

Organ Donation: Opt in or Opt out?

by Tracy Pfeiffer

With great advances in the science of organ transplantation, many lives can be saved from conditions that would have otherwise been considered fatal. Living donors can donate entire kidneys and portions of other regenerative organs such as the liver, lung, intestine, and pancreas. Full portions of these organs as well as others such as the heart, bone, cornea, and tendons can be harvested from donors shortly after they are declared dead. Unfortunately, there are not enough donors to meet the demand for these organs. Each month in the United States, about 3,700 individuals in need of donated organs are placed on an organ waiting list.¹ Currently, there are over 92,000 people on the organ waiting list.² An estimated 18 people die each day waiting for transplants because of the shortage of donated organs.³

In the United States, the most common way that people can become organ donors is by declaring that they want to be one when they obtain their driver's licenses. When a person makes this declaration, her driver's license will have a symbol printed on it that reflects her status as an organ donor. A person can also become a donor by notifying her family and/or her doctor that she wishes to be an organ donor. This election is completely voluntary, and in practice can even be overturned by family members after the death of the individual.

People choose not to become organ donors for many reasons. Some are afraid that medical professionals will not work as hard to save their lives if they are organ donors. This fear originates from the knowledge that there is such a serious organ shortage, making donated organs so valuable. Some people may disapprove of organ harvesting upon brain death. Although the law and medical standards are clear that a person is dead when their brain stops

functioning, there has been much debate over this concept among society at large in recent years. Today, life support technology can continue a person's respiration and circulation long after their brain stops functioning. Many people have trouble believing that a person is actually dead when they are still breathing and the blood is still circulating to the organs. For those people, the notion of harvesting one's organs while they are still on life support is particularly disturbing.

To address the shortage of organ donation, some European countries such as Spain, Belgium, and Austria have implemented an "opt-out" organ donation system. In the "opt-out" system, people are automatically considered to be organ donors unless they officially declare that they do not wish to be donors. This system comes in two forms: hard and soft.⁴ In the soft system, which is used in Spain and France, even if a person has not opted out of donation, her family may refuse donation of her organs after her death.⁵ In the hard system, which is used in Austria, relatives of a presumed donor have absolutely no right to refuse consent to donation.⁶ The "opt-out" system has resulted in an overall increase in organ donation with the highest donation rate being in Austria where the number of kidney transplants performed was nearly equal to the number of people on the waiting list.⁷

In 2005, the American Medical Association (AMA) Council on Ethical and Judicial Affairs issued a statement addressing the proposal of a presumed consent program in the United States.⁸ The opinion stated that a presumed consent system would only be ethical if (1) individuals were aware of the presumption, (2) accessible and effective mechanisms were established for documenting an individual's decision to opt-out, and (3) physicians verified that the deceased did not object to donation either in documentation or to the individual's family.⁹ The Council stopped short of endorsing a presumed consent program, and instead encouraged physicians to implement pilot studies of the effects of an opt-out system.¹⁰ The opinion

concluded that a presumed consent system should not be widely implemented unless these pilot studies indicated a significant increase in organ donation as a result of the system.¹¹

The problem with the AMA's recommendation is that it merely makes a suggestion that physicians implement such investigative pilot programs. There is no strong incentive or guidance for physicians to conduct these programs. With such a lack of encouragement and structure, it is unlikely that these pilot programs will be implemented. In addition to the AMA taking a stronger position on the consideration of "opt-out" programs, the federal government should also become more involved in exploring this option. This way, physicians can be assured that the government will back them in investigating the effects of presumed consent and that they will not face legal punishment. In addition, Congress will have full access to the results of these studies and can take them into consideration when deciding whether to write new legislation regarding organ donation.

The European experience with presumed consent has, so far, proven to be successful at increasing donor rates and should not be disregarded by the American legislature. Each day that the United States fails to seriously consider an "opt-out" organ donation system, the country loses 18 human lives that could be saved. This is too great of a risk to justify stalling in this process.

For more information, see:

- Gail Van Norman, *Organ Donation a Personal Decision*, Seattle Post-Intelligencer, March 20, 2007, available at http://seattlepi.nwsourc.com/opinion/308302_organ21.html (last visited October 30, 2007).

- Eric J. Johnson, *Do Defaults Save Lives?*, 302 Science, no. 5649 at 1338, available at <http://www.sciencemag.org/cgi/content/summary/302/5649/1338> (last visited October 30, 2007).
- American Kidney Fund, *American Kidney Fund Position on Methods to Increase Cadaveric Organ Donation*, available at http://www.kidneyfund.org/pl_cadaveric_organ.asp (last visited October 30, 2007).

¹ Womenshealth.gov, *Organ Donation and Transplantation*, available at http://www.4woman.gov/faq/organ_donation.htm (last visited October 30, 2007).

² *Id.*

³ *Id.*

⁴ BBC Health, *Organ Donation: Fact Files*, available at http://www.bbc.co.uk/health/donation/factfilesod_comparisons.shtml (last visited October 30, 2007).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ American Medical Association, Council on Ethical and Judicial Affairs, Opinion 4-I-05, available at http://www.ama-assn.org/ama1/pub/upload/mm/369/ceja_opinion_2_155.pdf (last visited October 30, 2007).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*