The Dead Donor Rule and Means-End Reasoning

A Reply to Gardiner and Sparrow

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A response to ''Not Dead Yet: Controlled Non-Heart-Beating Organ Donation, Consent, and the Dead Donor Rule'' by Dale Gardiner and Robert Sparrow (*CQ* 19(1))

Organ donation remains an important therapeutic option for many people today. A successful organ transplant usually has the effect of saving a life and significantly improving the quality of someone's life. Unfortunately, the demand for vital organs far exceeds the supply. In a typical year, an estimated 4,500 people die while on a waiting list for an organ transplant. Many of these deaths are attributable to the very organ for which they were listed failing. Clearly, saving lives is a value, and expanding the supply of organs would be a step toward saving more lives. To this end, proposals to include patients who satisfy so-called cardiac death have been endorsed. Donation after cardiac death (DCD) has served as an important source of vital organs and has given patients who want to donate but will likely not suffer from brain death an opportunity to donate their organs. In this article, I wish to address a key ethical concern regarding DCD raised by Dale Gardiner and Robert Sparrow.[1] Gardiner and Sparrow provide an interesting and insightful argument to the effect that premortem procedures as typically used in DCD protocols violate a *proper* understanding of the dead donor rule (DDR). I argue here that their argument does not support the conclusion that DCD violates the DDR, but they have pointed out that any adequate understanding of the DDR must include what I refer to as a respect condition: the donor himself must be respected at every point during the donation process.

Gardiner and Sparrow rightly point out that the DDR must include not only a prohibition on killing but an instruction that the donor cannot be treated merely as a means. They say that the DDR must include

> a prohibition on *killing* and a prohibition on *using living patients* solely as a means to an end. This second component of the DDR, which should be understood as affirming the respect due to living persons by demanding that donors must be dead before their organs can be removed to advance the ends of others, is equally as important as the first.[2]

In arguing for this, the authors have us entertain an example in which the DDR is understood narrowly as only prohibiting killing the donor. To quote at length,

> With appropriate anesthesia, it would be possible to reduce warm ischemia even further by surgically exposing the organs to be salvaged before life support was withdrawn. As long as the patient's heart stopped beating as the result of life-sustaining treatment being

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> withdrawn rather than as a result of the preparations for donation, then this procedure would be compatible with an interpretation of the DDR that only prohibited killing the patient. Yet, it is clear that, in this scenario, we would be flagrantly violating the ordinary standards of ethical medical practice.[3]

The basic idea is that we can radically mistreat the donor, even if we do not do anything that kills her. Because the DDR is meant to protect mistreating the donor, it must be understood in a broader sense. But once we understand it in this broad sense, Gardiner and Sparrow believe that it becomes apparent that performing various premortem procedures on a typical DCD donor is using the donor solely as a means.

It is not obvious just exactly why DCD is not respectful of the donor, given all of the other procedures that could be done but are withheld until the donor has died. So, to see the fundamental problem Gardiner and Sparrow are adverting us to, consider the following reconstruction of their argument. Their first premise tells us what the DDR should include, namely,

1) The process of extracting organs from the donor should neither (a) kill the donor nor (b) use the living donor solely as a means to an end.

Let us say that condition (a) is the kill condition, and (b) is the respect condition. The second premise characterizes DCD emphasizing the usage of premortem procedures:

2) DCD involves premortem procedures that aim to preserve the viability of the target organ. (Such procedures include a blood draw for tissue matching, administration of heparin to prevent clots in the organ, and at some centers, insertion of a femoral cannula for in situ cooling.)

The conclusion Gardiner and Sparrow wish to reach is that DCD donors are used solely as a means and this therefore violates the respect condition of the DDR. But to get that conclusion, we need to import a suppressed premise, according to which,

> (Means) The use of typical premortem procedures on the donor involves using the donor solely as a means to an end.

We can now derive the conclusion

> DCD violates the DDR (and is therefore, immoral).

We need (Means) in order to ground the inference that DCD violates the DDR, specifically, the respect condition.

I venture to say that the only weak link in the argument is (Means). Abandoning the respect condition in organ procurement ethics is certainly counterintuitive. But in defending (Means) we need to know what it is to treat someone solely or merely as a means. For without a glimpse into what such acts look like, we cannot say whether doing a blood draw and administering heparin amounts to using the donor merely as a means. I do think there are considerations in this regard that render (Means) false, and therefore the argument is not sound.

By way of introducing my concerns, consider how ubiquitously we use other people as a means. John Laird writes,

> Anyone who serves his fellow-men, anyone who does himself a service is treating himself as a means, in the first instance for the benefit of others, in the second instance for his own benefit.

> Similarly, anyone who accepts the services of others (or accepts his own services) is treating them (or himself) as a means. Post a letter and you are using postmen and railway men as means just as clearly as you are using ink and paper and the pillar box as means. The whole relation of using and of being used, of helping (including self-helping) and of being helped is a relation of means. There is no conceivable social relation in which we would not have to use ourselves or our fellows as means.[4]

Any case of hiring someone to do work views the person as a means to the end of running the business. Seeing a comedian or entertainer effectively uses the entertainer as a means to one's own enjoyment or laughter. But none of this should be rendered immoral. Kant, the putative father of this moral principle, acknowledges this.[5] It is not apparent, then, that taking a blood draw and administering 300 ug of heparin per 30 kg of body weight amounts to using the donor solely as a means. It appears, rather, that this "use" of the donor is not different in degree or kind from our everyday uses of people that are not morally reprehensible. But this appearance may be merely an appearance. More can be said in that we have different accounts of what it is to treat someone merely as a means.

One account comes from Thomas Hill Jr., who writes, "One treats humanity simply as a means if and only if one treats it as a means *but not* as an end."[6] Using someone as a means, on this account, occurs when one acts either against the person understood as an end or in total disregard to the person *qua* end. This account requires, as is recognized explicitly by Hill, understanding what it is to treat someone as an end. Only then can we know what *not* treating one as an end looks like. Hill provides a rather complicated account. For our purposes, however, we can rely on an intuitive grasp of what it is to treat someone as an end without filling out the concept in exquisite detail. When we treat someone as an end, it appears what we are doing is that we have the person's own welfare in mind. We are not ignoring or entirely disregarding the person's welfare. A manager hires an employee to do work for the company. What prevents the manager from using the employee merely as a means is that the manager provides just compensation for the work rendered. Laird provides a similar analysis according to which not treating someone merely as a means requires "that you are treating anything—call it x—not merely as a means if you pay *any* regard whatsoever to x for its own sake."[7]

But there are problems here. Consider a slave owner who sees to it that the slaves under him are comfortable, well-fed, and enjoy socialization with others, including himself. Two concerns can be highlighted here. First, suppose the slave owner is doing this because treating other things well respects his own dignity or perfects himself in acquiring various virtues. For such a person, he could act beneficently toward the slaves under him and regard their welfare as good, but only because doing so respects his own dignity or serves to acquire a virtue. If the agent misconstrued virtue ethics in this way, he would be doing good things not for the good of another but to acquire a virtue—he wants to become perfect and grow in character. For such a person, every "good" action is really a means (i.e., solely a means) to the perfection of the virtuous agent. Seeking perfection can be inherently self-absorbed, self-reflexive. Every moral choice is seen in light of how it perfects oneself. Second, suppose the slave owner sees to it that the slaves are well-fed and comfortable, and so on, only because doing so enhances

slave productivity. So, even though the slave owner is looking after the slaves' welfare, it appears that he is still doing something wrong. He is regarding their welfare only insofar as it contributes to worker productivity. These two scenarios highlight that even if the agent regards another's welfare as important, he may still be doing something wrong, and intuitively, it is wrong because he would be using the other person solely as a means. The slaves' welfare is promoted, but merely as a means. In the first case, the good treatment is a means to respecting the slave owner's own dignity or to progressing in virtue, and in the second it is a means to obtaining wealth. In both cases, the slaves are treated well, and yet, merely as a means.

One may object and claim that I have not provided a counterexample to Laird's analysis, because that analysis requires paying regard to x for x's own sake. There seem to be two components built into this condition: a welfare condition and a for-its-own-sake condition. My previous examples only show that a welfare condition is probably insufficient. But if our actions can benefit x, objectively understood, and yet we treat x merely as a means, it appears that on Laird's account what makes one treat another merely as a means is a belief. What kind of belief would this be? What would its content be? Should we require only a dispositional belief with the content that x is intrinsically valuable? Or do we want to require an occurrent belief because we are giving an analysis of discrete actions?

Finding an account of what it is to treat someone merely as a means that is not too weak so as to let the slave owner off the hook but also not too strong so as to deliver the right judgments on our daily activities with others is certainly a difficult task. I definitely do not fault Gardiner and Sparrow for not covering such ground. Because of this ambiguity, however, the truth of (Means) cannot be determined adequately without some characterization of treating someone merely as a means. In saying this, I am only saying that (Means) is without any justification. I propose, however, that there are reasons against thinking it true, given a rudimentary understanding of what it is to treat someone as a means, paired with the empirical facts of typical premortem procedures.

The argument Gardiner and Sparrow give for (Means) appears to be based on the thought experiment involving premortem surgery (quoted previously). If such an action were performed, then the attitudes of the clinicians would manifestly be wrong and inconsistent with the respect condition of the DDR.[8] I fear, however, that there is a fallacious move here in that one cannot move from the attitudes that must inform premortem surgery to the attitudes that inform the much more modest premortem procedures that are actually done. In any case, more can be said in rejecting the plausibility of (Means) other than simply undercutting an argument for it.

Consider what is done to controlled DCD donors premortem. They already have an IV line or venous port through which one can administer the heparin and draw a vial of blood. Let us add to this the insertion of a femoral cannula. Has one, by these very actions, treated the donor merely as a means? On the criteria Gardiner and Sparrow give us, we may try to answer this question by asking what attitudes the physician must manifest in performing such procedures. It seems, though, that a malevolent description of the clinician does not emerge when we consider what is actually done. Consider, for example, what the clinician is not doing. She is not, for example, administering streptokinase, which is more effective than heparin in preventing coagulation but has lethal side effects

that are known.[9] She is not performing the surgery described previously. She is not, at least in this country, doing such things in the absence of explicit consent from a reliable surrogate or the donor himself through a reliable advance directive. She *is* waiting a length of time whereby those involved can become morally certain that the donor will not auto-resuscitate. What the clinician is and is not doing reflects a caution that one does not want to kill the donor, nor intentionally hasten his death, nor otherwise harm the donor. It appears that the very care taken to avoid killing or hastening the donor's death reflects recognition of the donor *qua* person and not the attitude informing the premortem surgery. If we ask the physician why she does not administer, say, 1,000 ug/30 kg of heparin, or streptokinase, or why she does not perform premortem surgery, she will tell us that it would harm the donor, if not kill him. The donor's welfare is kept in view throughout the donation process and presumably for his own sake, and this becomes clear when we ask the reasons for these premortem procedures and not others. Any reason given will be in terms of the donor's welfare, not the recipient's. I conclude that administering premortem procedures does not amount to using the donor solely as a means.

A slightly more interesting argument for (Means) could be developed by appeal to the very structure of practical reason informing the choice to administer typical premortem procedures. The basic idea is that when one sets out to obtain the end of saving this person's life and the only means chosen is transplantation, in particular, extracting this person's vital organs, then one is using the donor as a means to an end. Something like this idea is adumbrated by Gardiner and Sparrow, although I do not attribute the following argument to them. They say, "there is a certain amount of intellectual strain involved in thinking of premortem interventions in the care of a patient designed to facilitate NHBD [non-heart-beating organ donation] as motivated by a concern for the best interests of the *donor*. They are more naturally understood as driven by a concern for the best interests of potential organ recipients."[10] A riposte to this comment is to say that if the good of the donor were entirely ignored in the donation process, then why the extended wait times? Why not streptokinase premortem? Why not the premortem surgery envisioned in their thought experiment? Presumably, we have reasons against these actions that are derivative not of the recipient's welfare, but rather of the donor's welfare. I do think these quips have some bite, but there is more going on here.

The following principle seems to capture the line of thought I am presuming Gardiner and Sparrow are articulating:

> (P) If premortem procedures on a donor would not be done unless there exists a recipient to benefit from them, then if a donor receives these procedures, he is being used merely as a means.

On a quick read of (P), one may wonder how it can be true given the consequent as stated, that is, "merely as a means." For (P) seems to capture the uncontroversial thesis that when a rational agent chooses a means, it is, by definition, to obtain an end. Means are not means apart from an end in view. We do not have a reason, yet, for thinking that administering premortem procedures amount to using the donor merely as a means.

The argument for why (P) is true as stated is to consider what we would say of means that are chosen only because of a specific end. That is, imagine that means M' are chosen in all and

only those possible worlds W^k where the agent choosing M′ is rational and only chooses M′ in W^k in light of E. It follows that in every possible world in which M′ is chosen, it is *qua* means. One can imagine hiring someone not merely for business purposes but to support a friend—the hireling can be treated as an end. One can imagine going to a show not just to have fun but to support the entertainer—the entertainer can be treated as an end. Certain means can be chosen as ends as well. But not so for M′. Therefore, it is necessarily a means, and from this step it is not too much to suppose that we have an account of what it is for a means to be merely a means. The punch line now is that choosing premortem procedures for a donor only makes sense when one has in view the good of the recipient. One would not choose these procedures apart from the end of benefiting a recipient. This seems to be the argument behind Gardiner and Sparrow's claim quoted immediately above. Is this an adequate account of the locution "using x merely as a means"?

I venture to say no. What we have is an analysis of a means *qua* means and not the *act* of using someone merely as a means. To see why, let M′ refer to premortem procedures. The fact of choosing M′ in all and only those worlds in which M′ leads to E does not entail using S (a person) merely as a means. The premortem procedures are used as mere means, not the donor. What we wanted was an account of the kind of human actions that involve using someone else merely as a means. The only account we have so far is an account of means per se as being merely means. It is tautological to say that premortem procedures are merely means because they are by definition tied only to achieving the end of extracting viable organs. In fact, any medical procedure is merely a means on this account, because they are chosen only for an end: health. But as an analysis of a human act, the preceding one does not work.

Gardiner and Sparrow offer a few interesting comments on the defense of DCD in light of current consent procedures. I will admit that it is much easier to defend DCD when the consent procedures are thorough and very likely manifest the donor's wishes. In the absence of known or justified beliefs about the patient's wishes, justifying premortem procedures becomes more difficult if not impossible. On this point, I would agree with Gardiner and Sparrow. I only offer caution in terms of what they conclude in light of their comments on consent procedures in the UK. UK organ donation procedures operate, apparently, on a model of presumed consent. Gardiner and Sparrow rightly conclude that DCD-cum-premortem-procedures is ethically suspect in such contexts. Instead of arguing that DCD is immoral, however, I would like to have seen an argument against the UK's presumed consent policies, at least in regard to controlled DCD. The conclusion that DCD is immoral does not necessarily follow. One could just as easily conclude that presumed consent will not be used for controlled DCD donors.

I conclude that Gardiner and Sparrow have offered us very helpful reflections on the morality of DCD and have forced defenders of DCD to consider justification for it in light of a proper understanding of the DDR. I think such justifications can be generated if we attend to the reasons why the clinicians are choosing some actions and not choosing others. The defenses of (Means) canvassed here are insufficient, and therefore, the argument that DCD violates the DDR is unsound. Any further discussion on this issue will have to agree with Gardiner and Sparrow that the DDR must include a respect

condition, and that consent is morally important in justifying DCD.

Notes

1. Gardiner D, Sparrow R. Not dead yet: Controlled non-heart-beating organ donation, consent, and the dead donor rule. *Cambridge Quarterly for Healthcare Ethics* 2010;19:17–26.
2. See note 1, Gardiner, Sparrow 2010, at 20.
3. See note 1, Gardiner, Sparrow 2010, at 21.
4. Laird J. The ethics of dignity. *Philosophy* 1940;15(58):135.
5. Kant I. *Critique of Practical Reason*. Beck LW, trans. Indianapolis: Bobbs-Merrill; 1956:76–7.
6. Hill TE. Humanity as an end. *Ethics* 1980;91(1):87. Emphasis mine.
7. See note 4, Laird 1940, at 136. Emphasis mine.
8. See note 1, Gardiner, Sparrow 2010, at 21.
9. Talbot D, Gok M, Minor T. Thrombolysis in the non-heart-beating donor. In: Talbot D, D'Alessandro AM, eds. *Organ Donation and Transplantation after Cardiac Death*. New York: Oxford University Press; 2009:103–16.
10. See note 1, Gardiner, Sparrow 2010, at 22. Emphasis original.