

# Does It Matter How We Die? Ethical and Legal Issues Raised by Combining Euthanasia and Organ Transplantation

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## Abstract

Ethics consultants, clinical ethicists, clinical and research ethics committees, and ethics research are ubiquitous in healthcare institutions, universities and government.

**Keywords** [Brain death](#), [Bioethics](#), [Ethical](#), [Legal issues](#), [Euthanasia](#), [Organ transplantation](#)

## Emerging Ethical Issues

Organ transplantation has always been a harbinger of emerging issues in bioethics. From the mid-1950s through to the 1970s, with the first kidney transplants and then

the first heart transplant, we faced at-the-time unprecedented ethical and legal issues: How should we decide who should receive a kidney when this was a very scarce medical resource? Was taking a heart for transplant murder? When was a person dead? Could death be defined? What constituted informed consent to organ donation and to being a transplant recipient? When did a transplant procedure move from being medical research to being accepted medical practice? Indeed, the ethical and legal issues we faced in the early days of organ transplantation are now often regarded as the birth of bioethics as we know that area of academic research and professional practice today.

In the last two decades, we have seen the spread of legalized physician-assisted suicide and euthanasia (PAS-E). Around 2010, discussion started to appear in the ethics literature about ethical and legal issues raised in recovering organs for transplantation from people *after* their deaths by euthanasia. Like some others, I first expressed disbelief that this could be happening and then experienced shock when the reports proved to be true—a few cases of this occurring were reported in the medical literature. The question was: should people who are given permission to access legal physician-assisted suicide or euthanasia be allowed to consent prior to committing suicide or being euthanized to their organs being taken *after* death for transplantation? By 2019, this possibility was such a live issue in Canada, which had legalized PAS-E in 2016, that the Canadian Blood Services—which manages organ recovery for transplantation—in cooperation with other Canadian organizations involved in organ transplantation issued guidelines governing it ([Downar et al. 2019](#)). But discussion of the issues raised by combining organ transplantation and euthanasia has not stopped there.

Very recently, it's been extended to the ethical and legal considerations relevant to euthanasia carried out through the removal of vital organs before death, that is, euthanasia *by* recovery of organs for transplant. "Imminent Death Donation" is also being discussed. Its proponents propose that mentally competent patients on life support treatment should be allowed to consent, under the rules governing live organ donors, to removal of their organs for transplant before the withdrawal of life-support treatment to allow them to die ([Lee, Potluri, and Reese 2018](#)). This would not involve the removal of vital organs but could well be a step toward accepting euthanasia *by* organ donation. (I will consider only euthanasia, not physician-assisted suicide, in

the rest of this article as that is the main focus of the discussion of the issue that I am addressing, namely, intentionally inflicting death—*euthanasia*—*by organ donation*.)

## What Issues Does Death by Donation Raise?

If we agree with obtaining organs for transplant from euthanized people, must their organs be taken only *after death* or should *euthanasia* be allowed to be performed *by removal* of vital organs? Asked another way, if we agree with “Donation after Death” why not “Death by Donation”? Both procedures involve, in the words of Vanderbilt University Intensive Care specialist Dr. Wes Ely, “a collision of the ethics of organ transplantation and the ethics of physician-assisted suicide and euthanasia” (Ely 2019, Personal communication).

It’s a truism, but no less important for being such, that good facts are essential for good ethics: a central fact in considering the ethics of a combination of organ transplantation and euthanasia is the huge unmet need for more organs for transplantation. That raises the question, how can we ethically and legally fulfill that need?

If euthanasia is not legal, the need cannot be met through euthanasia.

If euthanasia is legal (as in the Benelux countries, Canada, and now the state of Victoria, Australia), should a patient approved for euthanasia be able to request to donate their organs *after death*? If so, should a patient approved for euthanasia be able to request that instead of retrieving their organs after a lethal injection, they would be given a general anesthetic and, with their circulation functioning, death inflicted by removing their organs to ensure that they are in the freshest and most viable state for transplant, that is, “death by donation”? This possibility has echoes of Kazuo Ishiguro’s science fiction novel, *Never Let Me Go*, in which wealthy people were cloned and years later the young men and women clones were used as sources of replacement organs. When a vital organ such as the heart was taken, killing the young person, they were said to have “completed” (Ishiguro 2006). The Dutch are currently discussing whether euthanasia should be made available to people who feel that they have a “completed life.” Might they be candidates for euthanasia *by organ donation*?

## The Dead-Donor Rule

The *dead-donor rule*, a law forbidding removal of vital organs until after death, is clearly breached by euthanasia *by donation*. Removal of organs before death is culpable homicide—murder or manslaughter and almost certainly the former. This of course begs the vexed question in organ transplantation of when a person can be declared dead.

The concept of “brain death” is not uniformly defined. This can matter with respect to the time at which vital organs may be taken for transplant. For instance, the definition adopted by the [Canadian Blood Services and the World Health Organization \(2012\)](#) states that brain death is “the irreversible loss of the *capacity for consciousness* combined with the irreversible loss of all brain stem functions, including the capacity to breathe autonomously” (emphasis added). The American Uniform Determination of Death Act (1993, [1997](#)), for example, differs in an important respect. It speaks of “irreversible cessation of *all functions of the entire brain*, including the brain stem” (emphasis added), not just of “the irreversible loss of the capacity for consciousness combined with the irreversible loss of all brain stem functions.” The evidence considered necessary and sufficient to fulfill the requirements of the concept of brain death could differ between these two definitions. Whether death had occurred might be put in question by, for instance, very recent research showing that there is still some function in pigs’ brains four to ten hours after they have been decapitated ([Vrselja et al. 2019](#)). Might the pigs be “brain dead” under the Canadian definition and alive under the American one?

The concept of brain death was developed expressly to allow the recovery of organs for transplant in as optimal physical state as possible after death. The alternative concept of circulatory death and “donation after circulatory death”, which defines death as the irreversible loss of function of the heart and lungs, has the same goal. However, whether death is natural or whether it results from euthanasia, the *dead donor rule* means the organs must undergo a period without blood flow before being harvested, which means they are not in their optimal state.

This is why three North American healthcare professionals have argued recently that it might be ethically preferable to ignore the dead-donor rule if patients want to die by euthanasia and to donate their organs. In a paper published in the *New England Journal of Medicine*, the authors propose that allowing consent to “death by donation” can give these people a “why to die” and thereby give them a sense of

meaning about their deaths ([Ball, Sibbald, and Truog 2018](#)). This proposed justification inverts German philosopher Frederic Nietzsche's famous statement, "If a man has a '*why*' to live, he can get by with almost any 'how,'" to "If a man has a '*why*' to die, he can get by with almost any 'how.'" Feeling that life has no meaning and asking for euthanasia are both factors associated with loss of the will to live, which is often manifested as demoralization ([Kissane 2014](#)) or experiencing hopelessness—the person believes that he or she have nothing to look forward to, no sense of a connection to any future ([Chochinov 2012](#), 18–19). For these people feeling that death by euthanasia does have meaning could reinforce their desire for euthanasia.

The "Trillium Gift of Life Network" in Ontario promotes organ donation and transplantation. In September 2018, it released a forty-four-page report, "Organ and Tissue Donation Following Medical Assistance in Dying: Program Development Toolkit." It was clearly contemplating a connection between euthanasia (in Canadian law, called Medical Assistance in Dying) and organ donation ([Trillium Gift of Life Network 2018](#)), which has been further developed in the subsequent guidelines referred to above ([Downar et al. 2019](#)). The question is whether that connection might be expanded to include euthanasia *by* organ donation.

## Human Being versus Personhood

How the philosophical and legal concept of personhood is defined ([Somerville 2015](#), 87–116) could be relevant to euthanasia *by* donation. Death of a *human being* can be contrasted with death of a *person*. Depending on one's definition of personhood, these may or may not occur simultaneously.

If the concepts of human being and person mean the same, that is, one is a person simply because one is human, then both concepts will give the same result regarding when death occurs. But if personhood depends on fulfilling certain criteria beyond simply being human, as, for example, philosopher Professor [Peter Singer \(2006](#), 83–109) proposes, then failure to fulfill those criteria might mean that death of the person could precede death of the human being. In short, personhood could be lost and the person declared dead, while the human being was still alive. If loss of personhood were seen as sufficient justification to allow the person to be declared dead, it might be argued that euthanasia *by* organ removal is justified because the donor is already dead. The paradox here would be that if the donor were already

dead removing their vital organs does not kill them and, therefore, is not euthanasia. What the “dead donor rule,” as currently interpreted, makes clear is that, ethically and legally, we require the *human being* to be dead, not just the *person*, if that designation requires more than just being human, before vital organs are removed.

The concept of human dignity and what respect for this requires would also be impacted by euthanasia by organ removal. There are two very different definitions of the concept. One is that dignity is intrinsic to being human, so all *human beings*—whether or not we regard them as persons—have it and it cannot be lost. The other definition of the concept is that only *persons* have dignity that must be respected and personhood depends on fulfilling certain criteria, so failure to fulfill those criteria means a loss of personhood and, with that, loss of the protections respect for human dignity provides ([Somerville 2015](#), 87–116).

If human beings have dignity that requires respect simply because they are human and that respect includes respect for their lives, then euthanasia by organ donation would breach that dignity because they are still a living human being at the time the organs are taken. On the other hand, if only *persons* have dignity which must be respected, then loss of personhood means a loss of dignity and of the protections and respect, such as respect for life, that respect for dignity requires. This loss of human dignity could be used to ground an argument that euthanasia by organ removal does not contravene human dignity and is therefore justified, even if the loss of personhood is not equated to death. Such an approach would also affirm a personhood-based definition of dignity for use more generally, which portends a dangerous and potentially far-reaching precedent.

## Involvement in Euthanasia

Both ethics and the law recognize doctrines of complicity, that is, obligations not to participate or cooperate in unethical or unlawful acts or omissions and liability for doing so. For instance, the law provides for criminal liability for being a “party to an offense.” If, although legal, we reject euthanasia as ethically unacceptable ([Somerville 2006a](#)) or not valid medical treatment ([Boudreau and Somerville 2013](#)) or not an authentic element of palliative care, we should not be involved in transplants related to euthanasia. But what constitutes such involvement?

Healthcare professionals retrieving organs from euthanized people, whether retrieval takes place *after* euthanasia or whether euthanasia is caused *by* removal of organs, are clearly “involved.” But what about the medical team that transplants the organs to recipients? If they regard euthanasia as unethical, whether in all circumstances or just when it is carried out by removal of vital organs, should they refuse to use the organs from euthanized donors? What are the parameters of the right of conscientious objection of the transplant team to using organs procured in association with euthanasia? What if their refusal to transplant such organs meant a potential recipient would almost certainly die before another organ became available?

## Impact on Informed Consent of Connecting Euthanasia and Organ Transplantation

And what would be the impact on informed consent of the connection of euthanasia with organ harvesting? It is possible that a link between organ donation and euthanasia would function as coercion, duress, or undue influence invalidating consent to euthanasia. It could also be a barrier to the person’s changing their mind about wanting euthanasia. Such freedom is also a requirement for a valid consent to euthanasia.

Should organ recipients be told the organs came from a person who was euthanized? Might that be required to obtain their informed consent to the transplant? Certainly disclosure that an organ is infected with a virus, for example, with Hepatitis C virus, is required. Is a connection with euthanasia a “defect” with respect to the organ which must also be disclosed? Might a person receiving an organ from a euthanized donor suffer psychological harm when they later learn of the organ’s source?

## Healthcare Professionals’ Conflicts of Interest

Serious risks of conflicts of interest for healthcare professionals also exist in combining euthanasia and organ donation. Conflicts of interest are not just present if, because of competing interests, there is a failure to give priority to a primary obligation in practice. Conflicts of interest are present when a healthcare professional has conflicting duties. In the scenarios we have been considering, there are obligations both to organ donors who will be euthanized and to organ recipients.

This means healthcare professionals have conflicts of interest whether or not any wrongful action takes place. What safeguards would be needed to protect patients whose physicians face such conflicts? Would these safeguards be effective? Current evidence makes that very doubtful.

For example, reporting of euthanasia deaths is a standard safeguard in jurisdictions where euthanasia is legalized. But up to 40 percent of the deaths in the Netherlands carried out by euthanasia may not be reported ([Onwuteaka–Philipsen et al. 2005](#)). Would recovering organs for transplant in association with euthanasia place the most vulnerable people at even greater risk? In 2013, 27 percent of deaths attributed to euthanasia in Flanders, Belgium, resulted from involuntary euthanasia of vulnerable people who were incompetent and unable to consent to euthanasia ([Chambaere et al. 2015](#)).

## Why Might Some People Who Agree with Euthanasia Find “Death by Donation” Ethically Unacceptable?

The question I want to address now is why some people who agree with euthanasia and even organ “donation after death” by euthanasia find “death by donation” ethically unacceptable?

### Impact on Human Dignity

Might the reason be that, as discussed above, “death by donation” overtly and directly offends human dignity? Respecting dignity requires, as philosopher Emmanuel Kant contended, that we see and treat people as an end in themselves, as having inestimable intrinsic value just because they exist and are human; we must not treat them simply as a means to be used for some other purpose, even if that purpose is to benefit others ([Kant 2007](#), 90). In euthanasia *by* donation, the person is overtly employed for a further purpose, even more so than in organ donation *after* euthanasia.

But might a person donating organs *after* or *by* euthanasia experience a feeling of greater dignity from doing so, because they are helping others through their death? Research shows that feelings of loss of dignity and feeling a burden on others are major reasons for requesting euthanasia ([Chochinov 2012](#), 5–8). Might people donating organs *after* or *by* euthanasia also see themselves as less burdensome



and, as a consequence, having more dignity? But, surely, it is to be hoped that we are not such a morally impoverished society that the only way a terminally ill person could avoid feeling a burden on others is to have themselves killed in a “useful way”?

A patient might also feel that saving another person’s life makes them a hero. It might help them to believe that their death has meaning. They might even feel that they are leaving a legacy for the future—people can die more peacefully, have a “better death,” if they can feel that that they will not be forgotten, that they are leaving something that, in the future, when they are no longer present, will represent them to others ([Chochinov 2012](#)). They might even imagine that they continue to exist in some form through their organ donation.

## Increased Loss of Respect for Human Life

Or might some people who agree with euthanasia find “death by donation” ethically unacceptable because it involves an additional loss of respect for human life beyond the loss caused by PAS-E? But if being able to consent to euthanasia *by* donation respects a person’s right to autonomy and right to control his or her own body and life, as is argued for justification of PAS-E in general, and respecting these rights takes priority over maintaining respect for life, why would those rights not extend to death *by* organ donation? A common justification for euthanasia is that a patient is “going to die anyway.” Why, then, would those who accept this justification not also accept that those people being euthanized who give informed consent to organ donation may die in the “most useful” way for others, that is, through euthanasia *by* removal of organs?

Is the issue we are considering not *if we die*—we all will—but that *how we die* matters? Advocates of legalizing euthanasia and those who oppose it all agree that we have a responsibility to relieve pain and suffering. Where we differ is setting the ethical limits on how we may do that. Those who reject euthanasia as unethical, see a difference in kind, not just in degree, between killing the pain and suffering and killing the person with the pain and suffering ([Somerville 2006a](#), 218–30).

## The Wisdom of Repugnance

If people who accept that euthanasia is ethical reject euthanasia *by* organ donation as unethical, might they need to reconsider whether their judgment that euthanasia

is ethical is correct? Sometimes, further developments of actions we initially saw as ethical can cause us to change our minds.

Are those who agree with euthanasia but oppose death *by* organ retrieval, being warned by their moral intuitions ([Somerville 2006b](#))? Are they experiencing what physician-ethicist [Dr. Leon Kass \(1998\)](#) called the “wisdom of repugnance”? This is sometimes described as the ethical “yuck factor.” We hear of some intervention or conduct we haven’t heard of before and our immediate reaction is “Yuck, that’s unethical,” without knowing precisely at the time why we think and feel that. Sometimes, however, as we become more familiar with such interventions, our repugnance diminishes. We come to see the intervention as ethically neutral and, later on, even as ethical. We need to ensure that any such progression can be justified and does not wrongly lead us into unethical conduct.

It is quite possible that connecting organ donation with euthanasia will encourage people to choose euthanasia rather than natural death or encourage them to choose euthanasia rather than physician-assisted suicide. It might promote legalizing euthanasia in jurisdictions where it is illegal, but physician-assisted suicide has been legalized and its extension to euthanasia is proposed by euthanasia advocates and that extension is opposed.

Might euthanasia *by* organ donation be opposed, because even more than donation *after* euthanasia, it so obviously detracts from the claim that euthanasia is used solely for the benefit of the person euthanized? The starkest example in this regard would be if euthanasia of newborn babies with disabilities, under the Groningen protocol in the Netherlands, were to be carried out *by* organ removal. The justification would be a desire to “do good” as there is an even greater shortage of organs for transplant to babies than of organs for adults. We should keep in mind the old saying “Nowhere are human rights more threatened than when we act purporting to do only good.” The good we seek blinds us to the risks and harms unavoidably involved.

Additional benefits to others, including society itself, in the form of cost saving could also be a factor promoting euthanasia *by* organ removal. It’s estimated that euthanasia, in itself, will save, for instance, the Canadian healthcare system up to C\$139 million a year ([Trachtenberg and Manns 2017](#)). This might increase if organ

recovery for transplants *after* euthanasia were normalized or euthanasia *by* organ donation were allowed. The lifetime costs of transplants are far less than alternative treatments such as dialysis.

## Conclusion

In conclusion, I want to leave readers with two very important questions: What would legalizing a practice of euthanasia *by* organ donation do to the ethos and ethics of medicine? In the early 1970s when, as a law student, I was researching legal and ethical issues raised by the advent of organ transplantation that we were witnessing, I spoke with a nurse who was involved in its being undertaken here in Australia. I have never forgotten her words: "I felt as if we were all hovering like vultures over the dying man waiting to take his organs." I still find horrible the image these words cause me to imagine to be. I fully acknowledge the immense benefits of organ transplantation, but we must not allow those benefits to blind us to the harms that we could do if we are not careful enough to ensure that we always act ethically.

And what would be the effect of combining euthanasia and organ transplantation on society, especially some of its most important fundamental shared values such as respect for human life both at the individual level of each person's life and in society in general? We fail to recognize how fragile these values are at our ethical peril.

It is only in respecting death that we ultimately respect life. Consequently, how we die matters because it is central to determining whether or not we respect life and that is central to setting the "ethical tone" of our society and establishing whether or not it is a civilized one. Therefore, a critical question in a context of legalized euthanasia is what does maintaining as much respect for death and life as possible in this context require that we not do? I propose that one such requirement should be that euthanasia is not linked in any way with organ transplantation.

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