

## **Mandatory Autopsies and Organ Conscription**

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## **Abstract**

Laws requiring autopsies have generated little controversy. Yet it is considered unconscionable to take organs without consent for transplantation. We believe an organ draft is justified if mandatory autopsies are. We reject the following five attempts to show why a mandatory autopsy policy is legitimate but organ conscription is not: 1) The social contract gives the State a greater duty to protect its citizens from each other than from disease. 2) There is a greater moral obligation to prevent murders than disease-caused deaths because killing people is morally worse than allowing people to die. 3) Autopsies don't confiscate body parts while organ transplants do. 4) The citizenry's knowledge that their organs are very likely to be taken will generate more anxiety than the remote possibility of a mandatory autopsy. 5) A religious conviction that one's organs will be needed in order to be resurrected is threatened by organ transplantation but not by autopsies that "return" body parts.

## **I. Introduction**

The State may require an autopsy in at least two distinct cases: (1) when ascertaining the cause of death is necessary so as to prevent an immediate and substantial threat to the public health (call these "health threat cases"), and (2) when foul play is suspected in the death of one of its citizens (call these "criminal cases").<sup>1</sup> This is so regardless of any objections to such invasive procedures expressed by the deceased before their deaths or afterward by their families. There is not even a religious exemption. Mandatory autopsies, whether they are done in health threat or criminal cases, involve treating one's remains in a manner in a way in which she or her next of kin do not want it to be treated. Nevertheless, despite the fact that most people are aware that mandatory autopsy laws exist, there is no significant public opposition to them. However, there is strong opposition against the harvesting organs from the deceased who did not wish to

donate. The grounds for this opposition rests primarily on the notion that doing so would involve treating one's remains in a manner in a way in which she or her next of kin do not want it to be treated. The question then becomes why are mandatory autopsies permitted but organ conscription prohibited? Our aim is to explore whether such divergent attitudes can be justified.

We will consider five reasons for accepting mandatory autopsies but not instituting an organ draft. These reasons are in some sense speculative. To our knowledge, there is no existing literature that directly argues against equating mandatory autopsies with organ conscription. Lest we be accused of manufacturing straw man arguments against the opposition, we should say that the reasons we give represent the most common arguments we have heard from peers at conferences and students in the classroom when he have argued that organ conscription and mandatory autopsies are analogous in the morally relevant ways. We then do our best to see how the arguments for one could be said not to apply to the other. The five reasons are as follows. 1) The social contract is such that the State has a greater duty to protect its citizens from killing each other than dying from disease-caused organ failure. 2) Autopsies remove but don't return a person's body parts while organ transplantation does not. 3) There is a greater moral obligation to prevent murders than deaths caused by disease and injury because killing people is morally worse than allowing people to die. 4) The citizenry's knowledge that their organs will likely be taken posthumously will be a source of more anxiety than the low probability of a mandatory autopsy. 5) A religious conviction that one's organs will be needed for bodily resurrection is threatened by multiple organ transplantation but not by autopsies that "return" anatomical parts after post-mortem examination.

We find all of these objections wanting. Hence, if mandatory autopsies are justified, we believe organ conscription is as well.<sup>2</sup> However, we are aware that there is more than one way to

remove an inconsistency in one's moral beliefs. Readers could conclude that the case against organ conscription is so compelling, that if mandatory autopsies are analogous in morally relevant ways, then they too are not justified. Nevertheless, we are going to start with the datum that mandatory autopsies are justified and thus try to show that there are not any *additional* morally compelling reasons not to accept organ conscription.<sup>3</sup>

## **II. The Social Contract Objection**

One reason that someone might argue that mandatory autopsies and organ conscription are not analogous could be based on the notion that social contract is such that the State has a greater duty to protect its citizens from killing each other than dying from disease-caused organ failure. The first thing to be said in response to this is that it would not draw any distinction between organ conscription and health threat cases of mandatory autopsies. New York state law states that one "compelling reason" for overriding consent and performing an autopsy is when "discovery of the cause of death is necessary to meet an immediate and substantial threat to the public health and that a dissection or autopsy is essential to ascertain the cause of death."<sup>4</sup> If an epidemic is feared, an autopsy could be mandated regardless of the earlier wishes of the deceased or the present wishes of their surviving relatives. So this would be an infringement on autonomy or liberty or posthumous interests or bodily integrity (or however the objection is construed) that is done for the sake of preventing death from disease rather than in the name of justice and crime prevention. And it is a small step from this admission to recognizing a need for organ transplants of *epidemic* proportions (though we will say more about frequency in section V below). If readers insist the analogy fails because epidemics threaten more people than the failure to procure the organs of any one deceased person, they should just imagine smaller epidemics. (A

“small epidemic” is a harmless oxymoron.) Imagine a virus, its nature is such that it is only able to infect a handful of people. We doubt that would justify an exception to a mandatory autopsy.

Readers might respond that autopsies during an epidemic, unlike organ transplants, ought to be mandatory because there is an element of self-defense in that the deceased could have infected others and thus the latter need to protect themselves. However, one can always imagine epidemics where people die without themselves becoming carriers that spread the disease. So they are not threats to anyone, rather their bodies possess information that could be used to save others from dying due to an infectious disease carried by someone else. We assume autopsies would still be mandatory in such scenarios, so it cannot be self-defense that distinguishes mandatory autopsies from organ conscription.

The social contract objection seems to have more promise, however, when it comes criminal cases of mandatory autopsy. However, we think even in these cases, a relevant distinction cannot be made between them and organ conscription. With respect to these criminal cases, readers should not argue that the reason a policy of mandatory autopsy is justified but organ conscription is not is because autopsies save more lives by facilitating the capture of murderers. That assumes autopsies are rather effective in solving murders, the murderers would kill again or that their non-capture dramatically undermines deterrence. But provided that most murderers are not serial murders, and coroners in the real world do not solve as many crimes as do their television drama counterparts, thus supplying little in the way of deterrence, it seems safe to say that the number of people saved by organ transplants is greater than the number saved through the aid autopsies give law enforcement agencies. However, it might be claimed that there is a difference in principle, though not in numbers of lives saved. The justification for mandatory autopsies may not extend to an organ draft if society has a duty to prevent the murder

of its citizens but is not so obligated to prevent deaths by disease and injuries. It might be argued that at the heart of the social contract is an interest to protect individuals against crimes by their fellow citizens rather than the evils of natural diseases. Establishing rule of law and using state power to protect the life and liberties of every citizen has been historically a much greater priority than providing health services to all.

One of the best examples of this is in the social contract theory of Hobbes, who identifies the creation of the civil society with human beings' desire to secure themselves from other human beings. In the brutish state of nature, the war of each against every other, humans give up their natural right to any and all things in exchange for the security that comes from forming a society with others. As Hobbes puts it, "the original of all great and lasting societies consisted not in the mutual good will men had towards each other, but in the mutual fear they had of each other" (1982, 22). On Hobbesian lines then, one might say that the social contract is implicitly based on fear of harm from other people, not simply on fear of harms in general such as disease; that is why I cannot form a social contract with a disease, which fears me and thus has something to gain by relinquishing its rights. The very notion is absurd precisely because diseases don't have rights, fears, etc. Therefore, if the state can override my or my family's wishes about an autopsy, it's because of the nature of the harm that I'm contractually bound to prevent as a member of my society; that is, harms caused by the intentional acts of other members of the social contract.

Of course, we do not believe in an actual historical social contract (in fact even Hobbes denies that there was ever a time in history where the whole world was in a pure state of nature). But, as Rawls showed, imagining a hypothetical social contract is a useful tool for retroactively justifying a society's structures and practices. Since many Western states now provide universal

health care, it would appear that an appeal to a social contract cannot as easily be made to argue that the government has a responsibility to fight crime but not look after its citizens' health. Of course, there are nations that do not have nationalized health care. However, merely not being in favor of a universalized State health care system does not mean one does not consider the social contract as binding the government toward (in some form or fashion) looking after the health of its citizens. It might be arguable in these cases that it is an instrumental rather than a moral decision. That is, the citizenry may agree that everyone is entitled to health care but just believe private delivery is superior. So it is simply a matter of efficiency that causes most people to oppose universal healthcare; they would still advocate a basic right to health care. In the same way, if private police forces were more efficient than State forces, one might similarly favor them while still holding a basic right to protection under the social contract.

In light of such considerations, a defense of the current practice of treating autopsies and organs differently might be made on the grounds that the government's duty to prevent crime is *greater* than its duty to promote health even though the latter also arises out of the social contract. The greater strength of the duty would be what would justify mandated action towards dead bodies in one case but not the other. Since both cases might be thought to involve inflicting posthumous harms by disregarding the deceased's wishes or violating their bodily integrity, *prima facie* objections against such conduct might be more easily overridden to prevent murder rather than disease and injuries from causing death.

This same position may also draw some of its appeal from the belief that retribution is more important than saving lives through organ procurement. Providing for retribution might be thought to justify autopsies that the deceased did not want but justice does not demand organ conscription. We do not think this is a promising approach. One reason is that it is not clear to us

that our punishment system is based on retribution rather than deterrence or reform, or a hybrid of these and possibly other principles. However, it has been claimed that whether retribution, reform, or deterrence or a mixture of all three provides the rationale for punishment, the fundamental structure of a fair criminal justice system is to hold accountable those responsible for criminal action, and the autopsy helps identify those responsible.<sup>5</sup> The autopsy is not designed to distribute benefits. If that is so, then our argument for an analogy between mandatory autopsies and organ conscription will have to rely solely on the basis of the earlier rationale behind autopsies undertaken in response to public health threats or the below considerations of distributive justice being as weighty as those of punitive justice. However, we are not convinced that is the reason for autopsies in the criminal law. Or at least it is not the whole story. We suspect that autopsies are often mandated to identify those responsible *and* to capture (i.e. incapacitate) murderers and to deter potential murderers. To assess our suspicions, we polled 76 undergraduates. The questionnaire informed the students to “Consider the case of someone opposed to ever being autopsied even if she were to die in suspicious circumstances that suggest murder. This survey is designed to discover your attitudes towards the government ordering the autopsy despite the dead woman's earlier opposition. The government's motivation is to use information from her autopsy to catch her murderer and by doing so prevent her murderer from possibly killing again and perhaps also deter future murderers.” We then provided a list of probabilities that capture would deter future murders and asked the students if nonconsensual autopsies were justified at the different percentages.

More than 2/3 (53 of 76) of the students responded that a 30% increase in deterrence justified disregarding someone pre-mortem objection to autopsies. What is very interesting is that 1/2 of those polled became more willing to endorse non-consensual autopsies as the



probability of deterrence increased. Since the very same people would respect the pre-mortem wishes of the deceased at one level of deterrence but not at a higher level, that shows they weren't in favor of mandatory autopsies just for the sake of bringing the killer to justice in a narrower sense of serving justice. If the latter had been the reason, then the responses shouldn't have varied with the likelihood of deterrence, they should just vary, if at all, with the likelihood of capture serving a narrower (non-deterrent) concern of justice.

Readers might ask what is the significance of a poll? Of course, a poll is not a philosophical argument but it does show that for many people the point of autopsies isn't that justice be done in some narrow sense of justice, but that considerations of deterrence are relevant. We are not insisting that the rationale for punishment couldn't be retribution or a hybrid of considerations. Our point is that those who see punishment for killers as serving a deterrence purpose will be compelled to recognize the analogy of mandatory autopsies with organ conscription. We admitted above that if the saving of lives doesn't have a prominent role in justifying autopsies, then we might have to put more weight on the analogy with epidemics. But we also offer other distributive justice arguments for why non-consensual organ procurement might be justified if autopsies are undertaken for other reasons, such as those based on punitive justice rather than life saving purposes. The distributive justice concerns could be just as overriding.

It may also be a matter of distributive justice that we take organs from all of the deceased. Since all of the living are entitled to receive organs, it may not be fair that one receive what one was unwilling to give (Steinberg, 2004). This may even give rise to a free rider problem. Furthermore, if bodies can be considered the property or quasi-property of the deceased and then their survivors or the State, there may also be an argument based on Locke's Proviso against

taking more than what one needs and having it spoil rather than be used by others.<sup>6</sup> It seems rather clear that the deceased or their surviving relatives cannot make use of organs spoiling in the grave.

However, it may be claimed that Locke's Proviso is meant to pertain only to previously unowned 'common' things when "enough and as good" is supposed to be left over for others. It does not appear to be applicable at all to 'wasting' one's property.<sup>7</sup> We have two responses to that objection. Consider first the following thought experiment. Imagine that I live in a remote area, and I find a very large tree that I am able to use for shelter and food by eating the fruit. I only need to water the tree regularly to keep it alive. However, after several years, I leave the area never to return. This parallels the relationship I have to my body (if it is my property) because when I die I am never to return. Now it certainly seems in the case of the tree that I had a just claim to it when I was living there, having "joined myself to it through my labor." However, it does not seem as though, once I am gone, that I have any claim against anyone that she should begin watering the tree and using it.

Our second response admits that the Lockean Proviso only applies to things previously unowned. We suggest that the body isn't the type of thing that can be owned until death. There are moral and metaphysical arguments against the idea that you own your body. The moral objection is that if your body was your property than you could sell it and others could make claims upon it, as they can on your other property, when you were indebted to them. Treating our bodies as objects to be bought and sold would be an offense to our dignity. The metaphysical argument is that property must be something that is alienable. As Jane Radin (1980) writes:

We have an intuition that property necessarily refers to something in the outside world, separate from oneself. Though the general idea of property for personhood means that the boundary between person and thing cannot be a bright line, still the

idea of property seems to require some perceptible boundary, at least insofar as property requires the notion of thing, and the notion of thing requires separation from self.

Since we endorse a metaphysics which entails that we are human animals and thus inseparable from our bodies, it follows then that our bodies can't be our property. But at death our remains could become property, and thus property that didn't have an owner before. If Andrew Grubb is correct, then human remains should be seen as akin to first possession rights as with wild animals or flowers that are hunted or picked. They didn't have a prior owner. So to allow the deceased or the family of the deceased to insist that the organs be left unused might be seen as violating a Lockean proviso on previously unowned property. Since concerns of distributive justice can be raised with organ procurement, it isn't obvious to us that claims to retributive justice (or determining criminal responsibility) override the need for consent in the matter of autopsies but distributive justice does not override resistance to organ donation.<sup>8</sup>

Some readers might insist that there is something objectionable about our other arguments for what appear to be redistributing body parts like they were wealth that can be taxed and redistributed.<sup>9</sup> One might base this on the great importance given to avoiding illicit touchings and violations of bodily integrity. Quite right. However, we can actually agree that bodily integrity should not be violated for purposes of saving lives. We have argued elsewhere why these concerns don't extend to the corpse. We have defended the position that bodies go out of existence at death. So there literally is not a dead body that can have its integrity violated.<sup>10</sup> Although we can't go into the details here, we can provide a brief summary of our metaphysical position. There are not any good metaphysical or biological reasons for believing any of us will ever become a corpse. If we are essentially organisms, then it seems that we are essentially alive and thus the corpse is not our body in a new state, but rather is the remains of our body. People

are just misled by the striking similarity between the living body and the “freshly” dead. It is better to say a body ceases to exist when the microscopic activities of the cells and chemicals cease to participate in a life than to hold out that the body persists until some vague period of decay when there is remaining more dust than flesh and bone.<sup>11</sup> Our view is that there really is no composite object *the corpse*, what exists posthumously are merely the remains of an earlier living body.

We have also argued that another reason to be skeptical that a living body continues to exist after death is that if dead bodies exist, they would have different part/whole relationships from living bodies<sup>12</sup> Live and dead bodies would acquire and retain parts in different ways. Something becomes part of a live body (and is retained as a part) by being assimilated, i.e. caught up in life processes. Foreign bodies are those that are not so assimilated. Dead bodies, if for the sake of argument we assume that they exist, obviously do not gain or retain their parts through life processes. They gain parts through bloat, decay, isolated cellular activity and postmortem procedures. And they retain parts differently. For example, what makes a liquid part of the living body is different than what makes it part of the dead body. It may just belong to the dead body because it pools in some cavity. We conclude that the need for different compositional principles to govern the relationships of dead and live bodies and to their respective parts provides more reason to deny they are identical entities. So any concerns about violating the bodily of the living cannot be extended to the dead.<sup>13</sup>

### **III. . Killing is Morally Worse than Allowing Death**

It is commonly claimed that killing someone is worse than allowing someone to die. It might be thought that the greater wrong of killing than allowing death provides a reason for mandatory autopsies but not for organ conscription. The idea would be that the crime fighting aid

provided by autopsies prevents people from killing while the unavailability of organs for transplants merely allows someone to die. We do not believe that a justification for the different reactions to mandatory autopsy and organ conscription is that the State has a greater duty to prevent killers from killing again (or inspiring others to kill with seeming impunity) than it does to prevent disease from taking the lives of its citizens.<sup>14</sup> This is not because we believe that killing and letting die are morally equivalent as James Rachels and others have claimed to show with some clever thought experiments (Rachels, 1975). If Rachels is correct, then, of course, our thesis about the equivalence of mandatory autopsies and organ conscription cannot be challenged on the grounds that killing is worse than allowing death. However, we have our doubts that such thought experiments provide support to the moral equivalence of killing and letting die for reasons, in part, given by Kamm (1994) and Nesbitt (1995). Kamm and Nesbitt show the Rachels-like examples are flawed because the death allower was willing to kill; he just did not have to.<sup>15</sup> If the death allower was unwilling to kill, a more nuanced thought experiment can show that killing and allowing death are not equivalent. Kamm offers such a thought experiment when she asks readers to imagine a cop fatally shooting the person who was drowning the child in a way that would cause the youngster to pop out of the tub unharmed. Our intuition, shared by many of our students, is that such a shooting is permissible. But we and our students balk, as Kamm expects us to, at a cop fatally shooting the person who is just allowing death but unwilling to kill. The second shooting would also cause the child to safely pop out of the tub. The natural conclusion to draw is that malicious death allower's actions are not as evil as that of the man trying to kill.

While we do not think killing is *significantly* worse than letting die, we still think there may be a duty to take on a greater burden to avoid killing than there would be to avoid allowing

someone to die. This intuition receives support from a Philippa Foot-like thought experiment in which you are rushing your seriously injured self to the hospital by boat. You could permissibly refrain from helping someone drowning in the water if doing so would prevent you from getting to the hospital in time. But you could not lethally run over a person blocking the canal even if that was the only way you could reach the hospital in the required time (Foot, 1984). As a consequence of your not reaching the hospital you will suffer a significant permanent disability. Such a Foot-inspired example suggests a duty to take on greater burdens to avoid killing than to avoid letting someone die. But even if that is so, it is not at all clear that we can put a greater burden on a *third party* (a person who is a source of organs but does not want to donate) to prevent someone else (Mr. X) from being the victim of a killer, than we can to prevent another person (Mr. Y) from dying from a disease. Imagine that the criminal attempting murder used a poison which causes a disease to destroy a vital organ while the other person accidentally was exposed to the same poison. It seems unlikely that one can take an organ against the wishes of the deceased to prevent such a killing but cannot do the same to save someone dying from the same disease in the absence of foul play.<sup>16</sup> Any moral distinction between killing and letting die seems to put greater restraints on the person considering killing but it seems to have no moral significance when it comes to what we can do to a third party (the source of the organs) to prevent a slightly greater wrong to a second party (the person dying whose death would make the shooting into a killing) rather than a person “merely” dying from a diseased organ.<sup>17</sup>

Why there is a morally relevant difference between killing and letting die, and why a greater duty to preventing the former dissipates when a third party is involved are difficult questions. We follow Thomas Nagel in understanding deontological restraints by looking to the principle of double effect (Nagel, 1986, 179). Roughly, the principle informs us that we infringe

deontological constraints when we harm someone deliberately or intentionally. The mistreatment must be something that we seek either as an end or a means rather than something that one's actions merely cause or fail to prevent but that one is not deliberately aiming at. Nagel explains:

It is as if each action produced a unique normative perspective on the world, determined by intention. When I (kill) intentionally, I incorporate that evil into what I do: It is my deliberate creation and the reasons stemming from it are magnified and lit up from my point of view. They overshadow reasons stemming from greater evils that are more 'faint' from this perspective, because they do not fall within the intensifying beam of my intentions even though they are consequences of what I do (Nagel, 1986, 180).

Nagel admits that from an impersonal point of view there is no difference between killing and letting an innocent die. But he emphasizes that each of us is not only an "objective self", i.e., one that can take up a detached, objective point of view that takes in everything from an agent neutral perspective. We are also particular persons who act on the world from a particular perspective. From that perspective our concern is not just to judge which of two states of the world is better but how to act. Nagel claims that every choice is really two choices, one from the internal point of view one from and one from the detached point of view. The balance of goods from the external point of view can't "cover up" the evil intrinsic character of certain actions.

Nagel adds that it is not just the point of view of the actor that explains deontological constraints. He explains the role of the victim's point of view:

The deontological constraint permits a victim always to object to those who aim at his harm, and this relation has the same special character of 'normative magnification' when seen from the personal perspective of the victim that it has when seen from the personal perspective of the agent. Such a constraint expresses the direct appeal to the point of view of the agent from the point of view of the person on whom he is acting. It operates throughout the relation. The victim feels outrage when he is deliberately harmed even for the greater good of others, not simply because of the quantity of the harm but because of the assault on his value

of having my actions guided by his evil. What I do is immediately directed against his good, it doesn't just in fact harm him (1986, 184).

Nagel admits that from the objective point of view, the death of an innocent victim in order to save the lives of five innocents provides a better balance of good over evil. But the five men couldn't make the same complaint as the one killed. He writes:

They can appeal only to my objective acknowledgement of the impersonal value of their lives. That is not trivial, of course, but it still seems less pressing than the protest available to my victim – a protest he can make not to them but to me, as the possessor of the life I am aiming to destroy (1986, 204).

So Nagel's ideas about every choice being really two choices and the normative magnification of harms when seen from the perspective of the agent and victim provides a theoretical framework in which to understand our intuitions. His ideas illuminate why people must indeed take on greater burdens or harms to avoid intentionally killing someone than they must do to avoid letting someone die but they don't have to take on any greater burdens or harms to prevent *someone else* from intentionally killing a third person than to prevent someone else from letting a third person die. Thus society cannot say to those who would later be autopsied against their wishes that they must accept such burdens in order that others can avoid being killed though they are not required to shoulder the same burdens in the case of organ procurement so others can avoid dying from disease.

#### **IV. Confiscating Body Parts vs. Examining the Dead Body**

Readers ought not claim that mandatory autopsies are morally different from organ conscription because a transplant results in parts of the body being "taken away" and then put in someone else while an autopsy, though it might "mangle" the corpse, still conceivably leaves most of the body/matter alone after the procedure. Suppose there is a case of a mandatory autopsy for fear of a threat to the public health. Let us assume that the only test for a particular



contagion involves the destruction of an organ where the infectious agents reside. Since this is permissible, we don't see how removing an organ for transplant can be morally distinguished from destroying an organ to discover if there is a health threat. Or we can stipulate that criminal autopsies involve the destruction of an organ when a certain poison is suspected as the cause of death for its traces can be discovered only by a procedure that dissects the organ beyond repair. We think it is unreasonable to claim that, for the sake of the public health or safety, the state would not be justified in destroying the organs in the above scenarios.

We needn't rely only on fanciful scenarios to argue that mandatory autopsies and organ conscription are on a moral par. In actuality, most autopsies involve the loss of considerable fluids while a number of solid parts removed and not put back into the cadaver.<sup>18</sup> So it is not that the corpse is restored to the state it was in prior to the invasive examination while the cadaver treated as a source for organ procurements is not. It may be that public attitudes are based somewhat on the presumption that *less* of the body is removed with autopsies than in transplants. Our students have sometimes been surprised when we informed them of the tissues and fluids lost during the autopsy.<sup>19</sup> Perhaps autopsies would face greater resistance if they were comparable in the extent of tissues removed without return. However, we do not think a law commanding the taking of a single or just a few organs without consent that is comparable in quantity to whatever tissue is now typically lost in an autopsy will be acceptable to the public as are mandatory autopsies. So even if quantitative differences do explain *some* of the differences in reactions to mandatory autopsies and organ conscription, we doubt it can play much of an explanatory role since opponents of organ procurement are not going to drop their resistance if every deceased person has to give up say only a single organ. We suspect the announcement of

such a public policy would be met with just as fierce a reaction as multiple organ conscription. There will be the same protests about violating autonomy and bodily integrity.

Before concluding this section there is one further objection that we must address. One may argue that whether the body parts removed are destroyed (as is the case in an autopsy) or transplanted (as is the case in organ procurement) makes a significant moral difference because in the latter case, organs might be used to prolong the lives of people whom the deceased would not want to support. Consider a case in which one is a Christian living in a nation in which 90% of the population is atheist (or one can imagine the reverse situation).<sup>20</sup> This person might very well object that the state has no right to violate her bodily integrity to save the life of someone whose belief system is antithetical to her own. In effect, the state is procuring her organs and contributing to a cause to which she is, or at least was, opposed.

We believe a twofold response can be given to this objection. First, consider the nature of estate taxes. While the tax money does not go to religious organizations per se like Christianity or atheism as in the above example, it is certainly the case that funds go to institutions which aid people to whom those taxed are morally opposed. If one is in a minority like the Christian in our example, he cannot object to having his estate taxed because it is likely that some of the money will provide life saving health care to some of those with atheistic beliefs. Our second response returns to a focus on health threat cases of mandatory autopsy. Though the body parts are destroyed and not transplanted, one can make the same objection. If the Christian is in the minority, and a disease is spreading just in the regions where atheists live, the now deceased Christian, whose work brought him into the atheist neighborhoods, would not have the right to insist that some of his

organs ought not be dissected and destroyed in an autopsy because he doesn't want any resulting discoveries to aid those with beliefs he loathes

### **V. Frequency and Anxiety**

Some readers might claim that mandatory autopsy scenarios are assumed to be quite rare but universal organ conscription would not be and thus would be a source of greater anxiety to the living than the prospect of a mandatory autopsy. They might think preventing the additional anxiety can justify the disparate reactions to the two consent-ignoring policies. We are somewhat skeptical that frequency is playing any role in the disparate reactions to the two cases. Readers can always imagine that it could be the involuntary organ procurement which was infrequent and autopsies far more common than they now are. That should neutralize the frequency objection basis for the greater anxiety but it does not seem to be making involuntary organ acquisition any more intuitively acceptable. So we tentatively conclude that readers' reactions are not due to the infrequency of autopsy scenarios and their engaging in some implicit calculations of expected utility.

We are aware that the prospect of organ conscription induces anxiety that mandatory autopsies do not. We suspect that the real root cause of the greater anxiety about nonconsensual organ procurement is based on the fear that organs will be taken prematurely from those near death or that some life saving measures will not be pursued by doctors in a hurry to harvest their organs.<sup>21</sup> Such autopsies, it will be claimed, do not create the same kind of public fear and anxiety as nonconsensual organ procurement because medical examiners have no capability or interest in causing or hastening death for the sake of doing an autopsy.

Some people might respond that such concerns are irrational and that public policies should not be based upon such concerns. We need not take a stand on that issue. Instead we think

the anxiety provoked by organ conscription can be offset if the policy is considered in the wider context. We would think that there would be more anxiety if people recognize that the chances are greater that they will someday need a life saving organ transplant that is not available than that they possibly some day will be shortchanged in their care so their organs can be taken. Therefore the odds are much more likely that one will suffer the first type of anxiety under existing policies than the second kind of anxiety under the advocated policy. Thus a new source of patient anxiety does not undermine our argument for organ conscription because it will be more than offset by a reduction in the anxiety due to organ demand far exceeding organ supply.<sup>22</sup> So we do not even have to appeal to a contestable principle that says we can ignore the irrational anxiety of those who are paranoid about organ taking conspiracies in order to save the lives of those in need of organ transplants.

Moreover, organ conscription should actually lessen the anxiety that arises from worries that doctors will not do everything in their power to keep patients alive in order that they become “donors.” This is because if the demand for organs ceased to outstrip the supply, the need for conspiratorial takings of organs would disappear. The vast increase of organs available for transplant would mean that there would not be the motivation for the illicit takings that stir the imaginations of writers and film makers and their readers and audiences who then refuse to sign donor cards. So those worried about premature organ procurement will have less reason to be anxious with the implementation of an organ draft.

But let us try to put this discussion more firmly in the context of our thesis. We are arguing that there is no relevant difference between existing mandatory autopsy laws and a policy of organ conscription. The preceding has in large part been an effort to compare the likely effects of such an organ conscription policy with those of the current policy of voluntary organ

donation with respect to the public's fears and anxiety about organ taking. All this takes for granted that weighing the public's fears and anxiety is relevant to policy making. If it is not relevant, then the entire discussion is moot and the reason fails to distinguish organ conscription from mandatory autopsy. But even if it is relevant, and high public anxiety is potentially a reason not institute a given policy, we have shown that there is not a good argument that an organ conscription policy such as the one we have been discussing would be affected by it.

## **VI. Religious Concerns that Organ Procurement is a Threat to Resurrection**

There is a further worry that readers might raise, namely that many people refuse to consent to organ donation for religious reasons that have to do with the need for their body parts to be available for reassembly come the resurrection.

As the Pauline notion of the resurrection suggests, there is a grand economy in the universal matter of bodies. All the parts must be accounted for. Even when an organ is fatally diseased or not functioning, it cannot be thrown away. (Barkan, 1996, 243)

The traditional rabbinic belief in bodily resurrection is, for some Jews, the source of an important objection to organ donation. They believe that the body must be buried with all its parts so that they will all be there when it comes time for resurrection. (Dorff, 1996 179)

We believe that there can't really be a problem if just an organ or two is taken at death since most religious people with objections to being donors would still accept a heart and lung transplant or an artificial organ. Since that is no threat to their survival, God could surely do what amounts to the same and provide them on Judgment Day with a new organ or two. The real worry is that if too much of someone's matter is taken and given to someone else, they both can't be resurrected since they would share matter essential to both. That is, even God couldn't replace the missing matter in a way that would preserve identity between the deceased organism and the

qualitatively similar body in the afterlife. To see this point more clearly, consider God suddenly replacing all of your body's matter with duplicate matter arranged in the same manner. The resulting organism would not be your organism but a duplicate. You couldn't survive such a dramatic change. Only if your body were to assimilate new matter gradually could it survive a complete turn over of your matter.

We contend that the objections to organ procurement on the basis of concerns of resurrection are unfounded. If there is an afterlife that involves resurrection of the body, we don't believe anyone should be worried about a scarcity of organs. Resurrection is a miracle and so if God can bring that about, we do not see any reason why He can't provide the appropriate organs. In fact, many religious views would not even seem to require the same matter for an embodied afterlife. The religious person with a Cartesian metaphysic identifies himself with his partless, immaterial soul, thus rendering a new body in the afterlife unproblematic. On this view, no one literally has a body that is a part of herself, but is instead just intimately connected to a body that she controls and from which she receives sensations. Even if someone believes that he is a compound of body and soul rather than just a soul controlling a body that is not literally a part of himself, there is not a problem with resurrection. The reason for this is that while having a body would be essential to one's existence, any body would do for the essentiality is of the generic sort. It is akin to our necessarily having to breathe oxygen but not any particular oxygen molecule. The existence of the same soul would suffice for preserving our identity with a future body/soul compound. Other Christians, most notably Catholics, who believe in a hylomorphic conception rather than a Cartesian or compound account of the human being, may think they need the same matter in order for them to have the same body in the afterlife. But this was not actually Aquinas' view. He maintained that whatever matter is configured by the soul becomes a

part of the resurrected body (Aquinas, 173). Aquinas even speculated that everyone would be resurrected with a body that appeared to be comparable to that of a healthy 32 year old. So if someone dies in infancy, his resurrected body would have to contain nearly all new matter. Thus the loss of matter to organ transplantation is not a threat to resurrection on the Thomistic version of hylomorphism. Even if that is not a plausible view, we do not see why God could not stagger resurrection if the deceased's matter, through transplantation or other means, ended up composing someone else at the time of their his death. That is, God first resurrects the last person who possessed the matter in question at his death. Then after that person expels his matter through metabolic processes, it is reassembled to resurrect the person who previously died with it. (Hershenov, 2003, 24-36.)<sup>23</sup>

Many secular readers may not be very sympathetic to religious based objections to organ procurement and think there is not even a need to meet such worries on their own grounds as we have attempted to do in the preceding paragraph. They might argue that particularly in the cases of dealing with the remains of the deceased, there are limits to what religious tolerance entails. Such readers might claim that we would not respect a religious belief that salvation can only be gained if one's body is literally untouched for a full year after death. This would mean that if a person died in the middle of a busy street, religious tolerance would require us to simply leave it there for a year. This would pose many difficulties, not the least of which is the health risks to other people that use the street of being around a decaying corpse on a regular basis. Perhaps just as we ignore such consent on the basis of public health concerns, ignoring wishes not to donate organs can also be justified on the basis of public health benefits. Of course the corpse is a threat to public health in one case and just not a benefit in the other. But if this rule is invoked in distinguishing corpse removal against objections from corpse salvaging without permission, it

will not explain ignoring the religious' consent for the sake of autopsies. Some of the autopsies are to discover, prevent or control epidemics, others are to learn whether a murder has occurred and to aid in the capture of the killer. In neither case is the body *then* a health threat, but still the deceased and their next of kin cannot block such autopsies.

Whether or not one agrees with the objections of the religious to their body's treatment at their deaths, it is still widely held that we have an obligation to tolerate religious views. It may be that the American Constitution would insist upon religious exemptions to an organ draft (Silver, 1988). We do not have a worked out organ conscription policy proposal and are rather sympathetic to the possibility that there needs to be an exception on religious grounds. But since the major Western religions are not opposed to organ donation, an organ draft will not violate any religious prohibition against organ procurement. This is not meant to downplay the significance of the beliefs of practitioners of other non-Western religions. If they are opposed to organ procurement, then they are entitled to a religious exemption. Our mentioning Western religions is just to point out that it is likely that there will not be a significantly large number of people in the West demanding religious exemptions.<sup>24</sup>

Any policy that allows religious exemptions could potentially be abused. Therefore, we very tentatively offer the following policy suggestion to avoid abuse either of citizens exercising the exemption from organ taking under the pretense of one's religious objections, or the heavy handedness of a government inquisition to determine the veracity of those who opt for the exemption. Our suggestion is that if someone opts out but then takes an organ, this shows a belief that they can survive without their original vital organ (as does the use of cardiopulmonary bypass machines during surgery). If they can survive with a new organ, surely they believe that God can give them a new organ come the Resurrection. Therefore, taking at least a single vital



organ from them is permissible. We maintain that their willingness to receive organs would remove them from the list of those with religious exemptions to providing cadaver organs. Perhaps they couldn't be compelled to give up all their viable organs but could still be forced to part with one or two organs at their deaths if they were earlier willing to receive say a heart and lung. Since such an acquisition is not a threat to their persistence, it should not be come resurrection either.

We do not recommend discriminating against the religious and withholding organs or giving them lower priority to receive an organ if they are unwilling to give, but are merely demanding consistency amongst those who opt out on allegedly religious grounds based on concerns about resurrection. If the religious objections to organ procurement that are not based on resurrection worries, then perhaps an exemption must be extended to them as well.

## **VII. Conclusion**

We have surveyed a number of alleged differences between organ conscription and mandatory autopsies. We believe there is no principled reason for society to permit mandatory autopsies but reject an organ draft. We are well aware that such an extreme policy recommendation is unlikely to be implemented any time soon. A policy whose appeal is usually recognized only after hours of argument in a seminar room will probably fare rather poorly in state or national legislative bodies. However, no one knows for sure what the future will bring. Moreover, we still think it is worthwhile to see what conclusion follows from defensible premises. And it should not be thought that this is just idle philosophical speculation. It may be that our readers have gained insight into the moral legitimacy of autopsies. If we are correct about the moral equivalence of mandatory autopsies and organ conscription, then if the latter is

considered beyond the pale, so should the former. It may be that public policies about mandatory autopsies should change as a consequence of the considerations put forth in this paper

We would prefer our arguments bring about a different result. But even if our own preference for a policy of organ conscription is considered too radical and thus rejected on pragmatic grounds, we believe our arguments can render other alternatives to the current American opting in system more palatable than they otherwise might seem. Consider the standard objection to presumed consent that some individuals opposed to organ donation will not opt out in time and thus have their autonomy infringed and their desires violated posthumously. If the arguments of this paper are correct, such organ takings without the consent of the source are not as objectionable as previously thought but akin to what we already accept with mandatory autopsies. The same attitude could be extended to worries that the consent will not truly be informed in all cases if mandated choice/required response policies are implemented. It is likely that some people applying to get a driver's license or filing their taxes will not be sufficiently educated to make an informed decision about organ procurement (Gill, 2003, 53-54). So even if our advocated policy is too extreme to become public policy, its passing muster in the seminar room serves to make some alternative organ procurement policies morally and philosophically more respectable than they might otherwise have seem.<sup>25</sup>

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<sup>1</sup> In New York for example, the law states: Whenever the district attorney in this state, in the discharge of his official duties, shall deem it necessary, he may exhume, take possession of, and remove the body of a deceased person, or any portion thereof, and submit the same to a proper physical or chemical examination, or analysis, to ascertain the cause of death...with or without notice to the relatives of the deceased person or to any person or corporation having legal charge of such body. New York Public Health Law, sec. 4210 (2002).

<sup>2</sup> We acknowledge that not all organ transplants are life saving. We are content with just defending life saving organ conscription though we are open to those who want to push our arguments to life improving efforts.

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<sup>3</sup> This is by no means the only, or perhaps even the best way, to justify an organ draft. One might also appeal to Epicurean reasons that the deceased do not have interests that can be frustrated. But we are eschewing any discussion of the metaphysics of harm in this essay. We will say that whatever the merits of anti-Epicurean accounts of posthumous harms, and we think they are little, if they don't tilt the scales against mandatory autopsies then they shouldn't do so against organ conscription.

<sup>4</sup> New York Public Health Law, sec. 4210-c. 2007.

<sup>5</sup> This claim was made by an anonymous referee.

<sup>6</sup> This Lockean theme is developed in R. Nozick. 1974. *Anarchy, State and Utopia*. Malden, MA: Basic Books: 175-82.

<sup>7</sup> This objection was made by an anonymous referee.

<sup>8</sup> It should not be thought autopsies are less objectionable to some people because they care more about catching their murderers than they do about saving a stranger's life. That may be an accurate description of most people's relative concerns. However, the relevant point is that autopsies are mandated even if people do not want to be autopsied. It doesn't matter that less people are likely to object to mandatory autopsies than organ conscription in order to bring to justice those who harmed them. The question is why is there the widespread sense that it is justifiable to ignore objections to being autopsied but not being an involuntary source of cadaver organs.

<sup>9</sup> An anonymous referee pressed this line of criticism.

<sup>10</sup> Our most elaborate defense of these points is in a forthcoming article in *Theoretical Medicine and Bioethics* entitled "The Metaphysical Basis for a More liberal Organ Procurement Policy." We present such arguments to show that the nonconsensual organs takings will not violate liberal principles of autonomy, bodily integrity or bodily property.

<sup>11</sup> This argument is due to Eric Olson, *The Human Animal: Identity without Psychology* (Oxford: Oxford University Press (1997), pp. 151-52.

<sup>12</sup> The metaphysical basis of those arguments are laid out in two articles by David Hershenov, "Are Dead Bodies a Problem for the Biological Account of Personal Identity?" *Mind* 114 April (2005), pp. 31-59 and "Organisms and their Bodies: Response to LaPorte. *Mind* July-August 2009. Forthcoming.

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<sup>13</sup> One referee maintained that our recommended organ conscription would justify even cannibalism. Well, we supposed that we must admit that even cannibalism might be justified in some life saving instances as with the case of the downed athletic team chronicled in the *Alive*. However, it won't be justified if there was an alternative source of food. And keep in mind that we are writing about eating the *remains* of the dead, not eating parts of an *existing body*. If our metaphysics of the body is correct, then cannibalism of the deceased is not literally eating the dead person or the body of the deceased. Rather, it is really eating matter that used to compose a human body. And we do that all the time when we eat creatures composed of matter that years ago was found in the living but has been returned to the food chain. This is not to deny that there are, of course, quite striking visual differences that makes one's skin crawl in one case but not the other.

<sup>14</sup> Here it may be pointed out that throughout the paper we rely heavily on the notion that mandatory autopsies in criminal cases are justified (at least in part) because they prevent killers from killing again. But there may be other plausible grounds for justification. For example, one could say that the primary justification is done on behalf of the deceased. That is, the deceased has been victimized and so the state does the autopsy to benefit that person. We think this is problematic for several reasons. First, it would involve a strangely paternalistic notion of benefit. Keep in mind, the deceased expressed a clear wish NOT to be autopsied even should she should die mysteriously, yet the state would have to say that the person is wrong about her own best interest. And, even if this is the case, why then could the state not make a similar argument about organ conscription saying that giving the gift benefits the giver whether she realizes it or not. Second, justifying autopsies in criminal cases this way raises Epicurean puzzles about the subject of benefits. If the person no longer exists, how can she be harmed by her death and benefited by the autopsy?.

<sup>15</sup> Rachels poses a thought experiment in which the reader is asked to judge between two evil men who intend the death of their six year old cousins so as to inherit a large sum of money. One cousin, Smith, drowns the child in the bath tub. The other, Jones, allows the child to drown after he slips and hits his head, though Jones was fully prepared to drown him if necessary. (1975, 78-80)

<sup>16</sup> Thomas Scanlon shares our intuition. He writes "If you have to choose between saving someone from being murdered and saving someone from being killed in a similar manner accidentally, and you have no special relation

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to either of them, it seems that your choice should depend only on which one you are more likely to succeed in saving. (Nagel, 1986,178)

<sup>17</sup> Some readers may be worried that the above thought experiment is misleading because it is the moral repulsion to organ conscription that is making people respond that it is just as wrong for an organ to be taken without consent to prevent someone from being killed by an earlier gunshot as it is to take an organ without consent to save the life of those with disease caused organ failure. Such readers can see that the distinction between killing and letting has little relevance to our thesis if they imagine that the organ in question had been consensually offered to the organization governing transplant matches. There are two people who need the organ urgently, will benefit equally from the transplant, are equally unlikely to reject the organ, and have been on the waiting list for the same time. The only difference is that one needs it because of a disease and the other needs the organ because of a life threatening, intentional gun shot. It does not seem to us, and the few others we have asked, that we should give the organ to prevent someone from being killed rather than just to prevent the death from disease. So it does not seem that any moral nonequivalence between killing and letting die distinction plays much of a role in distinguishing an organ draft from mandatory autopsies.

<sup>18</sup> This is also true of hospital post mortems. However, it might be argued that hospital post-mortems often take place only after consent is obtained so organ procurement should follow the same protocol. Our response is that insomuch as the social benefits of a hospital post-mortem approach that of an autopsy, then consent is not needed contrary to existing practice. It may be that consent for a hospital post-mortem is so easy to obtain that medical institutions are willing to ask for it since they rarely get rebuffed. Perhaps a hospital post-mortem is viewed as more of a continuing diagnosis by and in the same institution that began when the patient was alive and thus does not seem as much as a new and different type of intervention and bodily integrity invasion. If so, hospitals then do not risk much by such requests and in return they get the clear and additional legitimacy that comes with consent.

<sup>19</sup> But we have not had any students change their view towards mandatory autopsies upon learning about the details of post mortem examinations.

<sup>20</sup> We thank an anonymous reviewer for this example and for bringing this objection to our attention.

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<sup>21</sup> Informing our students that the transplant team is composed of distinct persons from those who declare death hasn't assuaged their fears of unscrupulous medical personnel. So we doubt that publicizing this will do much for the paranoia of many of the public.

<sup>22</sup> It may also be that any policy considerations based on avoiding making us anxious that our organs will someday be taken prematurely should be offset by the anxiety of all of those in desperate need of an organ transplant.

<sup>23</sup> There are other accounts of bodily resurrection that don't involve reassembly of body parts of the deceased. There is the body snatching account of Peter van Inwagen (1978) and the fission account of Dean Zimmerman (1994). Organ transplant is no threat to such accounts of resurrection since the resurrection body is not the same matter as that found in the fresh corpse. Lynne Baker's account of being constituted by a transformed eternal body (2005), not one's earthly body, also suggests that multiple organ transplants are not a threat to resurrection.

<sup>24</sup> We are somewhat concerned, unlike Silver, that while the major Western religions do not prohibit transplants, they may prohibit refusing to give a person the choice to donate or not. (1988). We are also concerned that some religions, Islam for example, have a very "decentralized" policy making structure. Local Imams often dictate conflicting policies.

<sup>25</sup> We would like to thank two anonymous referees and \_\_\_\_ (Acknowledgements withheld for the sake of blind reviewing.)

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