WHEN THE DEAD DO NOT CONSENT: A DEFENSE OF NON-CONSENSUAL ORGAN USE

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I. INTRODUCTION

The current policy of the American Medical Association regarding the use of organs from the recently deceased is to act only when 1) the deceased is known to have no objections to the use of his or her organs, and 2) no member of the immediate family, upon consultation, vetoes the use of the deceased’s organs. This policy has been called the ‘double veto’:1 either the deceased’s wishes concerning his or her remains, or the wishes of the family members surviving the deceased, is sufficient to stop the procurement of organs from the deceased. If either party vetoes the decision to use the deceased’s organs for transplant, the procurement, as a matter of policy, will not take place.

In what follows, I will argue that this policy ought to be abandoned. I will not, however, argue that the autonomy of the patient should trump all else. Rather, I will argue that there is sufficient reason to take, without consent on the part of the deceased, to take the deceased’s organs. As I hope to show, this position is entirely compatible with the view that we have a prima facie obligation to respect the wishes of the deceased.

2. PATIENT AUTONOMY AND THE DOUBLE VETO

The primary defense of (at least part) of the current policy (known as the “Pittsburgh Protocol”)2 relies on the view that we have a moral obligation to respect the autonomy of patients, even after these patients die.3 This view can be defended in several ways, some more controversial than others.4 What the patient would want is thus regarded as one of the deciding-features in determining whether or not said patient’s organs might be used. The current policy in American and British medical practice is to presume that a patient would not consent to organ donation.5 Thus, given this policy, removing the organs of a
deceased patient—even if such a removal would save multiple lives—cannot be carried out unless the medical staff has explicit consent on the part of the patient (when he or she was living), or, that failing, on the part of the patient-surrogate (if the patient did not specify one way or the other), as well as explicit consent from the family of the patient.

This policy reflects some rather intuitive views, albeit while ignoring the philosophical difficulties surrounding them: 1) it is thought that the loss of bodily integrity is against the interests of the deceased, the deceased’s family, or both, and 2) consent to the loss of said integrity is “morally transformative” (to use Alan Werthheimer’s phrase). It is the consent of all involved that transforms a (perceived) harm into a non-harm. Consent, in the case of organ donation, marks the difference between a violation of one’s interests and a generous act. By requiring the consent of both parties (the patient and the patient’s family), it is presumed that we avoid engaging in morally questionable action.

As I suggested above, these views are perfectly intuitive, so long as we ignore some of the philosophical difficulties surrounding them when we consider the case of the dead. I want to take a closer look at each of these presuppositions, and bring out some of the philosophical difficulties in more detail. My aim in doing this is to begin to consider what the double veto leaves wanting as a policy for organ procurement. In considering the limitations of the double veto by examining its problematic philosophical underpinnings, I also want to prepare the ground for an alternative view: namely, that organs should be harvested regardless of whether or not consent is obtained from the deceased or the deceased’s family.

2.1 Bodily Integrity

First, consider the view that the loss of bodily integrity is against the interests of the deceased, the deceased’s family, or both. Rather than dive into the vast literature on the question of whether or not the dead have interests, let us simply assume that the dead do, in fact, have some stake in what happens after their death. If it can be shown that this interest in bodily integrity is not sufficient to avoid organ donation, the case for a policy of double veto will be virtually annihilated.

2.1.1 The Intrinsically Valuable View

The most basic version of the view that the loss of bodily integrity is a harm (where I will begin) would have it that any and all loss of bodily integrity constitutes a harm against the deceased and/or the deceased’s family simply in virtue of the fact that it is a loss. An amputation would constitute a loss, on this view, even if it was required for health (it is a loss in the sense that, all things considered, it would be better if the amputation had not been necessary). Likewise, the removal of a ruptured appendix would count as a loss (on the same grounds as above). Let us call this view B1I: The Intrinsically Valuable View.

Now, as is I hope clear, B1I has a smell of the absurd about it. If the dead are harmed, or have their interests thwarted, when any loss of bodily integrity occurs,
it would follow that any autopsy would go against the interests of the dead.10 This would be so even if said autopsy were necessary in bringing about justice for the deceased, perhaps by uncovering evidence that would lead to the capture of the deceased’s murderer. Presuming that the dead have interests, it would seem then that some loss of bodily integrity (an autopsy) would be in the interest of the deceased, but also against the interests of the deceased, as, ex hypothesi, all disruption of bodily integrity constitutes a violation of the interests of the deceased. Because this is absurd, we have sufficient reason to reject the (rather banal) view that bodily integrity is itself of intrinsic value.11

Moreover, if bodily integrity is intrinsically valuable (if BI1 is true), it would follow that decomposition itself would constitute a harm and/or a thwarting of the interests of the deceased.12 Decomposition, as we now know, is inevitable.13 It thus follows that there is no way to avoid the destruction of what (on the banal view) is posited as having an intrinsic value. The refusal to donate organs on the basis of wanting to preserve the integrity of the body here seems simply misguided: one cannot preserve the integrity of the body. Dust will indeed return to dust. It seems pointless to insist on the bodily integrity of a corpse when that corpse might be of some use, but to ignore the integrity of the same corpse once it is in the ground.

This consequence of the banal view, I think, reveals that few persons actually endorse this view. If one’s aim is to prevent loss of bodily integrity, then we are not doing nearly enough to preserve the corpse. Even after embalming, a corpse will normally begin to decompose within a week.14 If we really cared about preserving the integrity of the corpse, there would be as much resistance to grave decomposition as there is to organ donation. Because the movement for infinite preservation is limited to very few, eccentric individuals (like philosophy’s beloved Jeremy Bentham), we have good reason to think that the more common objections to mandatory organ donation is a subtler view than the one we have been considering.

2.1.2 The Closure View

BI1, we have seen, is not a particularly plausible view. A much more plausible view of bodily integrity is captured in the idea that there are conditions under which the violation of bodily integrity is permissible—even desirable—but that these are far outnumbered by the circumstances in which such violation is impermissible. In the case of organ conscription, for instance, the violation of bodily integrity is neither desirable nor permissible.

This formulation captures most of the views currently advocated by philosophers and the laity alike.15 For clarity, though, I want to distinguish this view into finer strands. There are two types of reasons typically offered against organ donation: survivor-regarding reasons, that place the benefit of the deceased’s loved ones, or even society as a whole, at the center of our decision making, and deceased-regarding reasons, that regard the well-being of the dead person as of
central importance. I will call the above view, when based on survivor-regarding reasons, **BI2: The Closure View.** When the above view is based on considerations regarding the deceased, I will call the view **BI3: The Autonomy View.** I will reserve consideration of **BI3** for section 2.1.3, below. Survivor-regarding reasons include the following:

1) The loss of bodily integrity of a loved one would prevent the ability of a family to achieve the sort of closure normally provided by a funeral service. If the body is tampered with, with organs removed, the therapeutic benefit of a viewing of the body will be nullified. Indeed, a viewing of the body in such a state might very well be traumatic to the living.

2) Related to (1), and as F. M. Kamm has pointed out, survivors may have a strong desire for the “use-history” of a loved one’s body parts to end with the history of that loved one. Much as we would not want a spouse’s ring to be re-used after the death of a spouse, we might feel a strong desire to put all of a loved one to rest.

3) It might be thought that, by giving consent to take the organs of a loved one, we are complicit in the loss of that loved one’s bodily integrity. This, of course, would explain the difference between our attitudes toward organ removal, on the one hand, and decomposition, on the other.

4) Finally, a general policy of organ removal might have serious consequences for the way we regard ourselves as agents. As Kamm puts it, “our sense of ourselves as different embodied people may diminish, for good or ill” (221).

Each of these arguments, it seems to me, fails to adequately justify BI2. Arguments (1) and (2) can be dealt with together in this context, as they both involve the immediate well-being of those close to a loved one.

First, it is not at all obvious that a viewing of the dead provides the therapeutic effect that it is often claimed to have. It is perhaps revealing to notice that the viewing of the deceased is anything but a universal cultural practice. This suggests, at a minimum, that there are many ways to achieve healthy closure after the loss of a loved one, as it is unreasonable to suggest that only cultures that have viewing are adequately dealing with the fact of death. So, even if it is true that viewing an intact corpse can aid in the mourning process, allowing survivors to achieve closure, it is not the only way to find such closure—nor even demonstrably the best. Indeed, it might even be the case that our attitudes about viewing the body are in fact an instance of our **inability** to deal with the fact of death. Consider Kamm’s remarks on this point:

[I]t seems important that the last contact of the living with the dead should be with what seems to be an intact body; anything else may take away a continuing illusion of life. People may prefer that the undeniable evidence of death and radical change that a dismembered surface or decaying body presents come to exist beyond sight. (222)
As Kamm goes on to (correctly) point out, even if such viewing is crucially important for the benefit of the survivors, it has almost no relevance to the issue of internal organ removal. Any loss of bodily integrity can be disguised for the benefit of the family. Even if it is true that grieveres have the right to experience an intact body, it does not follow that the body must actually remain intact. All that follows is that we have a duty to make the body appear to be intact—and this can be accomplished in conjunction with the removal of organs. Of course, if this were a general policy, families might well demand knowing whether or not organs were used. As a workable policy, then, this one would be highly unsatisfactory. To counter the demands of those with a strong interest in the integrity of the corpse, we thus need to show that the interests of those surviving the deceased (or even of the deceased himself) can be trumped. This, I think, can be shown quite easily (I will return to this below).

Let us now turn to the “dirty hands” objection: the view that consenting to organ removal makes the grieving part of the violation of the deceased, implicating them in a wrong-doing. There is indeed an important difference between allowing the body to lose integrity in the grave, and consenting to the immediate loss of that body’s integrity. The difference between removing organs and letting them rot is analogous to the difference between killing and letting die. Even if we cannot stop decomposition, we need not have a hand in it. Thus, while the rot of the grave might well be lamentable, it is not the result of a direct action on the part of the family of the deceased (in normal cases). Allowing organ transplant, however, would involve the action of the family, and hence would implicate them in the destruction of the body.

But notice that what we are to conclude from this point is anything but clear. One might conclude, as it seems the double veto does, that the family should have veto power when it comes to organ donation. This enables the family to prevent themselves from having a hand in the loss of bodily integrity, even though that loss is inevitable. But another perfectly plausible response is to simply take the choice out of the hands of the family. Giving the family no say whatsoever would serve two functions. First, it would actually serve as a means of respecting patient autonomy in a way that the current policy does not (because the family could no longer override the wishes of the deceased when the deceased wished to donate organs). Second, it would prevent forcing a family to dirty their hands with a decision they are perhaps ill-equipped to make (emotionally, morally, or intellectually). On this view, then, the objection to organ donation actually works against BI2: by removing the power of the family to veto, we effectively eliminate the double threat of dirty hands (that they violate the integrity of the body, and so save a life; or that they preserve the sanctity of the body, but thereby let someone die).

The final objection mentioned above warrants only a word or two. It may well be the case that a general policy of organ conscription would drastically change
the way we think about human beings, personhood, the body, and so forth. But this is incredibly speculative. When several people die every day from organ failure due to lack of transplant, the speculative possibility that the way we think about human agency might alter seems like a distant worry. Indeed, our current policy suggests that we value ownership of organs postmortem more than helping treat those persons who desperately want a normal life span. I welcome some change in the way we think of organs.

2.1.3 The Autonomy View

The other class of arguments in support of the preservation of bodily integrity I called “deceased-regarding” above. In essence, these arguments are concerned to respect the wishes of the deceased. At this point, however, I want to limit my concerns to whether or not the current policy of double veto actually does respect the autonomy of the deceased. I do this as a means of further exploring (and criticizing) our current policy for organ procurement. In defending an organ conscription policy, which I will do in sections 3 through 5, I will return to the question of autonomy, providing a more sustained treatment of the question.

As mentioned above, the double veto requires the deceased’s immediate family give consent to the removal of organs from the deceased. On the face of it, this policy seems to conflict with the autonomy of the patient: if my wishes to be an organ donor can be overridden by the wishes of my family to preserve my bodily integrity, it seems that, prima facie, my autonomous wishes can be trumped by the wishes of my family. Thus, it appears that the double veto policy is not in fact compatible with a true respect for the autonomy of the patient.

But this incompatibility, it might be argued, is only a prima facie one. T. M. Wilkinson provides the following analogy:20 If my parents refuse to allow me to be married, they have indeed violated my autonomy. If, however, the woman I intend to marry refuses to marry me unless my parents approve, my autonomy has not been violated. Likewise, if a doctor will only remove organs from a patient on the condition that both the patient and the patient’s family give consent, the doctor has not violated anyone’s autonomy.

This, I think, is a powerful counterexample to the claim that the double veto does not respect the autonomy of the deceased. But it is important not to exaggerate the force of this argument. It does not show that autonomy is never violated in the double veto. It merely shows that it is logically possible to refrain from acting on someone’s rational wishes without thereby failing to respect those wishes.

Notice, however, that this does not address the issue of whether the double veto policy itself is based on respect for autonomy. Indeed, if Wilkinson’s marriage analogy is a good one, the double veto would seem to be based more on respect for a surgeon’s desire not to cause offense. While this is not objectionable per se, it does point to a limitation in the view that the double veto is designed to protect the autonomy of a patient. While it might not necessarily violate said autonomy,
neither does it do much by way of insuring that the autonomous wishes of the deceased are carried out. Thus, any defense of the double veto cannot rely on the claim that the policy is justified as a means of protecting autonomy, for even though the policy might not necessarily violate autonomy, neither does it hold autonomy in particularly high regard.

This point can perhaps be made more clearly when we notice two senses in which one might respect another’s autonomy, one strong, the other weak. Respecting someone’s autonomy in the weak sense can be accomplished through a policy of non-interference. I respect your autonomy just insofar as I do not do anything to prevent you from carrying out your wishes. The stronger sense of respecting autonomy involves the actual promotion of the autonomously chosen ends of others. In respecting someone’s autonomy in this sense, one is required, as Kant claims, to make one’s ends my own. To truly respect your ends involves not merely non-interference, but actually contributing, where possible, to the attainment of your morally permissible, autonomously chosen goals.

Wilkinson’s marriage analogy, it seems, demonstrates forcefully that the double veto is compatible with respect for autonomy in its weaker sense. A doctor is not interfering with my autonomously chosen end of donating my organs by allowing a family veto. Her non-interference is thus a form of respect. But this is a far cry from the stronger form of respect for my autonomy, which would require the doctor to actively attempt to carry out my wishes once I have died.

Now, I think that an argument can be made that the stronger sense of respect for autonomy is the only one that can be meant when we talk about posthumous interests. After all, it is only through others making our ends their own that our posthumous wishes can be fulfilled. Left to their own devices, the dead can accomplish nothing. Indeed, the non-interference version of respect for autonomy would result in nothing but allowing the dead to decay. On this view, failure to bury the dead, or to conduct any type of funeral service, would constitute a form of respect (as I am not interfering with what is naturally happening to your corpse). As I think is obvious, this is ludicrous. Thus, the stronger version of respect for autonomy seems required whenever we are talking about respecting the autonomy of those who have died. If this is correct, though, we can see that Wilkinson’s marriage analogy does not demonstrate that the double veto is compatible with respect (in the strong sense) for the patient’s wishes regarding her organs.

The current policy, to reiterate, does not respect the wishes of the deceased any more than another policy not allowing such veto decisions would. Thus, defenders of the current policy cannot appeal to the autonomy of the deceased if they also acknowledge the power of family members to override the decision of the deceased when the family objects to organ transplant.

But, if we object to family overrides, there might still be a case to be made on the basis of autonomy. Respecting an agent’s autonomy, in other words, might well be a reason to reject the double veto—but it might also be a reason to refrain
from organ conscription, even when such conscription is required to save a life, or even several.

This is an important argument. Indeed, it is the most powerful argument available against the policy of organ conscription I advocate. Dealing with this argument requires, I think, coming to terms with the limits of autonomy generally. These limits are marked, in my view, by the vital needs of others. Thus, on my view, insofar as an organ shortage exists, a policy of organ conscription will be justified, even if the dead have a legitimate claim to their organs, as well as a legitimate claim against the living to respect their autonomy. In order to more fully defend this view, I turn (in section 3) away from the double veto, and toward a positive argument for mandatory organ removal. Before doing this, however, the second assumption of the double veto warrants some (minimal) attention.

2.2 Consent as Morally Transformative

I now want to turn my attention to the second presupposition of the double veto: namely, that consent is morally transformative. There are a large class of cases (all involving the living) where the transformative power of consent is obvious. I do not wish to dispute these cases. The issue, though, is whether or not this principle transfers cleanly to the case of the deceased.

There are some obvious asymmetries between the living and the dead. The very reason that consent is morally transformative in the case of the living is that the living do not object to what is being done to them. They are willing participants in the events in which they are involved. Exactly what “willingness” consists in is a question well beyond my current examination—but it seems clear that “being willing to x” is some type of psychological state. It is most likely a very complicated one (such that one might think one was willing to x, but upon reflection realize that one was only willing to y). If this is so, then occupying the state of “being willing to x” psychological state.

If this is so, it is not clear that the consent of the dead has the same morally transformative power that the consent of the living does. After all, part of the force of consent is that it can be withdrawn at any moment: the instant a person no longer wants to have sexual relations (and expresses this), the sexual act in which said person is engaged becomes rape. Consent is significant only if it is possible to withhold it.

Of course, the living patient who consents to donating organs could change his mind at any moment. In this respect, his consent is perfectly meaningful. But, as I must insist, the living patient has different properties than the corpse he leaves behind. A corpse is unable to withhold consent, and hence cannot consent to those things it undergoes. Once again, we find that consent is only defensible here if we presume it is possible to have obligations to the dead.

I do not mean to suggest that consent is irrelevant postmortem. I think consent is morally transformative. My point in this brief examination of the second un-
derpinning of the double veto is to show that endorsing this view (let’s call it the Principle of Morally Transformative Consent) does not apply unproblematically to the case of the deceased, and hence cannot be appealed to as support for our current organ procurement policy unless the substantial philosophical difficulties surrounding this view (when applied to the dead) are addressed.

2.3 Vetoing the Double Veto

My aim thus far has been to show that the double veto policy in place in the US and UK is deeply problematic. The sorts of arguments often presented in its favor do not carry the weight they are sometimes thought to have. This is obviously insufficient in establishing that a policy of mandatory organ donation is preferable, as this might involve equal (or even greater) philosophical and practical difficulties. It is thus necessary to turn my attention to what considerations are available in favor of organ conscription.

3. An Argument Against Consent: Reconsidering Autonomy

There are good arguments for the view that there are obligations to the dead.24 Respecting the autonomy of the dead is something we routinely do. Does this demonstrate that the wish of the deceased to be buried with all of his organs is a sufficient reason to so bury the dead?

3.1 A Thought Experiment

Consider the following case.

Imagine that you own vast amounts of farming land in remote portions of Africa. Imagine, moreover, that it pleases you to think of this land as being uninhabited by human beings. Finally, imagine that it is totally impossible for you ever again to use this land, see this land, hear anything new about this land, and so on. In fact, you have never seen this land—though you could have, at an earlier time, if you had been willing to engage in some rather dangerous or uncomfortable procedures. Certainly, the fact that you own this land gives you certain prima facie rights. But the question is this: are these rights sufficient to determine the use of the land in question? Is your ownership of the land a sufficient basis for deciding what will ultimately happen to the land, or are there limits to what it is within your rights (morally) to do?

Suppose a tribe begins to use your land for foraging and the like. While you would prefer for the tribe not to be there (so you could imagine your land with ease as uninhabited), it is by no means clear that the mere presence of this preference is sufficient justification for the removal of the tribe. To complicate things, imagine that the only source of clean water in that area is to be found on your land—land, the reader will recall, which you will never be able to visit, to use, or to hear any news about. Suppose that, if the tribe is forced off your land, their
chances of finding another source of fresh water are quite remote. Indeed, it is likely that they will die if they are removed from your land.

Again, I am perfectly happy to admit that the owner of this imagined land has certain rights in regard to this land. I am even willing to admit that others have certain obligations to the land owner. Thus, if this land were hijacked by a large oil company, and the land were used for profit, the rights of the land owner would be violated. But this is not equivalent to saying that the rights of the land-owner cannot by overridden in certain circumstances. In the imagined case, the land owner has nothing to gain in refusing to allow the tribe to use the water on his land. Indeed, such a refusal seems outright irrational, if not immoral. If the land-owner simply refuses use of the land on the basis that he will be unable to imagine his land as he would like to, and this, moreover, leads to actual human death, the landowner might justly be accused of the worst kind of narcissism—namely, the kind that kills. It is my view that the preference of the land-owner in a case like this should simply be overridden.

This analogy is meant to track our situation when it comes to the organs of the deceased. Even if a person has certain rights regarding her organs after she has died, it does not follow that this person can do with her organs whatever she wants—nor does it follow even that the wishes of the deceased should have de facto priority over other considerations. Indeed, while we ought to give weight to the wishes of the dead—respecting the autonomy of the formerly living, and honoring their wishes where possible, our respect must have limitations.

Of course, one might object that the analogy I have drawn here is inappropriate, as we bear a fundamentally different relationship to our bodies than we do to a distant land. I think this point is correct: our living bodies are nothing whatsoever like unseen land in Africa, if only because our body as a whole is us—or, minimally, it is more plausibly us than an unseen piece of land ever could be.

But I think the analogy is closer than this suggests. After all, I am specifically talking about our organs after we die. While we have all experienced our bodies—have lived them—very few of us ever see our organs. Very few of us feel a particular attachment to our pancreas, for instance. So, it is misleading to talk of the body as though it is coextensive with our internal organs. While the body is unlike unseen land, our internal organs are actually substantially more analogous to such land. When we add to this that we (as dead) cannot experience, the corpse, again, does not have the same properties as the living body.

This is an important point, as it derails one important objection to the thought experiment I have been considering. The objection runs as follows: in order to obtain organs, one must compromise the owner of those organs. There is simply no other way to get them. The same is not true of distant land. Thus, actions on someone’s body are importantly different from actions involving distant property. If the living body (which is the owner of the organs) has the same properties as
the corpse (the body that is no longer living), then this objection is devastating
to the thought experiment. After all, it would demonstrate that the owner of the
organs must be physically violated in order to utilize the organs he possesses.

The simple—and I think intuitive—response to this objection is to point out that
the corpse is not identical to the person who had possession of the organs now in
the corpse. The living body has died, and the entity that remains is not the entity
that was there before death. Rather, we have mere remains, not a subject that can
be violated by our procurement of its organs. Hence, even though the body must
be compromised in order to retrieve organs, this would only count as an objection
to our thought experiment if the body prior to death was the same (had the same
properties) as the body after death. Because the corpse is the mere remains of the
earlier entity, the objection to the thought experiment does not work.

3.2 Implication and Expansion of the Thought Experiment

There is a well-publicized organ shortage—a shortage that is life-threaten-
ing. If my thought experiment has served its purpose, we are in a position to see
that our obligations to respect the wishes of the deceased (regarding their own
bodies) are sometimes trumped by the vital concerns of others. To reiterate: I
am not claiming here that the preferences of the dead and dying are irrelevant.
I think that we have an obligation to respect the wishes of the deceased—but I
also think that this obligation can be overridden.

Consider another case, the example of the Uruguayan rugby team that crashed
in the Andes, resorting to cannibalism as a means of survival. As I have argued
elsewhere, in considering a case like this, we ought to consider the wishes of the
dead: it matters that the deceased may well have preferred not to be eaten. Insofar
as we do not respect their wishes, this is lamentable—but it is nowhere near as
lamentable as allowing more people to die from starvation. Thus, despite the fact
that the dead are owed our attention—that we should respect their wishes—the
wishes of the deceased must be constrained by the needs of the living.

Interestingly, we are less reluctant to acknowledge this in other cases. In a vast
array of situations, we simply accept that the wishes of the dead can be trumped
by the needs of the living: someone’s desire to be displayed atop the Eiffel Tower
after death will not be honored, if only because this interferes with the needs of
the living (if only the need not to see dead bodies on the Eiffel Tower). When
the preferences of the deceased are not rationally founded, or demand too much
of a sacrifice on the part of the living, these preferences can be trumped by other
considerations. So, even if one prefers not to be eaten when dead—even if it
means that fifteen more will die of starvation—this preference can be overridden
by the needs of the living. The case of organ donation is exactly parallel with
this kind of cannibalism case. Even if the family of the deceased objects to the
cannibalizing of their family member (because they cannot stomach the idea of
a loved one being treated as mere food), this reluctance on their part (or even on
the part of the deceased) is not sufficient to determine the moral permissibility of the action.

As these examples show, I think, mandatory organ procurement is a policy preferable to the current one. We are in a situation where the preferences of persons are allowed to override the potential life-saving capacity of donor organs. As I have been claiming, this policy is compatible with the claim that we should respect the wishes of the deceased (as well as the deceased’s family), provided that we recognize that there are conditions under which these preferences should be overridden. It is my contention that the current state of organ-availability constitutes such a condition. Thus, pausing over the wishes of the deceased (or their families) is, in my view, an immoral practice akin to talking about a land-owner’s right to have fantasies about his land as he sees fit, even when this will result in the unnecessary deaths of persons. Until we have rectified the organ shortage, we should not worry ourselves with the wishes of the deceased, as whatever their preferences for bodily integrity are, these will not outweigh the interests of those whose lives are in danger due to lack of available organs.

There is a powerful objection to this view, involving religious belief, that requires more attention.29 As discussed above, respecting the autonomy of an agent (in the strong sense) involves making the ends of an agent our own. There are persons who have more than a merely passing objection to organ donation: their very sense of themselves as moral agents depends on maintaining the integrity of the body. Respecting these persons thus seems to require allowing them to keep their organs after death, as to fail to do so would amount to forcing these people to live a life replete with horror.30

Though many reject religious beliefs tout court, this problem cannot simply be dismissed. No matter my level of epistemic confidence regarding religious matters, my respect for the autonomy of agents seems to require that I respect those (morally permissible) things that make agents who they are. Certainly this is part of the minimum conception of respect for persons: to respect what they have autonomously chosen to be. Even on the weaker sense of respect, to force such persons to donate organs would seem to amount to a form of interference with their practical, moral identities:31 a policy of mandatory organ donation would, in effect, force these persons (for example) to believe that they would not see the kingdom of God, or would be condemned to an unworthy life, or something else of the same sort. Here, it seems, we have a case where respect might well require an exception to organ conscription.

Before conceding this point, though, a few things need to be noted. First, a policy of organ conscription does not entail that everyone’s organs will be used. After all, older persons do not typically have readily usable organs for transplant. Thus, even if someone believed they needed to be buried with their entire body, it wouldn’t follow that the policy would preclude this being so. The removal of one’s organs would be feared, to be sure (much like other things that would lead
to scattered burial would be feared), but such fear would likely be insufficient to actually destroy an agent’s moral identity.

Second, there are cases where even our most cherished beliefs are over-ridden by policy (as in epidemics, where public health concerns trump the right to religious practice). So it isn’t clear that the mere presence of these strong beliefs is sufficient for exemption, particularly when life is at risk. More argument would be required to establish this—argument that is not immediately apparent.

Even if we acknowledge the importance of strong religious belief, though, this need not entail that the person with said beliefs will be exempt from contributing to a solution of the organ shortage. It simply is not clear that a person can consistently maintain that they must have all of their own organs after death. Consider the fact that many such persons would willingly take infusions of blood or accept transplanted organs. If this is so, then there should be no in principle objection to the removal of at least some organs.

If one insisted, on pain of irrationality, that he be buried with all organs, this need not entail that our imagined agent will not contribute to the cause. Irrationality, as usual, comes at a price. Allowing certain exceptions might well be conditional on contributing to the organ cause in other ways. Someone who insisted on being buried with all of her organs might be granted such a right, for instance, only on condition that she contribute organs while living that would rejuvenate during her lifetime. There is need for bone marrow, as well as liver portions, that could be met in this way, thus allowing a person to contribute to the organ shortage while also protecting bodily integrity at death. While I am unsure about the feasibility of this sort of policy, it does demonstrate (along with the other reasons given) that even respect for the autonomy of an agent need not produce exceptions to a general policy of mandatory organ donation.

4. TWO MORE OBJECTIONS

There are (at least) two additional objections to my view that are worth considering. These objections are as follows:

1) the view advocated is sufficient for justifying the use of mandatory organ donations from living persons as well as from the deceased, thus the view is unacceptable.

2) This view ignores our customary ability to do with our property what we want after death. It is customary to be able to bequeath property after death through a will, the giving of inheritance, and so forth. The body is simply one more piece of property. To reject this view is equivalent to rejecting the rights of persons to have wills. The view is thus unacceptable.

I will deal with each of these arguments in turn.
4.1 The Organs of the Living

The first objection stems from the view that my analysis is ultimately utilitarian in nature. Thus, the objection runs, if violating the interests of the dead can be justified because it will save lives, then so too can violating the interests of the living. The result of this, the objection continues, is a position in which we would accept murdering healthy young adults if their murder would promise to benefit several needy transplant patients.

The first thing to say in response is that I accept the view that the interests of some should be violated when lives are at stake. Thus, the interest of warlords in Africa to eliminate certain groups ought to thwarted, and these ought to be thwarted precisely because not thwarting these interests would amount to negligent homicide.

But it does not follow from this that I endorse the view that innocent persons should be sacrificed in the name of maximizing happiness. The difference between the two cases is plain: Harvesting organs from the living would deprive said person of something the dead (by definition) cannot be deprived of (namely, life). In taking the organs of the deceased, I am not taking his life, or, indeed, anything he is using. Because there is no deprivation taking place in the case of the dead, and to fail to transplant the organs of the deceased is simply to waste them, the case of the dead is quite different from the case of the living.

But there is a more difficult case to consider. Are the living obligated to give up organs when such a sacrifice will not thereby kill them? That is, even if we reject the view that it is permissible to kill someone to harvest his organs, we must still face the question of whether it is acceptable to force a person to give up organs when this will not result in death.

I think that there are powerful arguments against taking the organs of the living, though these are not, on my view, absolutely decisive. The most important thought experiment on this topic remains Judith Thomson’s important violinist case. To remind the reader of the details of this case:

You wake up one morning and find yourself back to back in bed with an unconscious violinist. A famous unconscious violinist. He has been found to have a fatal kidney ailment, and the Society of Music Lovers has canvassed all the available medical records and found that you alone have the right blood type to help. They have therefore kidnapped you, and last night the violinist’s circulatory system was plugged into yours, so that your kidneys can be used to extract poisons from his blood as well as your own.33

Now, I think this case highlights some of the important differences between using the organs of the living, on the one hand, and using the organs of the dead, on the other. Most intuitions, in this case, go against the violinist (and notice that the violinist is a person in need of a donated organ). Despite the predicament of the violinist (organ-recipient-to-be), an agent has no direct duty to give up her
organs. To do so, we all recognize, would be an act of moral heroism—something
saintly, but certainly nothing required of the average moral agent.

But our intuitions shift, I think, when we imagine the violinist attached to
someone who is *recently dead*. The burden created by the violinist for the donor
is simply not the same in the two cases. Thus, even if the dead are obligated to
donate their organs, it simply does not follow that the living are. Now, impor-
tantly, the living *might be so obligated*, but I do not think this position follows
from the arguments thus far considered, nor do I think that our intuitions on these
cases are identical. My task here, however, is not to determine whether or not the
living must give up their organs to those in need. It is merely to ask whether or
not this position is entailed by the position defended here, and hence whether or
not it might be seen as an untenable consequence of my view. Though I am not
sure the position is, in fact, untenable, there *is* good reason to think that it is not
a direct consequence of the view defended here.

There is an additional case that must here be considered—one that is substan-
tially trickier than the case of taking organs from the already living. The case in
question involves the comatose: is it acceptable to remove organs from persons
who are comatose in order to save others? If so, one might contend, the position
advocated here is even less intuitive than it initially seemed. Taking organs from
the comatose is very close to outright killing them.

First, let me note that the question of whether or not taking organs from the
comatose is permissible hinges on how we understand the term “comatose.” Obvi-
ously, someone who is comatose, but who has a reasonably chance of emerging
from this state, should *not* be subjected to mandatory organ donation. This is so,
I think, for the same reason that the *non-comatose living* should not be subjected
to this policy. Whatever the preferred explanation for the wrongness of killing,
this explanation seems to apply equally well to living persons and to those who
are recently and retrievably comatose.

When the case shifts to cover the irretrievably comatose, my above arguments
seem to support the view that it is permissible to remove organs *after life support
has been removed* (when death occurs). Of course, this does not touch the question
of whether or not needing organs is a *reason* to end life-support. My own tempta-
tion is to argue that it *is* permissible to euthanize a living body for its organs, if
we know *in fact* that the person is irretrievably in a comatose state. This hunch,
of course, cannot pass for argument. What will decide this issue, it seems to me,
will be the best arguments available in the euthanasia debate. If one accepts, as
I do, that someone who will not recover from a vegetative or comatose state can
be allowed to die (say, in order to save resources, to respect the person, or any of
several other reasons), it seems difficult to deny that saving other lives is not a
legitimate reason for euthanizing. Thus, the organ draft *would* apply to those who
can justifiably be euthanized. Again, though, what is crucial in this case seems to
be that euthanasia itself is justified. If euthanasia is justified in these cases, so too
will organ procurement (given the above arguments). I do not pretend that this settles the issue of acquiring organs from the comatose, but it does (I hope) point out what will settle this question: namely, the question of the moral permissibility of euthanasia (active or passive) in the case of the irretrievably comatose.

4.2 The Body as Property

The second objection posits the right to property as a right which covers our ability to do with our bodies what we will. Because of this right, the objection runs, we should be permitted to handle our bodies much as we handle other pieces of property.

I have two responses to this objection. First, even if we accept that the body is a piece of property, it doesn’t follow that we can do with this property whatever we want. Indeed, even if parts of the body are property, this does not follow. Much of the argument for this claim has been given in the preceding pages. To reiterate: we cannot leave our property in places where said property endangers the lives of others, for example. Likewise, if my above arguments work, there is something quite morally reprehensible in thinking that my right to do specific things with my property trumps another’s more basic right to life.

But there is an even stranger response to be made here. As Cecile Fabre has recently argued, if organs are felicitously considered as among the scarce resources of the world, principles of distributive justice would demand their availability to those in need. While I am skeptical that bodies, or parts of bodies, can be construed as property, it turns out that this need not be demonstrated in order to show that property considerations are not adequate to reject an organ conscription policy. A powerful argument has been advanced (by Cecile Fabre) to the effect that, if body parts are construed as things that can be property (as resources), then justice will commit us to a policy of organ re-distribution at the time of death. Thus, even if my uncommon intuition about bodies and property is misguided, an argument from property rights cannot stand: even if bodies and body parts are property, we have good reason to advocate a policy of mandatory organ donation.

This leaves open the question of whether or not the interests of the dead in regard to the dispersal of their goods ought to be respected. It might well be the case that the right to inherit one’s family’s wealth can be overridden by the needs others have for basic medical treatment, adequate food and clothing, and so on. This is an important question, but it is importantly different from the question of whether or not we have the right to determine what to do with (each part of) our bodies once we are deceased. Thus, the second objection against my view fails.
5. Conclusion

In this paper, I have argued that the consent of the deceased should not be required in order to use the organs of the deceased in life-saving operations. While I agree that we have an obligation to consider the interests of the dead, I do not accept the view that the rights of the dead should control the lives of the living—particularly in matters that will determine who is who among the living and the dead.  

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NOTES


2. H-370.975 Ethical Issues in the Procurement of Organs Following Cardiac Death: The Pittsburgh Protocol: The following guidelines have been adopted: The Pittsburgh protocol, in which organs are removed for transplantation from patients who have had life-sustaining treatment withdrawn, may be ethically acceptable and should be pursued as a pilot project. The pilot project should (1) determine the protocol’s acceptability to the public, and (2) identify the number and usability of organs that may be procured through this approach. The protocol currently has provisions for limiting conflicts of interest and ensuring voluntary consent. It is critical that the health care team’s conflict of interest in caring for potential donors at the end of life be minimized, as the protocol currently provides, through maintaining the separation of providers caring for the patient at the end of life and providers responsible for organ transplantation. In addition to the provisions currently contained in the protocol, the following additional safeguards are recommended: (a) To protect against undue conflicts of interest, the protocol should explicitly warn members of the health care team to be sensitive to the possibility that organ donation decisions may influence life-sustaining treatment decisions when the decisions are made by surrogates. Further, if there is some reason to suspect undue influence, then the health care team members should be required, not merely encouraged, to obtain a full ethics consultation. (b) The recipients of organs procured under the Pittsburgh protocol should be informed of the source of the organs as well as any potential defects in the quality of the organs, so that they may decide with their physicians whether to accept the organs or wait for more suitable ones. (c) Clear clinical criteria should be developed to ensure that only appropriate candidates, whose organs are reasonably likely to be suitable for transplantation, are considered eligible to donate organs under the Pittsburgh protocol. (CEJA Rep. 4 - I-94; Reaffirmed: CSA Rep. 4, I-02). http://www.ama-assn.org/apps/pf_new/pf_online?f_n=browse&doc=policyfiles/HnE/H-370.975.HTM, last accessed on January 2, 2007.

This has been amended as follows:
Organ Donation After Cardiac Death: Given the increasing need for donor organs, protocols for donation after cardiac death (DCD) have been developed. Controlled DCD allows patients who have agreed to be taken off of life support or their surrogate decision makers the opportunity to donate the patients’ organs once death has been declared. In these cases, life support is discontinued in or near the operating room so that organs can be removed promptly after death is pronounced. DCD also may be considered from patients who suffer unexpected cardiac death (uncontrolled DCD). It requires that they be cannulated and perfused with cold preservation fluid (in situ preservation) within minutes after death to maintain the viability of organs. Both of these methods may be ethically permissible, with attention to certain safeguards.

1. Hospital policies should specify important details of the DCD process, such as the required time delay before death can be pronounced after cardiac arrest.

2. In all instances, it is critical to avoid perceived or actual conflicts of interest in the health care team with respect to caring for the patient versus facilitating organ donation. The health care professionals providing care at the end of life should be distinct from those participating on the transplant team. No member of the transplant team may have any role in the decision to withdraw life support or in the process leading to pronouncement of death.

3. Clear clinical criteria should be in place to ensure that only appropriate candidates, whose organs are reasonably likely to be suitable for transplantation, are considered eligible to donate organs under these protocols.

4. Palliative care for DCD candidates should continue after removal of life support until death is declared.

5. In controlled DCD, the decision to withdraw life support should be made by the patient or the patient’s surrogate decision maker before any mention of organ donation (unless the patient or surrogate spontaneously broaches the subject). This is meant to ensure that withdrawal of life support is not influenced by the prospect of organ donation.

The informed consent for controlled DCD should include specific discussion of pre-mortem interventions aimed at organ preservation, to improve the opportunity for successful transplantation, rather than to benefit the patient. Interventions that are likely to hasten death must not be used.


3. There are important questions surrounding when death should be said to occur. As sorting through the controversy is not immediately relevant to my current inquiry, I will not here address the issue. For an array of positions, see The Definition of Death: Con-
A DEFENSE OF NON-CONSENSUAL ORGAN USE 307


4. An obvious way to defend the view is to claim that we have obligations to respect the wishes of all human beings, and allowing human beings to dispose of their corpses as they wish is part of what is involved in respecting human beings.

This view, of course, faces some obvious problems: it is difficult to understand why an obligation to human persons would extend, as it were, beyond the grave. Other obligations clearly do not so extend (like, for example, an obligation to help someone move). When one dies, one ceases to be a human agent, and hence loses the moral status of human agents (or so one objection might run). While we should respect the autonomy of all human beings, it is a stretch to think that a corpse is a human being in the same moral sense as a living person is. A corpse is not responsible, cannot respond to claims made upon it, and, after all, is not autonomous in any sense of the term. Thus, even if it is true that we ought to respect the wishes of human beings, it simply does not follow (directly) from this that we have a moral obligation to respect the wishes of a person when that person no longer exists (I assume, for the sake of convenience, that death is final).

To defend the view that we should respect the wishes of the deceased thus requires an argument for the view that we have obligations to the dead. While such arguments are available—and quite convincing ones, in my view—I am willing to simply concede that we can escape the above difficulties. Let us grant that there are obligations to the dead, and that these involve respecting the wishes of the deceased.

5. This, of course, is not the case in many countries in Europe, where a policy of presumed consent has become the law of the land in many nations.


7. The same analysis applies to numerous other cases: rape and sex, surgery and battery, violence and sado-masochistic pleasure differ only in that one of each pair involves consent, whereas the other lacks it. Indeed, the presence of consent in all of these cases changes the moral status of the action in question.


9. The second assumption to be explored, as mentioned above, is that the consent of the deceased is morally transformative. If it turns out that violation of bodily integrity of the deceased is not problematic, though, there will be no need for any moral transformation. Thus, if the first assumption behind the double veto is to be abandoned, the second assumptions falls as well. I will have more to say about this below.

10. Interestingly, the state reserves the right to conduct an autopsy regardless of the wishes of the family or deceased.

11. Of course, one might here object that the dead can have competing interests, and that the interest served in an autopsy is not an interest in ending bodily integrity. Rather, the dead has an interest in justice, which is (contingently) served through autopsy. This contingent interest, however, cannot be regarded as truly competing with the (necessary) interest in the maintenance of bodily integrity (when posited as an intrinsic good). I find this response unconvincing, if not outright question-begging, but it nevertheless warrants further argument.
12. There is of course a distinction to be made between the harms and the interests of the dead, but I will leave this aside, as it is not immediately germane to the current discussion.

13. Most people probably think we always knew this. Surprisingly, though, early practitioners of embalming claimed that their procedure would preserve the corpse forever. We now know this to be woefully inaccurate. Indeed, the best way to preserve a corpse now seems to be plastination—a process that appears to be able to maintain the integrity of the corpse for an estimated 10,000 years.


16. Of course, it is possible for survivor-regarding and deceased-regarding reasons to overlap. The distinction should be understood as heuristic. The deceased might well have an interest in the family viewing the body of the deceased, for example.


19. These same considerations apply to the desire to have the use-history of an organ co-terminate with the history of the person. The most that follows from this is that the family should not be informed that the deceased’s organs have been harvested. This would allow 1) the family to have the comfort of an ended use-history, and 2) the benefit of harvesting usable organs to save the lives of those in need.


21. In *The Metaphysics of Morals*, Kant claims that the categorical imperative, in the formula of humanity, captures, among other things, the “duty to make others’ ends my own (provided only that these are not immoral)” (Cambridge: Cambridge University Press, 1996), 6:450.

22. This is not to say that the policy is inconsistent. See T. M. Wilkinson, “Individual and Family Consent.”

23. Even those who think we are our bodies, like Fred Feldman, would agree to this point. (On Feldman’s view, we continue to exist after we die, but we exist as a corpse.
Although the person is identical to the body, the dead body [which carries on after death] has different properties from the living body. See Feldman’s *Confrontations with the Reaper*.


25. This objection was forcefully raised by an anonymous referee. A possible response to this objection—the one that I use, it should be admitted—was also suggested by this referee.

26. According to the 2005 OPTN/SRTR Annual Report, there were nearly 87,000 patients on the waiting list for various organs.

27. This was popularized in the film *Alive!*

28. AUTHOR ARTICLE

29. I am deeply indebted to Cecile Fabre’s discussion of this issue, as well as of some solutions, in *Whose Body Is It Anyway?* The idea of living donations as an alternative to postmortem donations, which I use below, is from this important book.

30. I have in mind, for example, persons of the Jewish faith, who believe that the body must be buried whole if it is to pass into the company of God.

31. For a more detailed discussion of this kind of problem, see AUTHOR ARTICLE

32. I am grateful to Leah Mcclimans for bringing this point to my attention.


34. Fabre, *Whose Body Is It Anyway?*

35. ACKNOWLEDGMENTS
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