that a person is properly vested with paramount authority to control the disposition of his or her body or parts before and after death. If this argument holds, then procurement personnel bear a burden to show why current retrieval policy, which routinely ignores these rights, should continue. The fact that this disregard of rights occurs in only a few cases is irrelevant to assessing its significance. The practice still demands moral-legal justification in those cases where it occurs, small in number as they may be.

Third, the rights-recognition and protection issue we are focusing upon is likely to become more confused as more states enact what is called "required request" legislation (Caplan 1984; *American Medical News* 1985b). These laws mandate that all hospitals ask families of brain-dead potential donors about the possibility of organ removal from these individuals before disconnecting them from respirators and issuing death certificates. People are likely to assume that if families of *all* potential donors must be asked about donation from these ex-patients—irrespective of whether the latter have signed donor cards—then families must have final legal authority concerning the disposition of organs from these individuals. With the exception of Florida and New York, whose UAGAs permit families to override positive declarations of donative intent by dead relatives,[15] no state grants families of declared donors this authority. Required-request legislation will lend increased authority to the view that surviving families *do* have this legal power, and the rights-recognition issue here under examination will become increasingly difficult even to clarify. The issue should be addressed before it becomes too obscure to appreciate.

Declared Donors' Rights under the UAGA: "Deeper" Considerations

If the paramount legal rights of registered donors under the UAGA are to be provided with a deeper theoretical justification, such a justification cannot rest simply on the principle that the decision of a declared donor ought to be respected because it is an autonomous

[15] *Florida Statutes Annotated,* Sec. 732.911(3); New York. *McKinney's Public Health Law,* Sec. 4301.

decision. My autonomous decision to give 10 percent of my neighbor's salary to charity carries no weight because his income is not mine to give. Something else must be added to an autonomous decision to donate anything before such a decision can command first authority: a legitimate "property" interest in the donated thing on the part of the decision maker. If someone can make a posthumous "gift" of his or her body or parts, these items are by implication personal property in some sense.

The body-as-personal-property claim is not without its problems, however. The following considerations seem to count against it:

1. If someone injures my body, ordinarily I do not say that the person has damaged a piece of my "property."
2. The strongest form of property interest is "ownership" which embraces a distinct set of rights. These rights include the right to possess the thing, the right to manage the thing, the right to receive income from it, the right to transfer the thing, the right to exclude others, etc. (Honore 1961). But it is odd to speak about a person having this type of rights in his or her body or parts. Therefore, a person's body or parts cannot be coherently regarded as property.

These objections can be countered as follows:

Consider the first claim. Suppose my hand is severed in a machinery accident and is stolen before it is regrafted. Do I not have a possessory interest in this detached member justifying a claim of theft of personal property? To be sure, once the hand is reattached it would then be odd to speak of injury to it as property damage rather than assault. But as a detached part of my body it certainly seems natural and appropriate to speak of it as my "property."

In a 1974 British case,[16] the defendant, who gave a urine sample to police in compliance with the provisions of the Road Traffic Act, was convicted on the charge of theft of the urine from the police because he poured the sample into a sink, prohibiting analysis. A recent commentator argues:

[16] *Rex v. Welsh*, R.T.R. 478 (1974).

> [I]f a urine or blood sample can be stolen from the police when they have statutory possession, presumably it can be stolen from the provider of it himself (or anyone to whom he has transferred it) where no statute interferes. The person producing the substance has the *first right to it*, subject to statute (Matthews 1983 [emphasis added]).

Other variations on this example are conceivable. Suppose I have one of my kidneys removed for transfer to a blood relative, or to another histocompatible end-stage renal disease victim, and the kidney is stolen or damaged before implantation in the designated recipient. Isn't it coherent to speak of the excised organ as somebody's property (mine, or that of the hospital, transplant surgeon, or recipient to whom I have transferred it) such that one of these parties, as owner or trustee, can reasonably institute property theft or damage proceedings against the responsible party? Indeed, wouldn't a legal system be inadequate if it failed to permit such claims?

With respect to objection 2, it's far from clear that *all* the rights that ownership embraces become ungrammatical and hence nonsense when applied to the relationship of a person to his or her body or body parts. In many jurisdictions, individuals can legally sell certain body substances like plasma, semen, or hair, and also receive compensation for body services like surrogate mothering ("rent a womb"). The commercial sale of these substances/services implies an "income" interest in these items—one of the standard "incidents" of ownership. Most people, upon reflection, would probably consider a legal system inadequate if it prohibited the sale of these substances/services. (This contention has interesting implications for the question of the propriety of a commercial market in human organs and tissues [Peters 1984].) The legal doctrine of informed consent certainly suggests, and may be even said to imply that a person's body is personal property from which he or she can "exclude others,"—yet another incident of ownership. These cases, combined with the earlier theft-of-body-substances examples, indicate that while *all* the incidents of ownership may not intelligibly apply to the relationship of a person to his or her body (what would the right to "manage" one's body consist in?), enough do apply to warrant the claim that a person's body or parts is (are) that person's property in an important sense. At the very least they support the claim that a person has a property right (interest) in his or her body

or parts even if that right is a lesser right than that of full-fledged ownership. (The law, too, recognizes lesser property interests than ownership, e.g., an easement or a lease.)

Does or ought a person have property interests in his or her *dead* body such that he or she has or should have rights to control by premortem declarations what shall be done with it after death? Bellioti (1979) has convincingly shown that the claim that dead human beings cannot be rights bearers, simply because they're dead, cannot withstand philosophical scrutiny. The following example concerning the treatment of President Franklin D. Roosevelt's body shows the intuitive plausibility of the claim that a person should have first authority to control the posthumous disposition of his or her own corpse. In a four-page letter, Roosevelt gave specific instructions concerning the manner of his burial. He directed that "the casket be of absolute simplicity, dark wood, that the body not be embalmed or hermetically sealed, and that the grave not be lined with brick, cement, or stones" (Mitford 1963). Despite these instructions the body was embalmed, placed in a bronze casket, and interred in a cement vault. One is led to ask: Why does this treatment of Roosevelt's corpse seem illicit? We're strongly tempted to reply: Well, it was Roosevelt's body, so his word should have been respected. This general view is enunciated in the 1978 case, *Matter of the Estate of Moyer.*[17] where the court said:

> It is our view that the laws relating to wills and the descent of property were not intended to relate to the body of a deceased; and that it forms no part of the "property" of one's estate in the usual sense, as other chattels or property. Nevertheless, we agree with the petitioner's contention that a person has some interest in his body, and the organs thereof, of such a nature that he should be able to make a disposition thereof, which should be recognized and held to be binding after his death, so long as that is done within the limits of reason and decency as related to the accepted customs of mankind. However, because of the involvement of the public interest and rights and responsibilities of survivors, this is a property right of a special nature; and we do not desire to be understood as saying that this right should be regarded as an absolute property right by which a person could give absurd or preposterous directions that would require extravagant waste of useful property or resources,

[17] *Matter of Estate of Moyer*, 577 P. 2d 108, Utah (1978).

or be offensive to the normal sensibilities of society in respect for the dead.

It is plausible to hold, then, that a person has a legitimate and primary proprietary interest in his or her living or dead body. This claim warrants the further assertion that a person has first right to control what happens to his or her body before and after death. A person's legal right under the UAGA posthumously to donate or retain personal body parts without veto by his or her family arguably rests on this plausible premise. This adds significant weight to the claim that present policy ought to be revised in favor of a policy in which families of registered donors are explicitly apprised of the rights of these donors in the standard interview situation and recognizable limits placed on the de facto authority now given to families to expedite or prevent donation from relatives who are declared donors.

Explanations and a Possible Justification of Current Rights-ignoring Procurement Policy

What explanations or justification might be given for present retrieval policy that routinely ignores the rights of declared donors and donees? Some individuals involved in organ procurement may simply be misinformed about what the UAGA says. They may think that the law requires that a person's family "validate" his or her premortem decision to donate before organ removal can take place. Others may be aware of what the law says concerning the rights of declared donors yet believe that if the law was tested, e.g., if a family challenged organ removal from a relative who was a declared donor absent their consent or over their dissent, that the courts would rule in favor of the family. (The foregoing history of Anglo-American case law concerning the disposition of cadavers lends some support to this view.) On the basis of this belief procurement staff may judge that it is pointless to tell an authorized donor's family about the legal rights of their deceased relative since these rights would never be granted priority anyway under judicial review.

I suspect, however, that few procurement personnel are even aware of the fact that the current procedure of regularly asking families of all potential donors—declared and undeclared—for permission to remove organs from these expatients is contrary to both the spirit

and the letter of the UAGA. The nonacknowledgment of the rights of registered donors and donees under present procurement practice, therefore, stems from ignorance and may be pardoned. Nonetheless, I think it will be instructive to consider one initially plausible argument for continuing the present rights-disregarding retrieval policy, despite what the law says. The argument consists of three premises:

1. The practice of regularly seeking consent from families of all potential donors—whether the latter have signed donor cards or not—and letting a family's decision (whether positive or negative) control the disposition of body parts, will not subject procurement personnel to legal challenge. (Call this the " 'no liability' claim.")
2. Revising present policy so that families of declared donors are routinely informed about the rights of these individuals will not yield more organs than are retrieved under present policy. Such a revision would have no practical value; hence, it would be useless. (Call this the " 'useless revision' claim.")
3. Revising present policy so that families of declared donors are routinely informed about the rights of these individuals may jeopardize the long-term goal of the organ procurement movement, namely, securing the maximum amount of organs for transfer to ESOD victims who will die without them. (Call this the " 'risky revision' claim.")

Let us examine each of these assertions.

The "No Liability" Claim. This claim seems to embrace two subclaims: (a) The provisions of the UAGA do not provide grounds for challenging current procurement practice; and (b) even if the UAGA provides grounds for challenging present retrieval practice, it is unlikely that anyone will bring suit against procurement personnel on these grounds.

The following counterargument might be made against subclaim (a): If an individual has validly signed a donation document, and, if his or her organs are medically acceptable for transfer to one or more needy ESOD victims after death, then the most readily available person authorized to function as donee (usually the attending physician) is under an affirmative legal obligation to initiate the necessary procedures to get the decedent's organs into the "distribution system." (Minimally,

this would require notifying the nearest organ procurement agency of the donor's availability.) The drafters of the Model UAGA never intended to permit a donee to decline an anatomical gift for just any reason. The UAGA expressly says that an anatomical gift from a registered donor must be declined if it is medically unacceptable for use for those purposes specified by the donor. And it is equally certain that the drafters of the Model Act never intended family objection to stand as an acceptable reason for a donee's refusing a gift from a declared donor. The following statement from the commentary on Section 2(e) of the Model Act makes this abundantly clear: "[This] subsection . . . recognizes and gives legal effect to the right of the individual to dispose of his own body without subsequent veto by others."

If there are other legitimate reasons for a donee refusing a gift from a declared donor (besides medical unacceptability of the donor's body or parts), these are for a court of law to determine. The attending physician must, therefore, make a good-faith effort to see to it that the body or parts of a declared donor get into the available organ pool. Under the provisions of the UAGA the role of the donee is analogous to that of an executor of a will and the class of waiting ESOD patients is analogous to a group of heirs to an estate. Whether a court would accept this line of reasoning is far from certain. Subclaim (a), therefore, is at least debatable.

How about subclaim (b)? Even if the foregoing interpretation of the UAGA is cogent, would anybody ever bring suit against organ procurement staff on these grounds? The possibility is remote but nonetheless conceivable. Suppose someone dying of an ESOD discovers that organs from a deceased histocompatible declared donor were not taken because the donee (the attending physician) failed to initiate retrieval procedures in deference to family objection to organ removal from their relative. This potential recipient, recognizing that under existing allocation rules he or she would not have been *guaranteed* to receive the needed organ from the deceased (histocompatible) donor, might nonetheless band together with a representative group of other potential recipients and bring a class action against the attending physician on the grounds cited above. While this is a conceivable scenario, it is an improbable one. It must be conceded, then, that subclaim (b) is plausible.

The "Useless Revision" Claim. The full argument for this proposition

might go like this: Under present procurement policy, whenever a family knows or is informed that a deceased relative has signed a donor card, the family almost always agrees to permit organ donation from their loved one. It is unlikely, then, that telling families of declared donors about the legal rights of these donors will increase the number of organs retrieved from such individuals by family consent. The procedure will be a useless exercise.

This argument simply misses the point. If a person is vested with paramount legal authority to give his or her organs away at death, and if he or she exercises this authority (a right) by signing a donor card, then the family and all other parties are under a corresponding legal obligation to refrain from actions that stop or impede the process of giving effect to the decedent's stated wishes. According to Feinberg's (1973) by now classic exposition of the nature and value of rights, a right is a valid claim under some system of rules, moral or legal, for actions of forbearance or positive assistance from others. The particular type of behavior that the right obliges others to provide is behavior that is owed to the rights-bearer as his or her "due" under the system of rules. The behavior can be legitimately demanded by the rights-bearer or a proxy, and coercing those who fail to comply is thought to be justified. Whether the interests of the individual within the scope of the right are to be served by others (by actions of forbearance or assistance) is not at all dependent on whether those who owe this behavior to the rights-bearer are positively disposed to serve these interests from motives of love, self-interest, a sense of noblesse oblige, etc.

Under the UAGA, the family has no legal right to control the disposition of organs from a dead relative who is a declared donor. On the contrary, they have a duty to "stand out of the way" so that the decedent's desire can be given effect by those authorized to perform the necessary removal and transfer procedures. Leading the family of a declared donor to believe that they have disposing authority over organ removal from the deceased by asking their permission to do this is pure deception; it misrepresents the legal topography of the situation. From this new perspective, seeking consent from the family of a declared donor is a "pointless procedure." But this just shows that the "useless revision" claim implicitly invokes the following procedural rule: Unless there is good reason to believe that giving recognition

to the rights of declared donors will increase the organ "harvest," there is no point in revising current family interview procedures to include it. But then it's natural to ask: If acknowledging declared donors' rights will not jeopardize the goal of securing the greatest number of organs for the benefit of dying ESOD victims, why not go ahead and apprise families of these rights and avoid perpetuating the current rights-ignoring policy?

One answer to this query might be that a revised procurement policy that expressly acknowledges and protects the rights of declared donors would pose more risk to the long-term success of the organ procurement effort than present policy which keeps these rights "under wraps." This is the substance of the next proposition.

The "Risky Revision" Claim. One tempting argument for this claim might be this: It is pointless to inform families of declared donors about the rights of these individuals unless one is prepared to follow through with appropriate rights-acknowledging/protecting behavior, e.g., orally defending the donor's rights against a dissenting family, taking medically acceptable organs from the deceased over the family's objection and being prepared to defend this action in court if necessary, etc. But this type of follow-through behavior will surely alienate the families of declared donors. Procurement personnel will gain the reputation of being "organ vultures" who care little about the feelings and values of surviving families. The procurement movement will get a bad press which may result in fewer donations of organs by families in circumstances where they are legally permitted to decide whether organs will be taken from deceased relatives, in cases, namely, where the decedents have not signed donor cards and there is no known objection by the decedents to this procedure. Even if procurement personnel are acquitted of legal wrongdoing for taking organs from a declared donor without consulting the family or over their objection, they will have won a legal battle but probably at the cost of ultimately losing the procurement "war." Follow-through procedures are bound to be counterproductive. Therefore, families of declared donors should not be informed as a matter of policy of the legal rights of their deceased kin.

This argument assumes that appropriate rights-acknowledging/protecting behavior is an all-or-nothing affair. It maintains that unless one is prepared to go to court to defend the rights of a declared donor

and donee against an objecting family, there's no point in apprising families of these rights to begin with. But this is an extreme position.

Admittedly, an equally unacceptable option would be to provide mere "token recognition" of the rights of declared donors. This would involve simply telling the family about the applicable rights of the donor and donee in the situation and then proceeding to deal with the family as under present policy by asking their permission to remove organs from the decedent. This policy would communicate the following message to the family: These rights are operative in this circumstance but we (procurement personnel) don't take them seriously and we don't expect you to either. So we'll treat this case as if your loved one had not signed a donor card and defer to your judgment about the acceptability of taking his or her organs. This policy doesn't completely sell out the paramount authority of the decedent in the way current policy does. Some recognition is afforded the declared donor's rights. But the distinction between this policy and current policy is vanishingly small. It's an almost complete sellout.

Practical Proposals

A Revised Rights-acknowledging/Protecting Policy

I suggest that the following revised policy be adopted in cases where potential donors have authorized posthumous organ removal from their own bodies.

The family of a medically acceptable declared donor should be informed that the hospital is about to take the necessary steps to give effect to the decedent-authorized donation. The family is not asked to consent to this activity since such a request is both unnecessary and inappropriate. The family is simply informed, as a matter of courtesy, about standard hospital procedure. This approach is reportedly used by transplant coordinators in California, Florida, Colorado, and Wyoming (Overcast et al. 1984). It would be proper and salutary for the procurement staff person to convey to the family that they have reason to be proud that their deceased relative was generous and practical-minded enough to make this bequest before he or she died. (Most people dread thinking about matters pertaining to their own

death. Few even make out a will.) The interviewer will, of course, provide the family with answers to the kinds of questions most often asked by lay persons about organ removal: Will it disfigure the body and preclude open casket viewing? What is meant by "brain death"? Will organ removal jeopardize the possibility or quality of life in the hereafter? etc.

If, after such questions have been responded to by the interviewer, the family still objects to organ removal from the declared-donor relative, and it appears that more information will not persuade them to the contrary, then the interviewer will ask the family to sign a "written declaration of dissent" form. This document will be a formal request to the donee (usually the attending physician) to decline the decedent-approved gift. The form will state that family members understand that the decedent has authorized the gift, and it will require that the family state briefly the nature of their objection. I suggest that the interviewer leave the room to permit the family to complete this short document in private. This will give the family an opportunity to reflect about what they're doing without the coercive presence of a hospital functionary who is not a member of the "inner circle." It will be understood that the donee will perfunctorily sign the document and that will be the end of the matter. The form, completed by the donee and family members, will become part of the patient's hospital record. (This policy assumes the truth of the "no liability" claim above.)

There are a number of advantages to this policy. First, it gives stronger recognition to the rights of declared donors vis-a-vis their dissenting families than does the "token recognition" approach. It requires that the family assume a modest burden of proof by declaring in writing why the decedent-authorized bequest should not be honored. The consciences of family members serve as the final judge of whether their reasons are adequate. The exercise will make them aware of the seriousness of what they're doing and also leave no doubt that the decedent-authorized gift will be "aborted" not by a legal action performed by them, but by a legal action of the *donee,* namely, the donee's waiving right of access to the decedent's body or parts.

Second, I doubt whether such a policy will alienate the public from the organ procurement movement. The family gets their way (the donee's waiver is automatic) without having to bow and scrape in a face-to-face interchange with the donee and without having to go to

court. But the family does have to assume some burden of proof in deference to the decedent's rights.

It might be objected that this policy still permits "selling out" a declared donor's rights in capitulation to his or her family's contrary wishes. In reply I ask: Are the predictable long-term consequences of adopting a policy of *never* "selling out" a declared donor's rights and going to court if necessary really worth it? Given the current state of public knowledge and opinion about organ donation, an unyielding rights-protection policy might endanger further the lives of those awaiting transplants because an alienated public will make fewer organs available for transfer to needy ESOD victims.

The compromise policy I recommend might still be opposed on other grounds, however. It might be urged that telling families about the rights of deceased relatives who have signed donor cards will simply add to the stress these families experience as a result of the sudden deaths of their loved ones. They already feel an overwhelming sense of powerlessness. God, fate, destiny, or chance has struck them a devastating blow. Now they have to be told that one more thing is out of their control: the disposition of body parts from their relatives. This information will hardly be therapeutic. It also risks giving the procurement staff person a bad image as the bearer of more bad tidings. This is surely not conducive to engendering and maintaining good relations between the organ procurement movement and the public.

This objection can be countered in a number of ways. First, when the family of an undeclared donor is asked about donation from a relative, that question also doubtless increases family stress. It confronts them with the fact that the end has indeed come. There is no ground for further hope. The message is hardly therapeutic. But honesty demands that it be spoken. Second, it probably adds to a family's stress to tell them that an autopsy must be performed on a relative because of insurance contract provisions or because there is reason to believe that the death may have been caused by criminal action. But despite the upset this information may cause the family, this information must be provided because legal rights of insurers and/or coroners are controlling in the circumstance. Similar reasons warrant telling the family of a declared donor about the latter's rights after he or she has died.

Another objection to adopting the policy I have recommended might be that the policy will deprive families of registered donors of

an opportunity to be generous and to experience the therapeutic benefits associated with performing an act that benefits others. The argument here is that if the family of a declared donor is told that organ transfer procedures will be set in motion as a result of an action performed by the decedent (his or her signing a donor card), then the family is put in the position of being a mere spectator to a chain of events aimed at a lifesaving result. The family will be deprived of an opportunity of understanding that an action of theirs contributes to bringing some good out of their tragic loss—a perception which carries with it positive therapeutic effects.

This argument says, in effect, that we should continue to hide the rights of registered donors from their surviving families so that the latter will be provided with an opportunity to exercise charitable impulses with attendant emotional benefits. We should perpetuate a charade, in other words, for the sake of advancing the psychological welfare of such families.

I doubt, however, whether families of declared donors would themselves approve of this deception if they became aware of it. So, in addition to the fact that the policy sells out entirely the rights of registered donors, it would also likely be rejected by those whom the policy is designed to benefit, namely, the families of these potential donors. These two reasons count heavily against this argument for maintaining present policy rather than adopting a policy that expressly acknowledges these rights.

The revised family-interview "script" I have recommended is offered as a political compromise among the triad of conflicting interests at stake when families are approached about organ donation from registered donors: (1) saving the lives of the maximum number of ESOD victims, (2) acknowledging and protecting the rights of declared donors, and (3) respecting the needs of the grieving family. This resolution is hardly a "clean" one on a strict moral assessment—the moral-legal rights of registered donors should trump the needs and wishes of the grieving family—but it is probably the most socially acceptable balance among these interests we can hope for at present.

Formal Procedures Protecting Objectors

Up to now the discussion has focused on issues connected with protecting the rights of donors and donees in cases where decedent-donors have

expressed a positive desire to donate their bodies or parts for medical uses after death. There is another aspect of organ retrieval procedure, however, which so far we have bracketed from consideration: providing adequate respect and protection to a person's premortem decision *not* to serve as a donor.

An individual opposed to being a donor will naturally refrain from signing a donation document. But an unsigned driver's license donor card is ambiguous. It fails to distinguish between various classes and subclasses of unsigned card carriers such as: (A) individuals who have never thought about donating their organs; (B) individuals who have considered (momentarily or reflectively) donating their own organs, including (1) individuals who in fact favor donating their organs but who (a) do not know that their license contains a donation form, or (b) haven't taken the time to sign the form; (2) undecided individuals who, because they haven't made up their minds, have refrained from signing their driver's license donor cards; and (3) individuals definitely opposed to donation who have resolutely refrained from signing the donor forms on their licenses.

The three basic subcategories under (B) (favor donation, undecided, oppose donation) are a standard minimum-classification scheme. If those in category (A) reflected about personal donation, the results of their deliberations would fall under one of these subcategories. In a recent survey, approximately 19 percent of those interviewed were definitely opposed to donating their own organs after death (Manninen and Evans 1985). (Some of the undecided doubtless expect that if they don't make a commitment one way or the other before death, their bodies will be given the standard form of interment, viz., intact burial underground.)

What protection does the UAGA afford dissenters? The relevant sections of the Model Act are the following:

> 2(b) Any of the following persons . . . *in the absence of actual notice of contrary indication by the decedent* . . . may give all or any part of the decedent's body . . . [emphasis added];
> 2(c) If the donee has *actual notice of contrary indications by the decedent* . . . the donee shall not accept the gift . . . [emphasis added].

If a person does not wish to be a posthumous donor the Act informally requires that he or she inform others about this decision before death. Refraining from signing a donor card is clearly insufficient

because unsigned cards are ambiguous. An "actual notice of contrary indication" would have to be either a written declaration or an oral statement of dissent made to someone—a family member, a friend, a physician, attorney, minister, etc. But it is plausible to believe that, in real life, individuals who do not want to be posthumous donors may never inform anyone about their views. It is naive to think that many objectors will take the time to put their objection in writing, and many might not make an oral declaration of their opposition because the "right moment" never comes up. Other objectors may be too embarrassed to reveal their reasons for refusing to donate. For example, some individuals may not want to donate because they just don't like the idea of being cut up after death. But they may think that others will view this as a silly fear and a weak excuse for not making organs available when these body parts might save one or more ESOD victims from impending death. Thus, in order not to be put on the defensive, such objectors never give "actual notice" of their dissent.

If data from a number of recent surveys can be trusted, however, tacit objectors appear to be at some risk of actually having their organs removed after death against their true desires. A majority of people express a willingness to donate organs from deceased relatives (Manninen and Evans 1985; *American Medical News* 1985a). In actual practice, the majority of white families (60 to 80 percent) do consent to organ removal from deceased kin when asked (Prottas 1983). But less than a majority of individuals (42.1 percent in a recent study) (Manninen and Evans 1985) believe that their own families would give permission to remove organs if asked.

There is reason to believe, then, that the provisions of the UAGA offer insufficient protection to objectors. This situation could be remedied by two revisions in current policy:

1. Provide an "objection box" on driver's license donor cards which individuals can check if they do not want to be donors at death. A revised donor form might read as follows:
   "I hereby declare my desire to provide at death, if medically acceptable,
   _____ any needed organs or parts
   _____ only the following organs or parts
   _____

for the purposes of transplantation, therapy, medical research, or education.

_____ my body for anatomical study, if needed

Limitations or special wishes, if any: _____

_____ I oppose the use of my body or parts for any of the purposes enumerated above."

2. Place an affirmative obligation on all hospitals to conduct a reasonable search for evidence of a potential donor's objection to donation before organ removal procedures are initiated. This would require looking for a donor card carried by the decedent, or, if such a document cannot be located or proves uninformative (it is blank), querying the family about the decedent's views on donation.

This entire process could be simplified if at the time of driver's license application or renewal an individual's positive or negative decision about donation was entered into a computer registry. After a potential donor is pronounced dead, authorized procurement staff could consult the registry to determine whether the individual is a declared donor or an objector. The computer registry device could be combined with the practice of requiring licensees to state explicitly whether they agree or object to serving as posthumous organ donors. Under this policy a license application would be considered incomplete without this information.

An objection to the procedure of mandatory choice might be that the threat of withholding driver's licenses from individuals until they have registered an official "yes" or "no" decision about donation is an unjustifiable infringement of personal liberty; or, at any rate, it is too strong a penalty to impose for such an omission. Suppose a person doesn't want to make a decision? Wouldn't a policy that required such a decision be coercive? Isn't it like forcing a person to vote in a public election?

I do not believe that the analogy to voting is apt. The degree of imposition on an individual in the two situations is not comparable. Voting may require a substantial expenditure of time and effort that a person might not otherwise undertake. But those who apply for or renew driver's licenses usually have to appear at a department of motor vehicles office to take a vision test, pay fees, etc. Requiring a person to check one more box on an application or renewal form that must

be completed anyway hardly seems an onerous burden. Indeed, my suspicion is that the general public would probably not object to such a requirement. After all, if a person isn't sure about whether he or she wants to serve as a posthumous donor, such a person can protect his or her interests simply by checking the objection box, that is, by saying "no." And many might do this.

But now we can see why it is likely that those who would most strenuously oppose a policy of mandated choice would be organ-procurement staff who might worry that a sizable number of undecided people would register negative decisions concerning donation. Assuming that the decisions of these nay-sayers would be honored (no family would or could be asked if they wished to override the decedent's refusal), the number of organs retrieved under such a policy might be less than under current policy. At present, if undecided individuals do not sign driver's license donor cards, and if they have not given "actual notice" of opposition to this procedure, then their families can make this decision for them after death. And, as we have seen, most (white) families do consent to organ donation from deceased relatives when asked. The speculative risks connected with a policy of mandated choice are ones that procurement personnel would probably prefer not to run. Procurement staff might also argue that the policy unfairly oversimplifies the actual spectrum of possible views people may have about personal donation. Some people may really be undecided about the issue. If from motives of self-protection these individuals register a "no" decision, or out of disingenuous altruism they indicate a "yes" decision, the policy has forced them to make an inauthentic declaration.

These are formidable objections to a policy of mandated choice. Only further debate will reveal whether they are decisive. The policy of adding an "objection box" to donor cards, however, quite independent of a system of mandated choice, I believe, stands on its own merits and deserves adoption.

Summary

Organ procurement personnel in the United States appear to be unaware that the standard practice of asking the surviving families of all classes of potential donors (declared and undeclared) for permission to remove

organs and tissues from these individuals is inconsistent with the provisions of most state UAGAs. The majority of these Acts vest first authority concerning the donation of body parts in those individuals whose organs and tissues are needed and judged medically acceptable for removal and transfer. These laws do not give families the right to veto the positive written declarations of dead relatives who have authorized the posthumous taking of their own body parts. Hence, seeking family consent for the removal of body parts from registered donors is unnecessary and inappropriate according to the provisions of most state UAGAs.

The primary authority given to individuals under this legislation to control the taking of organs and tissues from their bodies after death arguably rests on the plausible premise that a person's body is his or her property in a significant sense. This gives individuals first authority to control the posthumous disposition of their body parts. Under current retrieval practice, however, families of deceased registered donors are seldom informed about the paramount rights of these individuals and are led to believe that they have final legal authority over the disposition of organs and tissues from these expatients. This is, in effect, an unwitting but nonetheless serious "sellout" of the moral-legal rights of these potential donors.

I have attempted to show the weakness of one plausible line of argument for the claim that current retrieval practice with its family priority orientation ought to be continued in unamended form, irrespective of what the law says. I suggested an alternative procedure for approaching the surviving families of registered donors which I believe offers a socially acceptable compromise among three values which enter into competition at the death of a declared donor: (1) saving the maximum number of lives of ESOD victims, (2) respecting and protecting the rights of declared donors, and (3) honoring the needs of the grieving family.

Finally, I called attention to the manner in which current procurement practice provides insufficient protection to those who do not wish to serve as donors after death. A practical solution to this problem, I urged, would be to include on standard donation documents (e.g., driver's license donor cards) a box that card carriers check to register officially their objection to serving as posthumous donors. A person's positive or negative decision concerning donation made in conjunction with driver's license renewal or application could also be recorded in

a computer registry which procurement personnel can consult after the death of the individual.

The revised policy I recommended for approaching the families of registered donors, as well as the suggested addition of an "objection box" to standard donation forms, would, I believe, provide more adequate recognition of and protection to the paramount rights accorded individuals under state UAGAs to control the posthumous disposition of their own bodies or parts than is available under present retrieval policy.

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