

Patient Autonomy and the Family Veto Problem in Organ Procurement

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Abstract

A number of bioethicists have been critical of the power of the family to “veto” a patient’s decision to posthumously donate her organs within opt-in systems of organ procurement. One major objection directed at the family veto is that when families veto the decision of their deceased family member, they do something wrong by violating or failing to respect the autonomy of that deceased family member. The goal of this paper is to make progress on answering this objection. I do this in two stages. First, I argue that the most plausible interpretation of what happens when a person registers as an organ donor in an opt-in system is that they give their consent to the State to posthumously remove their organs for transplantation purposes. Call this the Authorization Account. Second, given the Authorization Account, I argue by analogy that when families veto an individual’s decision to donate and the individual’s organs are not in the end removed, neither the doctors nor the family violate the individual’s autonomy in any morally objectionable sense. Call this the Non-Removal Thesis. I argue that, since the Non-Removal Thesis is true, we do not violate the autonomy of registered donors when we fail to remove their organs because their family has objected.

1. ORGANS AND FAMILIES

A question of paramount significance in the debate over organ procurement from the dead is: who should have the final authority to decide what happens to a deceased patient’s organs?¹ Countries such as the United States, Scotland, England, and New

¹ Frances Kamm. *Morality, mortality vol 1*. (New York: Oxford University Press, 1993: 205–12, 217–21); Robert Veatch. *Transplantation Ethics*, 1st edition. (Washington D.C.: Georgetown University Press, 2000); David Price. *Legal and ethical aspects of organ transplantation*. (Cambridge: Cambridge University Press, 2001); Martin (T.M.) Wilkinson. *Ethics and the Acquisition of Organs*. (Cambridge: Cambridge University Press, 2011); Martin (T.M.)

Zealand currently operate under an opt-in system of organ procurement: on this model, the default is that a patient's organs will not be removed unless she has officially registered as an organ donor.² As we'll see, however, actual practice permits organ removal in various other circumstances.³ Opt-in systems such as those in the United States, England, and New Zealand, are more reliably characterized as "impure" opt-in systems because, in such systems, even if a patient has registered as an organ donor, doctors in practice often acquiesce to the wishes of the family regarding donation. Thus, if the donor's family does not want the donor's organs to be removed, doctors often honor this request.⁴ However, within these systems, the donor herself also has the power to veto the posthumous removal of her organs.⁵ Thus, most opt-in systems as we know them operate on what has been called a 'double veto'.⁶ My goal in this paper is to discuss one part of the double veto, namely, the family's power to veto or override a patient's registered decision to donate.

The power of the family to veto a patient's recorded decision to donate has come under considerable criticism. One of the most common criticisms against the family veto is that when families veto the decision of their deceased family member, they fail to

Wilkinson. "Individual and family consent to organ and tissue donation: is the current position coherent?" *Journal of Medical Ethics* 2005, 31: 587-590; Paula Boddington. "Organ donation after death—should I decide, or should my family?" *Journal of Applied Philosophy* 2005, 15:69–81; Govert den Hartogh. "The role of the relatives in opt-in systems of postmortal organ procurement." *Medical Health Care and Philosophy* 2012, 15:195–205; David Shaw. "We should not let families stop organ donation from their dead relatives." *British Medical Journal* 2012, 345: e5275; Jurgen de Wispelaere and Lindsay Stirton. "Advance commitment: an alternative approach to the family veto problem in organ procurement." *Journal of Medical Ethics* 2010, 36: 180-183.

² Although the majority of U.S. states operate under opt-in policies, some U.S. States, such as New York and Illinois, operate under Mandated Choice policies. Under mandated choice policies, people are required to decide whether to be organ donors or not. This is usually done in the context of obtaining or renewing a driver's license at the DMV, and one cannot obtain a license without deciding one's donor status.

³ Wilkinson, *Ethics and the Acquisition of Organs*; Den Hartogh, "The role of the relatives in opt-in systems of postmortal organ procurement."

⁴ Wilkinson, "Individual and family consent to organ and tissue donation: is the current position coherent?"; Den Hartogh, "The role of the relatives in opt-in systems of postmortal organ procurement."

⁵ This power to veto organ removal is essentially equivalent to the power to refuse consent to organ removal. See Wilkinson, "Individual and family consent to organ and tissue donation: is the current position coherent?" for discussion.

⁶ Wilkinson, "Individual and family consent to organ and tissue donation: is the current position coherent?"

respect the wishes of the deceased, and this constitutes a violation of the deceased patient's autonomy.⁷ This criticism has considerable plausibility, especially when we consider other cases in which we would think it is clearly wrong for families to either override or have the power to override a patient's decision regarding the treatment of her body. For example, imagine that families had the power to veto a competent patient's decision to undergo surgery to treat cancer or other diseases; or suppose that the family had the power to veto a patient's advance directive that instructed physicians to take her off life support in the event of brain death.

Although many find compelling the claim that the power of the family to veto a patient's decision is wrong because it is inconsistent with respect for the patient's autonomy, in this paper I defend the position that when families veto an individual's recorded decision to donate and the individual's organs are not in the end removed, neither the doctors nor the family infringe on the individual's autonomy in any morally objectionable sense. Call this the Non-Removal Thesis. The Non-Removal thesis is not simply the view that doctors and families act within their rights by not removing the organs of a registered donor. For this is consistent with the view that although doctors and families act within their rights by failing to remove the donor's organs, they do act in a morally objectionable way towards the donor. I am not merely claiming that it's morally permissible -- in the sense that it doesn't violate a potential donor's rights -- to not remove a person's organs who has registered as an organ donor; I am also claiming that not removing the donor's organs would not be doing *anything* morally objectionable in terms of her autonomy. In other words, the fact that a person autonomously agrees to donate her organs fails to ground any autonomy-based moral objection to not removing and using them after the person's death.

I'll argue for the Non-Removal Thesis in a two-step process. First, I'll consider what happens when an individual registers to become an organ donor. I will argue that registering to become a donor is best interpreted as a mere act of authorization whereby an individual gives her consent to the State to remove her organs for transplantation

⁷ Veatch, *Transplantation Ethics*, 1st edition; Shaw, "We should not let families stop organ donation from their dead relatives." Walter Glannon. "Taylor on Posthumous Organ Procurement." *Journal of Medical Ethics* 2014; Vol 40, No. 9: 637-638.

purposes after she has died. Second, given this notion of authorization as giving consent, I'll argue by analogy for the Non-Removal Thesis by considering analogous cases of mere authorization or consent, and suggest that not bringing about a state of affairs to which an individual has consented does not constitute a violation or infringement of her autonomy. By analogy, when families veto an individual's decision to donate and the individual's organs are not in the end removed, they do not infringe on her autonomy in any morally objectionable sense.

2. INTREPETING THE ACT OF DONOR REGISTRATION

Before I begin, some clarifications are in order. One might think that, under an opt-in system, if a person does not register as a donor then her organs will not be removed, even if her family permits it. This is incorrect. In actual medical practice, even if a person has not registered as a donor, doctors will often ask for the donor's family to give consent to organ removal. In addition, if the deceased's family makes it known that the donor did in fact wish to donate, then this often suffices for organ removal as well. These kinds of cases – where no official decision regarding organ removal has been registered – are both important and interesting. However, they are starkly different kinds of cases that present different ethical issues from the cases I am in concerned with.⁸ Thus, in this paper I am only concerned with cases in which (i) a person has officially registered as an organ donor, and (ii) her organs are not in the end removed.

In this section, my goal is to consider what happens when a person registers as an organ donor. In other words, what does a person *actually do* when she registers to become an organ donor? I will argue that the most plausible interpretation of what she does is that, in registering as a donor, a person gives her consent to the State to posthumously remove her organs for transplantation. I will dub this *the Authorization Account*.

⁸ On the topic of family consent to organ removal, see Den Hartogh, "The role of the relatives in opt-in systems of postmortal organ procurement." For an ethical analysis of cases in which a person has not registered as a donor but has indicated to her family that she wishes to donate, see Martin (T.M.) Wilkinson. "Consent and the Use of the Bodies of the Dead." *Journal of Medicine and Philosophy* 2012, 37 (5) 445-463.

According to the Authorization Account, signing up to become a donor essentially involves consenting to the posthumous removal of one's organs for transplantation purposes. The most straightforward evidence for the Authorization Account comes from donor registration documents that use the language of consent. For example, the official website for organ donation in the state of Colorado states that, "By registering as a donor you give legal consent to donate your organs and tissues at the time of your death".⁹ In addition, the U.S. Department of Health and Human Services indicates that the donation process begins "when people perform the simple act of indicating their consent to be a donor by enrolling in their state's donor registry."¹⁰

Thus, it is clear that donor registration documents seek people's consent to the posthumous removal of their organs for use in transplantation. Therefore, when a person registers to become a donor, the most straightforward interpretation of what they do is that they give consent.

It might be argued that the Authorization Account leaves out something important, namely, that many donors have deep wishes to donate their organs, and hence it is not mere consent that is given by registering as an organ donor. Although it is true that some people who register as organ donors also have a deep wish to donate their organs, this fact is an extrinsic one that is not present in every case of donor registration. Indeed, people who register as donors do so for a variety of reasons. According to the Authorization Account, if someone registers as a donor, all we can conclude from this act is that they have consented to their organs being removed for transplantation purposes. It does not necessarily communicate that they have a deep wish to donate. As an analogy, suppose you want to buy my car. I sign a contract that transfers ownership of my car to you. Now, it might be true that I really want to sell my car to you, or that I wish that you keep my car for many years to come. But all we can conclude from the fact that I signed the contract is that I legally transferred ownership of the car to you. Indeed, this fact, and not the fact that I really wanted you to have my car, is what makes it permissible for you

⁹ "Donate Life Colorado," <http://www.donatelifecolorado.org/register-now/>, accessed August 15 2015.

¹⁰ Organ Donation: The Process," <http://organdonor.gov/about/organdonationprocess.html>, accessed August 15, 2015.

to take the car as your own. I am suggesting something similar for donor registration: when a person registers as a donor, all we can conclude is that she has consented to organ removal.

Another reason to accept the Authorization Account involves a necessary condition on any acceptable interpretation of the act of donor registration. Any plausible interpretation must explain why it is permissible for the State to posthumously remove a person's organs for transplantation purposes if they have officially registered as a donor. The Authorization Account provides a simple and plausible answer: it is permissible to posthumously remove the organs of a registered donor because, by registering, they have given their valid consent to the removal of their organs for transplantation purposes. Consent, on the standard view, waives whatever rights the person has against unauthorized bodily invasions.¹¹ The Authorization Account thus exploits the commonly accepted view that gaining a patient's consent makes the posthumous removal of her organs permissible.

The main alternative to the Authorization Account is a view that sees the act of registration as a form of gift giving.¹² Thus, *the Gift Account* says that registering as a donor essentially involves gifting one's organs to the State or some other official procurement organization. One might object that the Gift Account is not a genuine alternative to the Authorization account since both involve the giving of consent. This worry is mistaken. Gift-giving necessarily involves features that need not be present when one is merely giving consent or authorizing the use of something that is properly yours. One of these features is that the giving of a gift involves the transfer of ownership of something, but consenting or authorizing that some thing be used need not involve a transfer of ownership. For example, if I have merely consented to you using my lawn mower, I haven't given it to you in the sense that it is now your property and not mine. But if I give you my lawn mower as a gift, I give it to you in the sense that it is now your property and not mine.

¹¹ Wilkinson, *Ethics and the Acquisition of Organs*; Wilkinson, "Individual and family consent to organ and tissue donation: is the current position coherent?"

¹² Veatch, *Transplantation Ethics*, 1st edition; Price, *Legal and ethical aspects of organ transplantation*.

Second, one cannot successfully give a gift without the recipient accepting it, but this is not true for authorizing or giving consent. For example, suppose I take my old coat and offer it to a friend, who rejects the offer. In that case, I have not actually given my friend a gift because he has rejected the offer. However, suppose I tell my friend that I have consented to let him take my coat as his own. In that case, it is true that I have consented to give my friend the coat, even if in the end he turns down the offer. Thus, while giving a gift requires the recipient to accept the gift, giving consent requires no such thing.

Now that I've argued that the Gift Account and the Authorization Account are genuine alternatives, there are two additional features of the Gift Account to consider. First, in normal gift giving, it is assumed that the recipient may do what she wants with the gift once it becomes her property. If I receive a shirt from my sister as a gift, I can cut up the shirt if I please, or I can cut off the sleeves and then wear it. But it would be strange if the State or other procurement organizations were able to do whatever they pleased with people's donated organs. Suppose, for example, that transplantation surgeons removed a donor's organs but instead used them for their personal biomedical research. Although doing this is consistent with the view that in donating one gives a gift, it is tacitly assumed that if one gives organs as a gift, it is expected that they be used for transplantation purposes. This could be viewed as a form of conditional gift giving: "you may have X *only if* you do such and such". This seems to be an improvement upon the original Gift Account. Registering to become a donor might therefore entail the giving of one's organs to the State *on the condition* that they are used for transplantation purposes.¹³

The second feature of the Gift Account that we need to consider concerns how to interpret the *time* at which the gift of a person's organs is actually given. Proponents of the Gift Account must make a choice between two different views of when the gift of a donor's organs is actually given. On the first view, by signing up to become a donor, a person successfully gives the gift of her organs to the State or the relevant procurement organization; however, although the gift has been *given*, it can only be *used* in the future

¹³ For a presentation of this view on conditional gift-giving, see Alida Liberman. "A Promise Acceptance Model of Organ Donation." *Social Theory and Practice* 2015, 41(1): 131-148.

once the donor has died. Consider how a parent might give her child the gift of a college savings account that can only be used once the child grows up and goes to college. The parent gives the child the gift now, but the gift can only be used at a later time.

Alternatively, on the second view, when a person registers to be an organ donor, they are not giving the State the gift of their organs *now*; rather, the gift can only be given once the registered donor has died. Once the person has died, then the gift can be given and received.

The problem is that, no matter which view we accept, the Gift Account runs into trouble. Consider the first version of the Gift Account. The problem is that in normal gift-giving, once a person successfully gives a gift to another person, it is inappropriate for her to take back what she has given as a gift. For example, if I receive movie passes from my relative as a birthday gift, then my relative cannot simply take back what is no longer hers a day later. The problem, however, is that people are permitted (and should be permitted) to change their donor status.¹⁴ Suppose I register to become a donor but then later come to realize that I wish to be buried with my organs intact. In that case, I may change my donor status and this decision will be respected. But the fact that people may change their donor status is inconsistent with the view that one gives a gift when one signs up to become a donor.

One might object and suggest that there are cases in which a person gives a gift but then later changes her mind and takes back the gift. For example, suppose I sign my will, which includes giving 500 dollars to Oxfam after my death. It seems that I am giving a gift to Oxfam, but this is consistent with me later changing my mind and altering the will to not include a 500-dollar gift to Oxfam. Similarly, it can be consistently maintained that a registered donor gives her organs as a gift, but that she may later change her mind and take back the gift. To reply, I suggest that the scenario involving the leaving of 500 dollars to Oxfam is not actually a case of gift giving. What this scenario seems more like is a case of *giving instructions*. In particular, my will gives instructions to the relevant parties on how to dispose of my property and assets. In general, a person can always change her mind about the instructions concerning how to dispose of what is

¹⁴ This is virtually the argument against the Gift Account given by Liberman, “A Promise Acceptance Model of Organ Donation.”

rightfully hers. But the same does not hold for gift giving. Indeed, it would be a strange conception of gift giving if it turned out that every gift giver was able to give a gift to another party and then take it back whenever she pleased.

Let's now consider the second version of the Gift Account. The problem for this version occurs when a registered donor's organs cannot be used for certain medical reasons. For example, a person who has signed up to become a donor may have died in circumstances such that their organs could not be properly preserved for transplantation, and hence their organs will not be used for transplantation. This presents a problem for the second version of the Gift Account. On the Gift Account, a person gives a conditional gift to the State when they register as a donor: remove my organs only if they are used for transplantation purposes. But if a registered donor's organs are not medically viable, then they cannot be used for transplantation purposes. In such cases, then, no gift is successfully given to the State because the sole condition on which the gift may be given, i.e. that the organs be used for transplantation, cannot be satisfied. This implies that registered donors, who turn out to have defective organs for transplantation purposes, did not actually give a gift to the State. But surely all registered organ donors, including those whose organs are not usable for transplantation, have done *something* that has changed the normative status of their situation in relation to the State. This is because, had a registered donor's organs been medically viable upon their death, it would have been morally permissible for the State to remove their organs and use them in transplantation. But the second version of the Gift Account cannot explain this normative change, since, in cases where the person's organs are not viable for transplantation, no gift has actually been given to the State.¹⁵

The Authorization Account, in contrast, can easily explain the normative change that occurs in situations where the organs of registered donors are not medically viable. On the Authorization Account, even if a registered donor's organs cannot be used, he or she has previously authorized the State to posthumously remove her organs for

¹⁵ To reply to this objection, it seems that proponents of the second version of the Gift Account must say that, although a person with defective organs does not actually give a gift, by registering as donors they signal their *intention* to give a gift at a later time. But this response is implausible since signaling an intention to give some thing as a gift to another party is not sufficient for that party to simply take that thing without your consent.

transplantation purposes; therefore, *had* the person's organs been useable for transplantation, it would have been permissible for the State to remove and use them in transplantation.

Given this second problem for the Gift Account, one might respond by putting forth a slightly different view, according to which, registering to become a donor involves merely *offering* the gift of one's organs for transplantation purposes. Call this the *Gift-Offer Account*.

On the Gift-Offer Account, a person doesn't actually transfer ownership of her organs to the State or the relevant procurement organization. In contrast, on the Gift Account, a person does transfer ownership of her organs, and this explains why it is permissible for the State to remove and use the organs of someone who has given them as a gift. The problem with the Gift-Offer Account lies in the fact that it does not involve the ownership transfer of one's property to the State. Consider the following analogous case. While conversing, I offer to give you my record collection as a gift. You tell me that you will think it over and get back to me in a couple of days. However, the next night you walk into my room while I am not there and take my records. It seems plausible that you have done something *prima facie* wrong by taking my record collection. And this *prima facie* wrongness remains even given the fact that I *offered* to transfer ownership of my record collection to you. Analogously, the mere fact that a person has offered to give the State their organs as a gift does not have the same normative force as *actually* giving one's organs as a gift. This is because merely offering one's organs as a gift does not involve a transfer of ownership or authority to another party. It seems, however, that the transfer of ownership or authority to the State is precisely what is needed on any gift account in order to make the posthumous removal of organs permissible.

Finally, let's consider a view on which when a person registers as a donor, a *promise* is made between her and the State. What I will call *the Promise Account* can be spelled out in two different ways. On the first interpretation, in registering as a donor, the State promises the individual that her organs will be removed and used *if* they are medically viable for transplantation. On the second interpretation, registering as a donor involves the individual promising the State that she will donate her organs after death. On this second account, however, a third party, such as a transplantation surgeon, must

discharge the promise, since the individual who made the original promise will be dead at the time at which the promise must be discharged.

Both versions of the Promise Account are implausible. Consider the second version of the Promise Account, which says that when an individual registers to become an organ donor, she promises to give her organs to the State if they are medically viable after death. The major problem for this account can be put as follows. By registering as a donor, a person promises the State that a third party will remove her organs after her death. But when a person makes a promise to another party (e.g. the State), this plausibly generates a *prima facie* obligation to discharge the promise.¹⁶ In this case, the promise made by the individual generates a duty on her part to posthumously donate her organs. But suppose that a registered donor later decides while alive that she no longer wishes to donate her organs and so she changes her status to a non-donor. In that case, she has made a promise and broken it. By breaking it, she has failed to fulfill a *prima facie* obligation, and consequently, she has done something *prima facie* wrong. But it is surely absurd to suppose that a person has done anything *prima facie* wrong by deciding to change her donor status to a non-donor.¹⁷ Since this is an implication of the second version of the Promise Account, the account ought to be rejected.

Alternatively, consider the first version of the Promise Account. The view is that, by registering as a donor, the State makes a promise to remove and use a person's organs after their death. The first problem is that it is difficult to see how an action that an individual performs (e.g. registering as a donor) entails that an entity distinct from her (the State) has made a promise *to her* about some thing (e.g. to posthumously remove her organs). In general, if some agent A makes a promise to another agent B, then A, rather than B, must do some action that generates the promise. Thus, since it is the individual herself registering as a donor, it is difficult to see how this could be understood as the State making a promise to the donor.

¹⁶ See William David Ross. *The Right and the Good*, ed. Philip Stratton Lake. (Oxford: Oxford University Press 2002 (1930)).

¹⁷ I am assuming here that there is no general duty to sign up to become an organ donor. However, there might be circumstances in which certain people have special duties to donate their organs, either because they entered into a contract with another person, or perhaps because they made a promise to another person that they will donate their organs to them, as in living donation.

Second, recall that a necessary condition on any acceptable interpretation of donor registration is to explain why it is permissible for the State to posthumously remove a person's organs for transplantation purposes if they have officially registered as a donor. The problem is that a mere promise to remove a donor's viable organs may not be sufficient to permissibly remove them after death. Consider the following analogy. You own a record collection that I very much want. You show me the collection and I leave you a note telling you that I promise to take your record collection from you. Given these details alone, it seems impermissible for me to take the records from you. After all, you never signaled that you accept my promise, nor did you consent to have your records removed from your possession. Thus, my promise to you that I will take your record collection is not sufficient to permissibly take them. By analogy, the promise made to the registered donor on behalf of the State is not sufficient to permissibly remove her organs after death.

It might be argued that, in addition to the State promising to posthumously remove her organs, a person *accepts* the promise that the State makes to her when she registers as an organ donor. Call this the *Promise-Acceptance Account*.¹⁸ The problem with this account is that it is subject to a similar problem as the second version of the Promise Account, namely, that if a registered donor later changes her donor status to a non-donor, she has thereby accepted and then rejected a promise made by the State to her. But accepting a promise and then breaking the terms of that promise is *prima facie* wrong. Therefore, an implication of the Promise Acceptance Account is that registering as a donor and then changing one's status to a non-donor is *prima facie* wrong. But surely it is not wrong for a person to register as a donor and then change her status to a non-donor. To illustrate, suppose you are thinking of selling your car to me. I take interest and I promise you that I will buy the car in two days time. You agree to the terms of the promise. Two days later, however, you change your mind and decide not to sell me your car. Since you agreed to the terms of the promise and have now broken that agreement, what you have done is *prima facie* wrong. Analogously, on the Promise-Acceptance Account, when registered donors change their status to a non-donor, they break the

¹⁸ For a similar account, see Liberman, "A Promise Acceptance Model of Organ Donation."

agreement that they made to the State. And if they break this agreement, it follows that what they do is prima facie wrong. However, surely people who are registered donors do not do something even prima facie wrong when they decide to change their donor status to a non-donor. Since this is an implausible entailment of the Promise-Acceptance Account, the account ought to be rejected.

One might argue that, in the car example, breaking the promise to sell your car is not wrong because the car is your property and you can, within reasonable limits, do whatever you please with your property.

Let's grant the objector the claim that, since the car is my property, I have a right to do whatever I want with the car, including breaking the original promise. But it doesn't follow from the fact that I have a right to do whatever I want with my car that therefore it is morally right to break the promise. Indeed, it is still prima facie wrong to break the promise, despite having the right to do so. But notice that, in order for my objection against the Promise-Acceptance Account to succeed, all I need is the claim that the Promise-Acceptance Account entails that it is prima facie wrong for registered donors to change their status to a non-donor. Therefore, the above objection fails.

Given the problems with both the Gift and Promise Accounts, and given the positive reasons to accept the Authorization Account, I submit that the most plausible interpretation of the act of donor registration is that an individual gives her consent to the State for the posthumous removal of her organs for transplantation purposes.

3. THE NON-REMOVAL THESIS AND THE FAMILY VETO

Now that I have argued that the Authorization Account is correct, I am in a position to present an argument from analogy for the conclusion that the Non-Removal Thesis is true.¹⁹ Before I proceed, however, some preliminary points regarding the nature of

¹⁹ One might wonder whether the Gift-Account supports the Non-Removal thesis, in which case the discussion concerning the Authorization and Gift Account would have been unnecessary. First, I should note that whether the Gift Account supports the Non-Removal thesis is irrelevant because I've argued that the Gift Account is an implausible account of what happens when a person registers as an organ donor. Since the Gift Account is false, whether it supports the Non-Removal thesis is not relevant for my purposes. However, let's suppose for the sake of argument that the Gift Account were true. How would that affect the Non-Removal Thesis? I think the Non-Removal Thesis would still be a plausible thesis, assuming that the Gift Account is true.

autonomy and the nature of the family veto are in order.

To understand the autonomy-based objection against the family veto, it is important to briefly discuss the concept of autonomy and how it relates to the case of organ transplantation. It should be noted that although I am not assuming any particular theory of autonomy, it is still possible to get a handle on the concept and what it entails about donors and their choices. Autonomy, most generally, is about self-rule, or living one's life according to one's own values and goals, and without the undue interference of others.²⁰ The thought is that people have the right to craft their life goals and plans in the way they see fit, and to carry out these goals and plans so long as they do not wrong others in the process.²¹ In the most general terms, a person's autonomy can be violated if others interfere with her choices or if they impose a set of goals and plans that is not the person's own.

People have an interest in what happens to their organs after they die. They have wishes that they be buried intact and wishes that their organs be removed and used in transplantation or research. Insofar as people have wishes about how their organs are used, whether a person's organs are used for transplantation purposes seems directly relevant to her self-chosen life plan and whether it has been respected or interfered with by others. For example, if I promise a loved one that I will not allow her organs to be posthumously removed, and I allow them to be removed, I have failed to respect her life-plan and I have thus violated her autonomy. Opponents of the family veto claim that the family's interference in the donor's decision to donate her organs similarly violates her autonomy because it violates her right to live her life in accordance with a particular life-plan, which includes donating her organs for transplantation purposes.²²

This is because, the State does not seem to be morally obligated to accept the donor's gift of her organs, just as I am not morally obligated to accept a gift from someone who attempts to give me one.

²⁰ See chapter 4 in James Childress and Tom Beauchamp. *The Principles of Biomedical Ethics*, 6th edition. (New York: Oxford University Press, 2009).

²¹ For discussion, see Wilkinson, *Ethics and the Acquisition of Organs*: Chapters 2 and 4.

²² Speaking of the right to make autonomous decisions about one's body, Walter Glannon, for example, claims: "So if a person clearly indicated that he did not want his organs procured for transplantation after his death and they were procured, this action would thwart his wish, violate his right and wrong him. A person's wish would also be thwarted, his right violated and he would be wronged if he indicated that he wanted to donate his viable organs and the transplant team failed to procure them". See Glannon, "Taylor on Posthumous Organ Procurement," p. 637.

There is, however, a reason to be skeptical about applying the concept of autonomy to deceased organ donors.²³ One might argue that once a person loses the capacity to be an autonomous decision-maker -- in this case, because she has died -- then it no longer makes sense to appeal to her autonomy when we fail to honor her choices. Thus, to claim that it is a violation of the dead donor's autonomy when her organs are not removed against her wishes seems to be a mistaken way of characterizing the situation. In other words, since the dead donor is no longer autonomous, we can no longer sensibly speak of her autonomy being violated by the decisions of others.

While this line of criticism is initially compelling, there is a possible reply to this objection that mirrors the reply to an important objection to the notion of posthumous harm. To begin, imagine that Laura has a strong desire that her children have successful careers when they grow up. However, because of her terminal illness, Laura dies when her children are relatively young. Many years later, however, Laura's children all lose their jobs and end up bankrupt. Thus, Laura's desire that her children have successful careers is frustrated. Given her frustrated desire, has Laura been harmed? Opponents of posthumous harm argue that Laura has not been harmed because, although her desire has been frustrated, there is no subject of the harm. Since all harms require subjects, and since Laura is deceased, no harm has occurred. Call this the No-Subject problem.

In a now famous paper, George Pitcher attempted to solve the No-Subject problem by drawing a distinction between the post-mortem self and the ante-mortem self.²⁴ The post-mortem self refers to the rotting corpse in the grave; a mere rotting body. By contrast, the ante-mortem self refers to the alive and existing person. Pitcher argues that when Laura's wish is frustrated after her death, the harm does not attach to post-mortem Laura, since post-mortem Laura is nothing but a rotting corpse. Rather, when Laura's wish is frustrated after her death, the harm attaches to Laura, the ante-mortem person; that is, the harm attaches to Laura when she was alive and had the desire that her children have successful careers. On Pitcher's view, "the sense in which an ante-mortem person is harmed by an unfortunate event after his death is this: the occurrence of the event makes it true that during the time before the person's death, he was harmed --

²³ Thanks to an anonymous reviewer for bringing this problem to my attention.

²⁴ George Pitcher. "The Misfortunes of the Dead." *American Philosophical Quarterly* 1984, Vol. 21 No 2: 183-188.

harmed in that the unfortunate event was going to happen”.²⁵ Thus, the fact that Laura’s children have failed careers makes it true that the ante-mortem Laura was indeed harmed.

A similar response can be crafted in reply to the charge that it makes little sense to speak of a deceased person’s autonomy being violated since the deceased are not autonomous beings. Suppose Julio very much wants his organs donated and when he dies, his organs are usable but they are not removed. If we accept Pitcher’s reasoning above, the fact that Julio’s organs were not used makes it true that ante-mortem Julio’s wish was frustrated, and hence, ante-mortem Julio’s autonomy was violated.

Note that it is not my concern in this paper to assess whether this reply is ultimately successful. However, the reply does show that there is at least one prima facie plausible way to think about posthumous autonomy violations. Although I am overall sympathetic to the worry that it makes little sense to talk about the autonomy of the deceased being violated, I believe it is more productive, from an argumentative standpoint, to meet opponent’s of the family veto on their own terms. That is, we should assume, for the sake of argument, that it makes sense to talk about posthumous autonomy violations and then argue that it is still not the case that the family veto violates the deceased’s autonomy.

Now that I have granted the idea that there can be posthumous autonomy violations, we should briefly explore the nature of the family veto. What exactly do families do when they veto a donor’s recorded decision? It should be noted at the outset that, in many countries, the family has no legal power to block a donor’s decision to donate, unless the family provides credible evidence that the patient had changed her mind about donation since signing up to be a donor.²⁶ Legally, doctors are permitted to ignore the family’s veto and procure organs from a registered donor anyway. However, when a registered donor has viable organs that can be removed for transplantation, most doctors will, as a matter of practice, consult the donor’s family on their preferences about donation. If the families have a strong preference against donating their family member’s organs, doctors will typically act in accordance with the family for various political and

²⁵ Pitcher, “The Misfortunes of the Dead,” p. 187.

²⁶ Wilkinson, *Ethics and the Acquisition of Organs*; Price, *Legal and ethical aspects of organ transplantation*.

practical reasons.²⁷ Thus, the family veto is better understood as the stating of a preference against donation, and doctors in practice either act against or in accordance with that preference. This understanding of the family veto as the stating of a preference against donation will play an important role in constructing my argument from analogy below.

To begin, consider the following case. Brenda has a spare car that she never uses, so one day she tells Ana that if she ever needs to use the spare car for something, she is allowed to do so. A year passes when one day Ana is babysitting a client's child and the child accidentally poisons herself by drinking a mislabeled jar of liquid. The child needs immediate medical attention or else she will surely die. Ana does not own a car but she remembers that Brenda granted her permission to use her spare car for whatever reason. Ana entertains taking Brenda's car to the hospital, but in the end she does not borrow the car. As a result, the child dies under Ana's care.

It seems clear that Ana has done something wrong by failing to take Brenda's car to the hospital. However, the wrongness of her act plausibly consists in the fact that she failed to save the life of the child under her care when it was relatively easy to do so. It seems equally clear, however, that the wrongness of Ana's actions does not consist in the fact that she violated Brenda's autonomy by not borrowing her spare car. The moral innocence of Ana's actions towards Brenda's autonomy seems to be captured by the general moral principle that failing to bring about a state of affairs that someone has merely consented to is not a morally objectionable violation of their autonomy. Call this the Consent-Autonomy Principle.

That the Consent-Autonomy Principle is true is confirmed by examples in other contexts. For instance, if I decide to give my old coat away by leaving it on the side of the dumpster, I have relinquished my claim to the coat and have thus consented to others taking the coat. But the mere fact that I consented to others taking the coat does not generate an obligation on the part of other people to take the coat. The fact that someone fails to take the coat does not constitute a morally objectionable violation of my autonomy. Similarly, if I consent to my friend using my lawn mower, it doesn't follow

²⁷ Wilkinson, "Individual and family consent to organ and tissue donation: is the current position coherent?"

that she now has an obligation to borrow the lawn mower. Her failing to borrow the lawn mower would not constitute a morally objectionable act of failing to respect my autonomy.

One might argue that perhaps Ana has a special obligation towards Brenda to borrow her car, and hence, failing to borrow the car would be violating this special obligation. The problem is that the sorts of actions that would normally generate special obligations are entirely absent from the Brenda and Ana case: Ana has made no promises towards Brenda, nor has she entered into an implicit or explicit contract with Brenda that could generate such a special obligation. The same, I suggest, is true for failing to remove organs from a person who has merely given their consent to organ removal. If potential donors give the State permission to posthumously remove their organs and doctors decide not to take the organs because of the family's preferences, they do not violate the autonomy of the registered donor in any morally significant way. This is the case for precisely the reason offered above in the case of Brenda and Ana: that failing to bring about a state of affairs (in this case, posthumous organ removal) that someone has merely consented to is not a morally objectionable violation of their autonomy.

One might object that the difference between failing to procure organs from a patient who has consented and the case of Ana failing to borrow Brenda's car is that in the former, there is the *expectation* on the part of the patient that her organs will be taken and used in transplantation. After all, when patients consent to posthumous organ removal, it's plausible that many of them expect their viable organs to be posthumously removed if they do give their consent to organ removal.

Although this objection appears superficially plausible, this initial plausibility evaporates when we consider analogous cases. To borrow two examples already discussed above: If I decide to leave my coat by the dumpster so that it can be picked up by someone who needs it, the fact that I expect someone to pick it up doesn't mean that my autonomy has been disrespected or violated if it happens to turn out that nobody picks up the coat. Or, suppose I permit my neighbor to borrow the lawnmower and I expect her to borrow it as well; my neighbor failing to borrow the lawnmower does not seem to constitute a failure to respect my autonomy, even assuming that I expected her to borrow it.

Secondly, a critic might object that the case of Brenda and Ana is dis-analogous from organ procurement because the Brenda-Ana case is a transaction involving two parties. However, organ procurement is more accurately viewed as involving three parties: the donor, the State (or transplantation physician), and the donor's family. What happens is that a donor gives her consent to the State to posthumously remove her organs; then the doctor seeks the family's preferences about donating the patient's organs and then either acts against or in accordance with those preferences. I suggest that correcting for this dis-analogy makes no difference to our assessment of whether Ana violates Brenda's autonomy in a morally objectionable sense.

Consider, then, the following variation of the Brenda-Ana case. As before, Brenda has a spare car that she never uses, so one day she tells Ana that if she ever needs to use the spare car for something, she is allowed to do so. However, Brenda's parents are also present and they tell Ana that since the car has been in their family for such a long time, they strongly prefer that the car not ever be borrowed. A year passes when one day Ana is babysitting a client's child and the child accidentally poisons herself by drinking a mislabeled jar of liquid. The child needs immediate medical attention or else she will surely die. Since Ana doesn't have a car, she remembers that Brenda granted her permission to use her spare car for whatever reason. Ana gives taking Brenda's car to the hospital some thought, and she also considers that Brenda's parents have a strong preference against anybody borrowing the car. In the end, Brenda decides not to borrow the car. As a result, the child dies under Ana's care.

Again, it seems clear that Ana does not fail to respect Brenda's autonomy by not taking the car. After all, Brenda has only granted Ana permission to borrow the car, and since the Consent-Autonomy Principle is true, failing to borrow Brenda's car is not a morally objectionable violation of her autonomy. Thus, by analogy, when doctors fail to remove a patient's organs in part because of the family's preferences against donation, neither the doctor nor the patient's family fails to respect the patient's autonomy in any morally objectionable sense.

One might object that the argument from analogy presented above is illegitimate because it involves a person's property, i.e. Brenda's car, but organs are not a person's property. But this objection is not plausible. First, this objection assumes the relatively

controversial position that organs are not one's property. This claim is not obvious, nor is there a consensus on it in the literature. Indeed, rights over organs have been called "quasi property rights."²⁸ Second, let's assume that organs are not one's property. Even so, merely citing that organs are not one's property is not sufficient to refute the argument from analogy presented above. For it needs to be explained why the fact that organs are not one's property is morally relevant so as to make the analogies I present illegitimate. That is, it needs to be shown that there is a morally relevant difference between one's organs and one's property that makes us unable to draw a moral conclusion about the former from the latter.

Next, one might object that, despite what the Ana and Brenda case shows, there are other cases analogous to the family veto in organ procurement which show that not honoring the decision of the donor is in fact a wrongful violation of her autonomy. Consider *the Clothing Case*: Imagine that 75 percent of people in a small town endorse the idea of leaving clothes at a clothing shelter for the poor and needy of the town. But one person, call him Rick, dislikes this practice because he thinks it encourages dependence and so he takes the clothes donated at the clothing shelter and buries them in the ground to rot. Now, surely what Rick does is wrong, and one reason it is wrong is that both the social autonomy of the community that created and endorsed this practice and the personal autonomy of each clothing donor, is violated. Since this case is analogous to the organ transplantation case, it follows that the donor's autonomy is also violated when the family vetoes her decision to donate her organs.²⁹

My reply is to first offer a couple reasons for thinking that the Clothing Case and the organ transplantation case are not analogous. Second, given the disanalogies identified, I will tighten the analogy that allegedly holds between both cases, and this will show that the Clothing Case does not, after all, involve a wrongful violation of the clothing donors' autonomy, and hence, it does not show that the organ donor's autonomy is violated when her organs are not removed because of her family's wishes against donation.

²⁸ Price, *Legal And Ethical Aspects of Organ Transplantation*, p. 126

²⁹ Thanks to an anonymous reviewer for bringing this case to my attention.

First, it seems we have the intuition that what Rick does in the Clothing Case is wrong because he seems to be engaging in either theft or something morally akin to theft. Since theft is *prima facie* wrong, what Rick does is *prima facie* wrong, and this might plausibly explain our negative evaluation of Rick's behavior. By contrast, in organ transplantation, the family is neither stealing, nor doing something akin to stealing, from the donor. Instead, they are merely expressing a preference that the deceased's organs not be taken, and in the end, the doctors decide to either take or not take the organs. This is the first way in which the Clothing Case and the organ transplantation cases are disanalogous.

Second, whether the Clothing Case successfully tells against my main argument depends on what is meant by the term "endorsed". When we say that 75 percent of the population endorse the clothing-shelter practice, does that mean that 75 percent have a preference for donating their clothes, that 75 percent of the population really, really want to donate their clothes, or that 75 percent of people in the town consent to their donated clothes being taken by those in need? If the clothing shelter case is truly analogous to organ transplantation, then to claim that 75 percent of people endorse the clothing shelter practice must mean that 75 percent *consent* to their donated clothes being taken by those in need. The way in which the Clothing Case was originally presented seemed to suggest that endorsing the practice meant something different than merely consenting to the practice, perhaps something like having a deeply rooted wish for the clothes to be taken. However, as I argued in the first half of the paper, the act of donor registration is most plausibly interpreted as an act of mere consent that the State may use one's organs for transplantation purposes. Thus, the Clothing Case needs to be interpreted in the same manner.

Now, given the above two points, let's re-state the Clothing Case: In a small town, 75 percent of people consent to having their extra, donated clothes taken by the needy at a clothing shelter. As a result, 75 percent of people leave their old clothes by their trash bins for them to be taken by the shelter workers. On the other hand, 25 percent of people in the town do not consent to their extra clothes being taken by the needy, but they tolerate the fact that others in the town do it. However, there is a man named Rick who does not really like the idea of the needy taking clothes from the clothing shelter.

Consequently, Rick sets up a small protest sign at the clothing shelter site, which expresses his preference against the clothing shelter's practices. Indeed, he even tells some people that he does not want them to take the clothes because it encourages dependence. Some see Rick's sign, disregard it, and take clothes anyway. Others see the sign and decide that they will not take any clothes after all.

Now, it does not seem like what Rick does violates the autonomy of the people who both donated clothes and whose clothes were not in the end taken. He is merely expressing a preference against the clothes being taken and people are free to act against or in accordance with that preference by taking the clothes or not taking the clothes. In addition, it's important to keep in mind that the people who donated the clothes merely consented to have the clothes taken. If they merely consented to the clothes being taken and the clothes were not in the end taken, this is not a wrongful violation of their autonomy. Indeed, suppose that all the donated clothes were purple, but that the needy collectively hated purple, and so they all decided not to take any of the clothes. This would clearly not be a violation of the clothing donors' autonomy.

Finally, one might point to real life cases that seem sufficiently similar to the cases I have been considering, but which show that the donor's autonomy has in fact been violated by the decisions of the family. Consider, for example, a case in which a family decides to donate the organs of their deceased loved one, even though they know with absolute certainty that this individual was utterly opposed to organ donation. This, the objection goes, would surely constitute a wrongful violation of the deceased's autonomy.

For the sake of argument, let's grant that the family's actions in this case *would* be a wrongful violation of the deceased's autonomy. Despite this, the case is disanalogous from the original case in two important ways. The case under dispute is one in which the family removes the organs of a patient who (i) did not previously consent to such removal and (ii) was known to oppose organ donation. So it's a case in which a person's body is invaded without their consent. That the person's body was invaded without her consent seems to be a wrongful violation of her autonomy. But this consideration is completely absent in the cases that I have focused on: that is, in the original cases under dispute, no organs are removed without the person's consent. Rather, their organs are simply not removed even though the deceased previously consented to their removal.

The second disanalogy is that this current case is one in which the patient has a deeply rooted wish to have their organs left intact. If the family knows this and does the opposite, this is plausibly construed as a violation of her autonomy. But in the cases originally under dispute, it is assumed that all registered donors have done is given their consent to organ removal. They have not expressed a deeply rooted wish to donate their organs. Thus, if consent is all that has been given, and the organs are not removed because of the family's preference against donation, this is not a violation of the deceased's autonomy.

Now consider a different kind of case, one in which the now deceased individual is an avowed atheist who very much wants to donate in order to save the lives of others at risk of premature death. Imagine that her family refuses to permit the donation because they have a religious perspective as a basis for their refusal to donate. In this case, it seems clear that the family violates the autonomy of their deceased family member.

My reply to this religious case is the same as the second reply to the above case. That is, even if the family's refusal in this case is a wrongful violation of the deceased's autonomy, this case is disanalogous from the organ removal cases under dispute because it is one in which the person has a very deeply rooted wish to donate her organs, yet this deep wish is not honored. Indeed, suppose the religious person did not have a deeply held wish to donate but instead merely consented to the use of her organs by signing a donor card. In that case, as I have argued, it would not be a wrongful violation of her autonomy if her organs are not removed because of the family's preference against donation.

This concludes the defense of my argument from analogy for the Non-Removal Thesis.

4. CONCLUSION

In this paper I argued that the Authorization Account is the most plausible interpretation concerning what happens when a person registers as an organ donor. Next, I argued by analogy for the Non-removal Thesis, i.e. the view that not removing a patient's organs in part because of the preferences of their family does not fail to respect the donor's autonomy in any significant sense. Thus, if a person has registered to become an organ donor and her family's preference against donation leads transplantation physicians to not

remove the person's organs, this is not a morally objectionable violation of the deceased's autonomy.

What my argument shows is that the family veto problem is not a problem about the donor's autonomy and the family's failure to respect it. Rather, the fundamental issue with the family veto problem is that too many useable organs are not removed because the family does not want them removed, and hence, many patients on the transplantation waiting list suffer or die when they would have been given a second lease on life had the organs been used. Indeed, in the United States, there are currently 120,000 men, women, and children on the organ transplantation waiting list. 8,000 of these patients die every year due to not receiving a new organ in time.³⁰

This practical problem does, however, raise some interesting theoretical questions. Among these is whether the family's autonomy, in deciding what happens to their loved one's organs, outweighs the needs of those on the waiting list. Since autonomy is considered a sacrosanct value in contemporary bioethics, arguably outweighing every other value including beneficence and non-maleficence, it might be the case that we ought to respect the family's wishes, even at the cost of not saving lives. One potential argument for this position is that, since individuals have the right to choose to not have their organs donated, and hence, the right to not save the lives of patients on the waiting list, then perhaps the families of the deceased who have merely consented to organ removal also have the right to choose not to donate their loved one's organs to help others on the waiting list. Although I do not have the space here to consider whether this argument succeeds, it is at least one prima facie plausible argument in favor of the claim that the family's autonomous decision outweighs the needs of patients on the waiting list.³¹

³⁰ See "Organ, Eye, and Tissue Donation Statistics," <https://www.donatelife.net/statistics/>, accessed May 25th, 2016.

³¹ I'd like to thank David Boonin, Eric Chwang, and two anonymous reviewers for Social Theory and Practice for their helpful comments on this paper.