

Presumed Consent for Organ Procurement

A Violation of the Rule of Informed Consent?

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On February 8, 2008, the *British Medical Journal* published an editorial titled, “Presumed Consent for Organ Donation,” penned by Danielle Hamm and Juliet Tizzard, two ethicists from the British Medical Association.¹ In their piece, the authors suggest that the United Kingdom should adopt a system of presumed consent.² Such a system would automatically register all adults as organ donors unless they opt out. It would make organ donation the default position, permitting surgeons to retrieve organs from every patient who dies and has not explicitly objected to such a surgical intervention. Appealing to the Spanish experience of organ donation and Spain’s

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¹Danielle Hamm and Juliet Tizzard, “Presumed Consent for Organ Donation,” *British Medical Journal* 336 (February 2, 2008): 230.

²The British Medical Association has also endorsed a proposal of presumed consent: BMA Medical Ethics Committee, *Organ Donation in the 21st Century: Time for a Consolidated Approach* (London: British Medical Association, 2000). See the debate between Veronica English and Linda Wright: Veronica English, “Is Presumed Consent the Answer to Organ Shortages? Yes” *British Medical Journal* 334 (May 26, 2007): 1088; and Linda Wright, “Is Presumed Consent the Answer to Organ Shortages? No.” *British Medical Journal* 334 (May 26, 2007): 1089. On November 17, 2008, the Organ Donation Taskforce of

its highest donor rate in Europe—Spain has a system of presumed consent and a highly organized and well-funded organ donation network—Hamm and Tizzard propose that presumed consent would increase organ donation rates, saving many of the nearly one thousand lives lost every year in the United Kingdom because of the dearth of donated organs.³

Can the Catholic moral tradition endorse a system of presumed consent for organ procurement? In this essay, I argue that it cannot. Informed consent—the stipulation that an organ donor must explicitly consent to the donation prior to organ procurement—is a necessary component of the Church’s teaching on the morality of organ donation and transplantation for two reasons. First, informed consent affirms and protects the intrinsic dignity and inviolability of the human person. Next, informed consent respects the essential formality of the donated organ as a gift that one person gives to another. Therefore, I argue that individual Catholics and Catholic institutions, especially Catholic hospitals, must reject presumed consent and not cooperate with an unjust system of organ procurement.⁴ Instead, I suggest that a system of mandated choice may be able to accomplish the goals of the proposed system of presumed consent while still remaining faithful to the donation model for organ procurement.

the United Kingdom rejected a proposal of presumed consent (also called routine recovery) for the country. See Zosia Kmietowicz, “Taskforce Rejects System of Presumed Consent for Organ Donation in UK,” *British Medical Journal* 337 (November 19, 2008): 1189, http://www.dh.gov.uk/en/Healthcare/Secondarycare/Transplantation/Organdonation/DH_081593. For an American perspective on the benefits of presumed consent see A. Spital and J. S. Taylor, “Routine Recovery: An Ethical Plan for Greatly Increasing the Supply of Transplantable Organs,” *Current Opinions in Organ Transplantation* 13.2 (April 2008): 202–206. The American Medical Association has rejected frameworks of presumed consent; see American Medical Association Council on Ethical and Judicial Affairs, “Strategies for Cadaveric Organ Procurement: Mandated Choice and Presumed Consent” (December 1993), CEJA report 2-I-93, http://www.ama-assn.org/ama1/pub/upload/mm/369/ceja_2i93.pdf.

³One study has suggested that presumed consent countries have roughly 25 to 30 percent higher donation rates than informed consent countries. See Alberto Abadie and Sebastien Gay, “The Impact of Presumed Consent Legislation on Cadaveric Organ Donation: A Cross-Country Study,” *Journal of Health Economics* 25 (2006): 599–620. However, the Organ Donation Taskforce of the UK found no convincing evidence that presumed consent would deliver significant increases in the number of donated organs. See also the analysis that suggests that presumed consent would not increase organ donation: E. J. Johnson and D. G. Goldstein, “Defaults and Donation Decisions,” *Transplantation* 78.12 (December 27, 2004): 1713–1716.

⁴It is striking that the Catholic countries of Europe, with some exceptions, presume consent while Protestant countries require informed consent. For more discussion and analysis, see R. W. Gimbel et al., “Presumed Consent and Other Predictors of Cadaveric Organ Donation in Europe,” *Progress in Transplantation* 13.1 (March 2003): 17–23; and S. Cameron and J. Forsythe, “How Can We Improve Organ Donation Rates? Research into the Identification of Factors Which May Influence the Variation,” *Nefrologia* 21.5 (supplement) (2001): 68–77.

Informed Consent and the Procurement of Cadaveric Human Organs

How do we morally justify the procurement and transplantation of human organs harvested from cadavers? Since the time of Pope Pius XII, the Catholic Church has explicitly supported the procurement of organs from the dead. For the Catholic moral tradition, organ donation is justified by the principle of charity. The person who donates an organ to a patient is making a genuine act of sacrifice modeled after the Lord's sacrifice of himself on the cross. In doing so, the donor fulfills the Lord's great challenge to his disciples: "This is my commandment, that you love one another as I have loved you. Greater love has no man than this, that a man lay down his life for his friends" (John 15:12–13). Organ donation is an act of self-gift of the human person. As Pope John Paul II emphasized in an address to an international congress on transplants, "Every organ transplant has its source in a decision of great ethical value: 'the decision to offer without reward a part of one's own body for the health and well-being of another person.' Here precisely lies the nobility of the gesture, a gesture which is a genuine act of love."⁵ The *Catechism* thus teaches the following: "Organ donation after death is a noble and meritorious act and is to be encouraged as an expression of generous solidarity."⁶

The *Catechism* also makes clear, however, that the donor must give his or her free and informed consent prior to his or her death, or the next of kin must do so at the time of the donor's death: "Organ transplants are not morally acceptable if the donor or those who legitimately speak for him have not given their informed consent."⁷ Here the *Catechism* echoes Pope Pius XII: "Generally speaking, doctors should not be permitted to undertake excisions or other operations on a corpse without the permission of those charged with its care, and perhaps even in the face of objections previously expressed by the person in question."⁸

There are at least two reasons for requiring informed consent for organ donation. First, informed consent affirms and protects the intrinsic dignity and inviolability of the human person in two ways. It acknowledges that the cadaver of a human person, though it is not intrinsically valuable, still needs to be respected because respect for the dignity of the human person, made in the image and likeness of God, requires that we also honor his or her mortal remains. As Pope Pius XII taught in 1956, "The human corpse deserves to be regarded entirely differently [from the dead body of an animal]. The body was the abode of a spiritual and immortal soul, an essential constituent of a human person whose dignity it shared. Something of

⁵John Paul II, Address to the International Congress on Transplants (August 29, 2000) n. 3, reprinted in *National Catholic Bioethics Quarterly* 1.1 (Spring 2001): 89–92.

⁶*Catechism of the Catholic Church*, 2nd ed., trans U.S. Conference of Catholic Bishops (Vatican City: Libreria Editrice Vaticana, 1997) n. 2296.

⁷*Catechism of the Catholic Church*, n. 2296.

⁸Pius XII, Allocution to a Group of Eye Specialists, (May 14, 1956) in *The Human Body: Papal Teaching*, ed. Monks of Solesmes (Boston: St. Paul Editions, 1960), 382.

this dignity still remains in the corpse. We can say also that, since it is a component of man, it has been formed ‘to the image and likeness’ of God. . . . Finally, the dead body is destined for the resurrection and eternal life. This is not true of the body of an animal.”⁹ Second, informed consent acknowledges that the human person is only a steward—not the master—of his or her own body. Accordingly, neither the individual nor anyone else, certainly not society, may treat either his or her body, or the organs, as property that can be taken and distributed at will. As Pope Pius XII taught, “God alone is the lord of man’s life and bodily integrity, his organs and members and faculties, those in particular which are instruments associated in the work of creation. Neither parents, nor husband or wife, nor even the very person concerned, can do with these as he pleases.”¹⁰

Next, informed consent respects and acknowledges the essential formality of the transplanted organ as a *gift* that one person gives to another. A necessary dimension of a gift as gift is that it must be given.¹¹ It must be endowed; one cannot receive a gift from the other if the other has not consented to the giving. In effect, without the giver’s consent, the so-called gift has been taken rather than been received. Thus, as Pope Benedict XVI recently taught, “With frequency, organ transplantation takes place as a completely gratuitous gesture on the part of the family member who has been certifiably pronounced dead. In these cases, informed consent is a precondition of freedom so that the transplant can be characterized as being a gift and not interpreted as a coercive or abusive act.”¹² In other words, without informed consent, a transplanted organ ceases to be a gift; it is something taken. Some may even say that it is something stolen. Indeed, as Robert M. Veatch and Jonathan Pitt point out, presumed consent is a myth. More properly speaking, laws that authorize the state’s taking of organs without explicit permission should be called routine *salvaging* laws, because they authorize the state to salvage organs from cadavers.¹³

In sum, in the Catholic moral tradition, organ transplantation from the dead, indeed, all organ transplantation, is justified by appealing to the virtue of charity. A transplanted organ is a charitable gift. Implicit in this teaching, however, is a

⁹Ibid., 380–381.

¹⁰Pope Pius XII, Allocution to the Fourth International Congress of Surgeons, (May 20, 1948), in *Human Body*, ed. Monks of Solesmes, 97.

¹¹For a phenomenological study of the gift, see Kenneth L. Schmitz, *The Gift: Creation* (Milwaukee, WI: Marquette University Press, 1982), 34–63. See also the insightful observations by Robyn Horner in *Rethinking God as Gift: Marion, Derrida, and the Limits of Phenomenology* (New York: Fordham University Press, 2001), 1–18.

¹²Pope Benedict XVI, Address to the participants in the international congress “A Gift for Life: Considerations on Organ Donation,” (November 7, 2008), trans. Zenit, <http://www.zenit.org/article-24191?l=english>.

¹³Robert M. Veatch and Jonathan B. Pitt, “The Myth of Presumed Consent: Ethical Problems in New Organ Procurement Strategies,” *Transplantation Proceedings* 27.2 (April 1995): 1888–1892. Veatch and Pitt point out that systems of presumed consent presuppose that everyone would agree to having their organs procured if they had been asked. This

presumption of informed consent, because a gift must be explicitly given by the giver in order for it to be a gift. Presumed consent would undermine this moral framework and as such has to be rejected in the same way that the selling and buying of organs has been rejected. Therefore, individual Catholics and Catholic institutions, especially Catholic hospitals, must reject presumed consent and not cooperate with an unjust and immoral system of organ procurement

Informed Consent and Mandated Choice

In lieu of presumed consent, several authors have proposed another option, the option of mandated choice.¹⁴ Mandated choice requires all competent adults to decide whether they wish to donate their organs after death.¹⁵ With this system, individuals are free to choose whether to donate, and even which organs they would like to donate. However, they are not permitted to fail to register their wishes. Individuals could also choose to let their relatives have the final say in organ donation. Unless they are granted this right, however, immediate family members and other relatives have neither the power nor the opportunity to veto the individual's decision, whether it is for or against donation.

A system of mandated choice could be accomplished by asking about organ donation on driver's license or state identification card applications, tax returns, or similar civil documents. The system of registration would have to be as inclusive as possible so that it can reach every adult member of a given population. An application or tax return would not be accepted until the question of organ donation is answered. The individual's decision would then be included in a database that would be accessible to individuals involved in organ procurement. A change of mind could easily be communicated at any time using a written directive. Finally, a system of mandated choice would have to incorporate safeguards that protect the confidentiality of the decisions made by each adult citizen to protect him or her against the possibility of coercion from family members, employers, or others.

is not supported by the empirical data. Not everyone would consent to organ donation if asked. Even in the United Kingdom, where 90 percent of the population is in favor of organ donation (www.uktransplant.org.uk), presumed consent would involve taking organs from a patient—every tenth patient—who would have denied consent if he or she had been asked. See also the brief note by C. Erin and J. Harris, "Presumed Consent or Contracting Out?" *Journal of Medical Ethics* 25.5 (October 1999): 365–366.

¹⁴For representative views, see P. Chouhan and H. Draper, "Modified Mandated Choice for Organ Procurement," *Journal of Medical Ethics* 29.3 (June 2003): 157–162; Susan E. Herz, "Two Steps to Three Choices: A New Approach to Mandated Choice," *Cambridge Quarterly of Healthcare Ethics* 8 (1999): 340–347; and Aaron Spital, "Mandated Choice for Organ Donation: Time to Give It a Try," *Annals of Internal Medicine* 125.1 (July 1, 1996): 66–69. Mandated choice was first proposed by Robert M. Veatch in his *Death, Dying and the Biological Revolution: Our Last Quest for Responsibility* (New Haven: Yale University Press, 1976), 272–273.

¹⁵The comprehensive definition of mandated choice articulated in this paragraph is taken with slight modification from Chouhan and Draper, "Modified Mandated Choice," 158.

Can the Catholic moral tradition endorse a system of mandated choice for organ procurement?¹⁶ It appears so. First, mandated choice respects the dignity of the human person as charitable gift giver. Each individual is still given the opportunity to give or withhold his or her organs for donation and transplantation. Second, procured organs would retain their formality as gift since they would be obtained with the explicit and informed consent of the donor, who has decided to give his or her organ to another. Finally, a system of mandated choice would serve the common good by increasing the supply of organs available for patients who need them. As such, a system of mandated choice can be justified within the Catholic moral framework.

However, three major objections have been raised against mandated choice. First, some have argued that mandated choice is illicit because compelling people to choose undermines their autonomy.¹⁷ To put it another way, commentators claim that mandated choice, by not giving individuals the choice not to choose, limits their freedom and as such is unjust. This objection comes from a secular tradition of bioethics that seeks, above all, to protect the autonomy of the human agent.

In response, as Pope John Paul II taught in his moral encyclical *Veritatis splendor*, human autonomy is not an absolute good.¹⁸ It is valued precisely because it allows us to achieve our perfection as persons living in communion with others. Thus, the rightful exercise of human freedom must be guided by the good—and the common good is included here—and the true. As such, the good and the true can impose, and sometimes must impose, legitimate and necessary limits to human freedom. Moreover, since the perfection of the individual cannot be divorced from the perfection of his or her community, the individual may have to surrender some personal autonomy in charity and in justice in order to protect the common good that allows the individual to achieve his or her own personal good. Within this framework, the minor and reasonable infringement on absolute human autonomy associated with a system of mandated choice can be justified by appealing to the common good that would be promoted with the increase in the number of transplantable organs that would result. A similar argument has been used to justify mandatory, and even forced, immunizations during epidemics.

Second, some have argued that mandated choice undermines the important role that the donor's family should have in organ donation, by eliminating the need to

¹⁶Mandated choice has been endorsed by the American Medical Association and the United Network of Organ Sharing but has been rejected by the British Medical Association. See American Medical Association Council on Ethical and Judicial Affairs, "Strategies for Cadaveric Organ Procurement;" J. M. Dennis et al., *An Evaluation of the Ethics of Presumed Consent and a Proposal Based on Required Response: A Report of the Presumed Consent Subcommittee of the United Network for Organ Sharing Ethics Committee* (Washington, D.C.: UNOS, 1993); and British Medical Association, *Organ Donation in the 21st Century: Time for a Consolidated Approach* (London: BMA, 2000).

¹⁷For a representative example of this objection, see J. Protas, "Mandated Choice for Organ Donation," letter, *Journal of the American Medical Association* 274 (1995): 942–943.

¹⁸John Paul II, *Veritatis splendor*, nn. 84–87.

obtain a family's approval for organ procurement.¹⁹ In response, as Aaron Spital has pointed out, the concern that most families would not tolerate being excluded from the final consent process is not well substantiated, since numerous surveys suggest that most people in the United States believe that individual autonomy should be respected with regard to organ donation after death.²⁰ In fact, Spital suggests that mandated choice is kinder to families than our present system because it eliminates the need for devastated families to confront the emotionally wrenching issue of organ donation during their most trying moments. Finally, the objection presupposes that an individual's decision to donate organs is made in complete isolation. Each person should discuss his or her decision to donate or not to donate with loved ones in the same way that the person should discuss his or her wishes with regard to end-of-life care and funeral plans. This way, an individual's family is not left in the dark with regards to the person's desires at the end of his or her life.

Finally, others have argued that mandated choice would actually lead to a decrease in the number of organs made available for transplantation. In testimony to the President's Council on Bioethics on possible policy proposals regarding organ procurement, Professor James F. Childress said,

I think there are good reasons here to think that if we instituted mandated choice at this time, we would actually reduce the number of organs from deceased donors for transplantation. Now part of that argument is that if you ask why people do not currently sign donor cards, some of those reasons have to do with inertia, with not having thought about it, but some of them just have to do with trust and mistrust of the system. Insofar as those reasons are present, to force individuals to make a choice where they're worried about that sort of thing will tend to lead them to say no. If they say no, they block familial decision making even though they might not have objected to the family making the decision. So it becomes a block in terms of what might happen later and in our current context, it's not at all clear that this would be an effective way.²¹

In other words, Childress suggests that mandated choice would force individuals to choose not to donate their organs because it would force them to confront their anxieties regarding organ transplantation.

In response, this objection presupposes that mandated choice would be introduced without any societal preparation. As Susan Herz explains well, the implementation of a system of mandated choice has to be preceded by a broad-based, ongoing educational campaign that confronts the public not only with the stark realities of the organ shortage but also with the great good of organ donation.²² Such an educational program would allow every citizen not only to ask questions regarding organ

¹⁹For a representative example of this objection, see Ann C. Klassen and David K. Klassen, "Who Are the Donors in Organ Donation? The Family's Perspective in Mandated Choice," *Annals of Internal Medicine* 125.1 (July 1, 1996): 70–73.

²⁰Spital, "Mandated Choice," 68.

²¹President's Council on Bioethics, "Organ Transplantation and Procurement: Policy Proposals," June 22, 2006, session 4, <http://bioethics.gov/transcripts/june06/session4.html>.

²²Herz, "Two Steps," 341–342.

donation but also to get them answered in a manner that should calm most concerns and anxieties. This would, it is hoped, permit more individuals to choose the path of fraternal love and donate when they are mandated to make a choice regarding organ donation. Significantly, Pope John Paul II has encouraged such efforts to promote organ donation: “There is a need to instill in people’s hearts, especially in the hearts of the young, a genuine and deep appreciation of the need for brotherly love, a love that can find expression in the decision to become an organ donor.”²³

In summary, the dearth of transplantable organs has prompted physicians, ethicists, and others to propose innovative systems of organ procurement. In this brief essay, I have argued that the Catholic moral tradition cannot endorse presumed consent because it would undermine the dignity of the organ donor as a charitable gift giver and of the donated organ as a gift. Therefore, individual Catholics and Catholic institutions, especially hospitals, must reject presumed consent and not cooperate with this unjust and immoral system of organ procurement. Instead, a system of mandated choice may be able to accomplish the goals of the proposed system of presumed consent while still remaining faithful to the donation model for organ procurement.

²³John Paul II, Address to the Eighteenth International Congress of the Transplantation Society (August 29, 2000), n. 8, reprinted in *National Catholic Bioethics Quarterly* 1.1 (Spring 2001): 92.