

# What's not wrong with conditional organ donation?

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*J Med Ethics* 2003;29:163–164

In a well known British case, the relatives of a dead man consented to the use of his organs for transplant on the condition that they were transplanted only into white people. The British government condemned the acceptance of racist offers and the panel they set up to report on the case condemned all conditional offers of donation. The panel appealed to a principle of altruism and meeting the greatest need. This paper criticises their reasoning. The panel's argument does not show that conditional donation is always wrong and anyway overlooks a crucial distinction between making an offer and accepting it. But even the most charitable reinterpretation of the panel's argument does not reject selective acceptance of conditional offers. The panel's reasoning has no merit.

In a well known British case in 1998, the relatives of a dead man consented to the use of his organs for transplant on the condition that they were transplanted only into white people. There was no clear policy for dealing with this offer, and officials and doctors in effect accepted it. In the resulting outcry, the British government and the panel it set up to report on the case condemned the acceptance of not only racist conditions but any conditional offers of donation. Their recommendations have become National Health Service (NHS) policy. The purpose of this paper is to criticise the panel's reasons.<sup>1</sup>

In the British case, the organs (two kidneys and a liver) (i) saved at least one life (the recipient of the liver) that would otherwise not have been saved and (ii) as it happened went to those who would have received them had the offer been unconditional. Nonetheless, the panel held that acceptance of the offer was wrong *even given those facts*. They said: "to attach any condition to a donation is unacceptable, because it offends against the fundamental principle that organs are donated altruistically and should go to patients in the greatest need".<sup>2</sup>

Is it really so bad to attach a condition to an organ donation? Of course it was bad in the case of the racist. The motive there was some mix of hatred and contempt and there is nothing to be said for it. But what about the condition that an organ go to a relative? There seems nothing morally wrong about agreeing to donate a kidney, say, on condition that it go to a sibling, whether the donation is to be from a living person or a dead one. A special concern for one's nearest and dearest is, on all but the most extreme views, at least morally permissible and often obligatory. Note here that we are considering the moral assessment of the donor's behaviour and not the decision by the transplant services to accept or reject the offer. This vital distinction—which is overlooked by the panel—is something I shall come to later.

Setting aside a special concern for one's nearest and dearest, let us consider the panel's explanation of what is wrong with attaching a condition to a donation. The panel claims that conditional donation "offends against the fundamental principle that organs are donated altruistically and should go to patients in the greatest need". Altruism in its normal sense

refers roughly to a non-self interested concern for the interests of others. Importantly, a wide variety of other regarding motives can be described as altruistic, such as a special concern for children, or the deaf, or the poor. "Altruism" does not have a specific application. It does not require—for example, that actions be motivated out of adherence to a greatest happiness principle or, saliently here, a greatest needs principle. Consequently, there need be nothing non-altruistic about conditional donation. Wanting organs to go to a child—although also apparently opposed by the panel—is not a violation of altruism any more than donating to a children's charity is.<sup>3</sup> Racial conditions can be altruistic if, for instance, the donor wants the organs to go to groups (say blacks in the US, or Maori and Pacific Islanders in New Zealand) that typically do relatively badly in receiving organs. It is not obvious that even the racist condition in the present case violates the rule that organs should be given altruistically; rather it looks like a mix of altruism towards whites and nastiness to non-whites.

If conditional donation cannot be condemned as invariably a failure of altruism, can it be condemned as a failure to donate according to the greatest need? It is unclear why people would be obliged, if they choose to donate, to donate according to the greatest need. To say that they are is both to deny donors any moral discretion in their donation and to hold that it is the greatest need, and not some other worthy goal, such as helping underrepresented groups, that is the only permissible aim. Perhaps this view about discretion and need is correct, although few apply it elsewhere, for instance to the conditions attached by those who make wills. But it is not defended in any way by the panel.

Bear in mind again that at this stage we have only been talking about the moral assessment of the donor. It is an entirely separate question whether a conditional donation should be accepted, even if the donor does no wrong in attaching the condition *or even if he or she does*. There is a crucial distinction between *attaching* a condition to an offer and *accepting* it. Because the panel's argument deals only with attaching conditions, this distinction makes the panel's reasoning, on the face of it, irrelevant to the question it considers, which is whether the offers should be accepted.

*Attaching* a condition might be "unacceptable", but that does not yet give us a reason against *accepting* the offer. Perhaps the panel believes an offer that is itself wrong should not be accepted. As a general principle, that cannot possibly be correct. There must be some offers that should be accepted if they do a great deal of good even if the motives are slightly discreditable. If I offer money to Oxfam in order to spite my wife, it would be preposterous for Oxfam to be morally required to turn down money that would save lives on the grounds that I should have given the money unconditionally and my offer was a morally bad one. But although the general principle is unsound, perhaps we can draw something relevant from the panel's claim that would morally forbid accepting conditional offers in the specific context of transplantation.

What is surely doing the work in the panel's argument is the appeal to greatest needs. Accepting a conditional donation might (but might not) prevent the system allocating according

to the greatest need. The counterargument here is that when we think about the principle of allocating according to greatest need, it cannot be understood as a fundamental principle and when its foundations are explored, there can be no unequivocal condemnation of accepting conditional donations.

The principle of allocating according to needs cannot be fundamental if it is taken to be a prescription for action. It has instead to be inferred from a principle such as: "it is important that needs are met". Suppose that trying to meet needs by a direct method caused needs to be less well met than by some indirect method. Then the indirect method should be chosen. This is not only not a hairsplitting point, it is of great significance in other fields, such as economics. The most famous defence of a market allocation of goods appeals to its superiority in providing them to any direct method, such as state allocation. That is why, for instance, the vital need for food is largely met through the market. Even those who think the market does not do as well as some alternative do not to dispute the idea here which is that, if it did, it should be preferred by a needs principle to trying to meet needs directly.

The application to conditional donation is straightforward. Since the panel's argument is supposed to rule out conditional donation whatever its effects, it begs no question to consider a case where acceptance of the condition causes some organs to become available that otherwise would not, and reduces access to organs for no one. Suppose that if the condition is accepted, the organs would not go to the person in greatest need but to someone who needs them less (but still needs them badly). The principle of allocating according to greatest need would condemn this. But the idea that needs should be met that underlies the principle would require accepting it. This is because whether or not the offer is accepted, the person with the greatest need would not receive those organs, but accepting the offer allows someone's needs to be met while refusing it meets no one's need for organs. A principle of meeting needs should then say that the offer should be accepted, no matter how important it is to meet the greatest need. The conclusion that the offer should be accepted goes through even more strongly if it is the person in greatest need who gets the organs, as the panel says happened in the case of the British racist.

Note that my arguments here have not been that a needs principle is outweighed by others. It is that whatever underlies a concern for needs merely contingently supports the principle that one should act so as to meet the greatest need, and that conditional donation cannot be categorically rejected out of a concern that needs be met.

What remains of the panel's argument? Here is one way to take their argument: it is wrong to accept organs if one would then be in the position of not being free to allocate them to the person in greatest need. That principle needs much more

elaboration and defence than can be wrung out of the panel's report, especially since its effect could be to cause some to die with no gain to anyone else. Even if the principle is sound, it does not support the unconditional rejection of conditional donation, because it does not justify rejecting conditional offers that would lead to the organs going to those in greatest need anyway. Recall that in the British case the liver did go to someone in greatest need; acceptance of the offer thus did leave those involved free to allocate to the person in greatest need. (They must have been free or else they could not have done it.)<sup>4</sup> Moreover, what was an accident here could become policy. Conditional offers could be accepted on the understanding that the organs would only be used when satisfying the condition coincided with allocating to the person in greatest need.

This paper has tried to show that the panel's arguments against conditional donation, or acceptance, have no merit. There are other arguments. A proper discussion of these would take much longer, but let us here close with one often mentioned and which may have been in the back of the mind of the panel (although they did not mention it). This is the objection that a policy of accepting conditional donation could have net bad effects on the supply of organs, perhaps because some refuse to donate in a system they see as compromised, perhaps because some attach conditions they would not otherwise have done. This objection, and particularly the criterion of "net bad effects" needs spelling out, but here are two preliminary replies. First, the objection speculates about the effects, and we might counterspeculate that people would not respond to the policy as predicted, especially if they do not find out about it. The second reply is about the role of speculation. In the present case, at least one life was saved for certain. When it comes to certainties of saving lives, there needs to be more on the other side than mere speculation. Why not try the policy of accepting conditional donations, get the benefits, and then think about discontinuing if the harms materialise?

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Accepted for publication 25 March 2003

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- 2 **See reference 1: 25 (emphasis added)**.
- 3 **See reference 1: 10**.
- 4 **Cohen GA**. Are disadvantaged workers who take hazardous jobs forced to take hazardous jobs? *History, labour, and freedom*. Oxford: Clarendon Press, 1988.