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## Philosophy and Theology: Lethal Organ Donation

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## PHILOSOPHY AND THEOLOGY

The *Wall Street Journal* reported: “Eight doctors at the Tongji Medical College hospital in Wuhan, China, traveled 40 miles on March 18, 1994, to procure a heart from a death-row prisoner. But rather than wait until the judicial authorities had executed the prisoner, the doctors carried out the execution themselves—by heart extraction.”<sup>1</sup> In the United States, Joshua Mezrich and Joseph Scalea wrote,

Large numbers of hospital patients have no chance of meaningful recovery, including many patients with progressive neurological diseases or severe cardiac disease, as well as many stroke victims. Yet lots of them desperately want to save the lives of others. These courageous people—and their families—desire a legacy in the form of organ donation; they wish to commit a final act of pure heroism. But even as the transplant waiting list stretches more than 120,000 patients long, the current system denies them this legacy.

As doctors, we are taught to do no harm. It may be time to redefine what we really mean by *harm*.<sup>2</sup>

Of course, the Chinese and the American situations differ in significant respects, but they share similarities. In his essay “Lethal Organ Donation: Would the Doctor Intend the Donor’s Death?” Ben Bronner considers whether double-effect reasoning might justify lethal organ donation, that is, removing vital organs from living patients.<sup>3</sup>

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1. Jacob Lavee and Matthew P. Robertson, “In China, New Evidence That Surgeons Became Executioners,” *Wall Street Journal*, May 31, 2022, <https://www.wsj.com/articles/china-new-evidence-surgeon-doctor-execution-murder-prisoner-organ-harvesting-donor-uyghur-falun-gong-genocide-human-rights-world-health-organization-who-11654012796>.
  2. Joshua D. Mezrich and Joseph Scalea, “As They Lay Dying: Two Doctors Say It’s Far Too Hard for Terminal Patients to Donate Their Organs,” *The Atlantic*, April 2015, <https://www.theatlantic.com/magazine/archive/2015/04/as-they-lay-dying/386273/>.
  3. Ben Bronner, “Lethal Organ Donation: Would the Doctor Intend the Donor’s Death?,” *Journal of Medicine and Philosophy* 44.4 (August 2019): 442, doi: 10.1093/jmp/jhz008. All subsequent citations appear in the text.

The answer to this question depends in part on how we understand intentional killing. Is it intentional killing to remove vital organs from a healthy body without replacing them or supplementing them—that is, is lethal organ donation always and necessarily intending the donor’s death? If so, then double-effect reasoning excludes lethal organ donation as intrinsically evil, a violation of the condition that the act itself, the means chosen, be ethically permissible. If not, then perhaps the act itself is ethically permissible. Could lethal organ donation be understood as the practice of removing organs from a living donor which as a side effect results in the donor’s death?

These questions cannot be answered without at least an implicit account of intention. Among advocates of double-effect reasoning, we find both what could be called a broad and a narrow account of intention. If we have a narrow account of intention, such as is advocated by new natural law advocates like Germain Grisez, John Finnis, and Joseph Boyle, then the removal of vital organs may not count as intentional killing, unless chosen as a means to bringing about death or as an end in itself.<sup>4</sup> On the other hand, if we have a broad account of intention, according to which all effects that come about with certainty count as intended effects, then removing vital organs from a living donor is intentional killing.

Bronner challenges a common assumption of advocates of the broad account: “Most assume that lethal organ donation would involve doctors intentionally causing the death of patients. Even those who defend the permissibility of lethal organ donation make this assumption” (443). Bronner illustrates his objection using paradigm cases.

Let’s say a hand grenade is dropped into a classroom, and to save the lives of your students, you dive on top of the grenade so that the students are not killed by the blast. Is your action, from a moral perspective, accurately described as suicide (intending your own death as a means or as an end)? A standard account of double-effect reasoning would account your action not as suicide but rather as accepting your death as an unintended, foreseen, though certain side effect of your protecting the students, which is a commensurately serious reason for allowing your own death. But if this analysis of the classroom grenade case is right, then it would seem that lethal organ donation is permissible on the same grounds. Bronner writes, “The donor intends, as a means, that her organs be extracted and given to those others. And intending (1) that one’s organs be extracted no more involves intending death than intending (2) that one’s body absorb a grenade blast. Both (1) and (2) may be foreseeably lethal, but in both cases, death is not what one aims to bring about” (446). So, just as the certainty of death in the case of grenade blast does not indicate that death was intended as a means or as an end, so too the certainty of death in the case of lethal organ donation does not indicate that death was intended as a means or as an end.

Or consider the case of lethal palliation. Bronner writes, “Lethal palliation is the administration of pain medication at a dosage necessary for pain relief but with lethal side effects, such as lethal respiratory depression” (446). Lethal palliation is not intentionally killing but rather foreseeing but not intending the lethal side effect following the administration of pain medication.

Bronner then considers lethal palliation in comparison with euthanasia. He argues that lethal organ donation is akin to lethal palliation rather than to euthanasia.

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4. John Finnis et al., “‘Direct’ and ‘Indirect’: A Reply to Critics of Our Action Theory,” *The Thomist* 65.1 (January 2001): 1–44, doi: 10.1353/tho.2001.0014.

First, in euthanasia, death is precisely the solution (i.e., means) by which pain is relieved, but in lethal palliation, anesthesia, not death, is the solution to the problem of pain.<sup>5</sup> In lethal organ donation, the organ donation, not the death of the patient, is the solution to the problem of lack of suitable donors.

Second, Bronner notes that in euthanasia the doctor deliberates about how to kill, but in lethal palliation, the doctor does not. But in lethal organ donation, the doctor also does not deliberate about how to kill. Deliberation focuses on how to ensure that the organs are suitable for donation.

Bronner notes a third contrast: “In a case of euthanasia, the intent to kill guides the doctor’s actions—‘for example, causing him to confirm that the dose is lethal.’ In a case of lethal palliation, foresight of the patient’s death does not guide the doctor’s actions in this way. ‘For example, it does not lead him to ensure that enough barbiturate is present to suppress respiration.’”<sup>6</sup> Likewise, in lethal organ donation, the patient’s death does not guide the doctor’s actions. Rather, it is the goal of providing suitable organs for donation—that is, he doesn’t remove the organs with an eye to causing death. The surgeon might, for example, first remove organs that do not cause death if these organs need to be removed first for suitable transplantation.

A fourth contrast is that if death does not arise in the case of euthanasia, the doctor has failed to achieve the goal that was intended, but in lethal palliation, if (somehow) the patient doesn’t die, the doctor has not failed if pain is relieved. Likewise, if (by some miracle) the patient didn’t die in lethal organ donation, the doctor would not fail to achieve the goal that was intended, namely, organ donation.

Bronner points to a fifth contrast. Euthanasia, unlike lethal palliation and lethal organ donation, requires an *intent* to kill as a means or as an end. If a doctor administers a lethal treatment but doesn’t realize this treatment will kill the patient, then the doctor hasn’t committed euthanasia. By contrast, if a doctor administers a lethal dose of painkillers but doesn’t realize the dose will kill the patient, the doctor *still* has done lethal palliation. Likewise, if a doctor removes an organ but doesn’t realize it was a vital organ, and the patient died, the doctor wouldn’t be intentionally killing but still would have done lethal organ donation. Lethal organ donation, like lethal palliation, does not violate the conditions of double-effect reasoning that the evil is not intended as a means or as an end.

In reply to these five points, someone who thinks double-effect reasoning excludes lethal organ donation might appeal to “closeness.” Bonner notes,

It might be suggested that the act of removing the donor’s organs *just is* the act of killing the donor, and hence that one cannot intend the removing without intending the killing. It is true that removing the organs kills the donor, but it is likewise true that administering the pain medication kills the patient in a case of lethal palliation. Hence the act of administering the pain medication *just is* the act of killing the patient, according to the present line of reasoning. So this reasoning cannot distinguish between lethal organ donation and lethal palliation. In particular, this reasoning yields the

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5. Euthanasia does not actually relieve the pain, because the subject no longer exists and so is not in a condition to experience the relief of pain, as Jorge Garcia has pointed out.

6. Bronner, “Lethal Organ Donation,” 447, citing T. A. Cavanaugh, *Double-Effect Reasoning: Doing Good and Avoiding Evil* (Oxford: Clarendon Press, 2006), 109, 110.

conclusion that *both* lethal organ donation *and* lethal palliation involve intending death. (449, emphasis original)

So, unless we give up what are commonly taken to be paradigm cases permitted by double-effect reasoning, namely, the grenade case and the lethal palliation case, we cannot hold that lethal organ donation violates the double-effect prohibition on intentional killing.

Imagine the case of George on death row. George knows that he will be executed via guillotine at midnight on July 25. He decides to donate his vital organs, and he consents to have his organs removed on July 24 just prior to midnight. What actually kills him is beheading, but if the guillotine had not killed him, he would have died a few minutes later from the loss of his vital organs. In such a case, the removal of his vital organs is not the cause of death. This case suggests that procuring vital organs from a living donor does not *have to* result in death, if death results from another cause first. In other words, it is false to say that the act of removing the donor's organs *just is* the act of killing the donor. Of course, George on death row raises other very serious ethical issues. Perhaps most obviously, can a person on death row, whose freedom has been almost entirely compromised, give legitimate free consent for organ donation? I'm skeptical.

Does it follow, from what Bonner has said thus far, that lethal organ donation is permissible? Not necessarily. He writes, "First, even if lethal organ donation would not involve intending death, there is a sense in which it would involve intending lethal harm. After all, a doctor involved in the procedure would intend that certain of the donor's organs be removed, and removal of those organs is a physical harm resulting in death" (456). In other words, even if lethal organ donation isn't a violation of double effect in terms of intentional killing, perhaps it is a violation of double effect because lethal organ donation is intending lethal harm.

In her essay "Double Effect Reasoning: Why We Need It," Helen Watt raises a similar concern:

It may well be psychologically possible for some particular surgeon to harvest the organs without intending death; after all, the donor's death will not in any way promote the goal of using the organs. There is, however, an intention clearly present which seems jointly conclusive morally with what is foreseen: the intention to invade the donor's body, in a way foreseen to do that person only serious permanent harm. It is not the intention alone but its combination with a very serious foreseen harm which is morally conclusive here. And due to this special combination, it is not just a matter of weighing the intended good effects against the unintended bad effects, as we might do in a case of live organ donation where the donor would recover. Whatever the good to be obtained for others, no amount of good can justify the intention to invade the body of an innocent person while foreseeing no health good, but only lethal harm, for that person. If someone is intending as much as that, and knows about the harm, then this is quite bad enough: we need not pretend that death itself is intended in order to condemn this kind of action. People have, in other words, special rights when it comes to deliberate invasions of their bodies of a kind that do them only serious harm.<sup>7</sup>

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7. Helen Watt, "Double Effect Reasoning: Why We Need It," *Ethics and Medicine* 33.1 (Spring 2017): 16.

Even if it were true that the surgeon were not intending to kill in removing the non-duplicate vital organ, the surgeon is intending lethal harm on the body of a patient.

We might be tempted to say that intending a physical harm resulting in death is mutilation, and (in the tradition of double-effect reasoning) mutilation is an intrinsically evil act. But one of the conditions of double-effect reasoning is that the act itself is morally permissible, that is, not intrinsically evil. So, based on these premises, lethal organ donation violates double-effect reasoning.

But there are two problems with defining mutilation in this way. The first is that some forms of mutilation are not intending a physical harm resulting in death. Take, for example, the castrati, males who had their testicles removed before puberty so as to maintain their soprano singing voices. This is mutilation, but it is not lethal. Likewise, if mutilation is defined as intending physical harm resulting in death, then killing in self-defense is mutilation and intrinsically evil. But this view is inconsistent with double-effect reasoning, at least as formulated by St. Thomas Aquinas.<sup>8</sup> So, I think we should reject the argument that lethal organ donation violates double-effect reasoning as a form of mutilation.

But there are other ways in which lethal organ donation may violate double-effect reasoning. In his essay “Can Double-Effect Reasoning Justify Lethal Organ Donation?,” Adam Omelianchuk focuses on what is often listed as the fourth condition of double-effect reasoning, a proportionate or commensurate reason for allowing and not preventing the foreseen but not intended evil effect.<sup>9</sup> Omelianchuk notes that this condition of proportionality is often understood in a simplistic, consequentialist way. In the case of lethal organ donation, we need to take into account not simply the saving of one life and the loss of another but also the effects of the interventions on the practice of medicine and its (traditional) commitment to first doing no harm (*primum non nocere*). We should also take into account the dangers to potential donors who are coerced into donation or made to feel guilty if they do not donate. Finally, we should take into account that giving ethical or legal permission to lethal organ donation could end up being counterproductive by making some potential donors unwilling to donate. These potential donors may believe that lethal organ donation is intentional killing, or they may simply find lethal organ donation repugnant, and so opt out of donating organs altogether.

Omelianchuk suggests that there are also other problems: “LOD [lethal organ donation] proposals are typically reserved for the sick and dying, which assumes that protections against killing can be relaxed insofar the quality of one’s life diminishes.”<sup>10</sup> Here I think Omelianchuk is mistaken. Advocates for lethal organ donation do not have to relax norms against intentional killing at all. Rather, if they invoke double-effect reasoning, they could argue that lethal organ donation is *not*

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8. Thomas Aquinas, *Summa theologiae* II-II.64.7, trans. Fathers of the English Dominican Province (1920; New Advent, 2016), <https://www.newadvent.org/summa/3064.htm>. For my own take on what constitutes mutilation, see Christopher Kaczor, “Intention, Foresight, and Mutilation: A Response to Giebel,” *International Philosophical Quarterly* 47.4 (December 2007): 477–482, doi: 10.5840/ipq20074748.

9. Adam Omelianchuk, “Can Double-Effect Reasoning Justify Lethal Organ Donation?,” *Bioethics* 36.6 (July 2022): 648–654, doi: 10.1111/bioe.13025.

10. Omelianchuk, “Double-Effect Reasoning,” 651.

intentional killing, just as they argue that removal of life-sustaining treatments that are more burdensome than beneficial is not intentional killing, despite the fact that death inevitably follows. Potential donors at the end of life have as much moral inviolability protecting them from intentional killing as do perfectly healthy patients. But the healthy and the unhealthy are not equal in terms of considering whether an intervention is seriously harmful to them. An intervention that shortens life by a matter of minutes harms an individual less than an intervention that shortens life by years. Healthy and unhealthy patients are also not alike in terms of a proper consideration of the burdens and benefits of treatment. The benefits of chemotherapy may outweigh the burdens for an otherwise healthy twenty-five-year-old but not for a ninety-five-year-old.

I agree with Omelianchuk that counterfactual tests don't distinguish what is intended from what is merely foreseen. He writes, "Counterfactual tests reveal what we would do if the chosen means were to fail or what our attitude towards the evil effect is if we could achieve our goals without it. As such, they can help clarify our intentions. Yet they cannot show that we do not will the evil effect as a means in the actual world where it is unavoidable."<sup>11</sup> Criminals often want to conceal their crimes. When witnesses see the crime being committed, most criminals would prefer to give the witnesses a drug that would erase their memory of seeing the crime, if such a drug existed. But since such a drug does not exist, some criminals choose to kill those who witness their crimes. These killings are intentional, even though the criminals would not have killed if they could have instead given the witnesses of the crime a memory-erasing drug. So, we cannot reason from counterfactuals that an act of intentional killing becomes a different kind of act if no other options are available.

So, if counterfactuals don't help us know intentions, what does? Omelianchuk seems to think that our intentions are constituted by pragmatic conventions. He writes, "These conventions specify an objective, publicly available set of facts that delimit the range of intelligible actions a person can choose to do, and thereby permit observers to correctly interpret an agent's behavior as expressing certain intentions that competent agents are responsible for acknowledging. Like linguistic conventions, pragmatic conventions structure and are structured by human activity."<sup>12</sup>

I'm skeptical. If our intentions are constituted by simple pragmatic conventions, then it seems hard to see how some actions are intrinsically evil by the nature of the act done, since actions would not really have a nature in themselves, but rather only a pragmatic convention, as good or evil. This view, ultimately, is indistinguishable from moral relativism. When the pragmatic conventions of a culture change, what previously was considered intrinsically evil can become permissible or even required. An emphasis on pragmatic conventions in determining what an action is may not be a bug but rather a feature of Omelianchuk's approach. But that seems to make his approach unacceptable to those who share the vision of the ethical life proposed by Pope St. John Paul II in *Veritatis splendor*.<sup>13</sup>

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11. Omelianchuk, "Double-Effect Reasoning," 4.

12. Omelianchuk, "Double-Effect Reasoning," 5.

13. John Paul II, *Veritatis splendor* (August 6, 1993), n. 81.