

## **Why Consent May Not Be Needed For Organ Procurement**

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## I. Introduction

It is widely and firmly held that it is ethically impermissible to take organs from the dead if they earlier expressed a wish not to be a donor. We share that intuition and feel a visceral distaste towards the taking of organs without permission. Yet we respond quite differently to a thought experiment that seems analogous in the morally relevant ways to taking organs without consent. This thought experiment elicits from us (and most others) the belief that we can justifiably go against the wishes of the living about how they later want their remains treated when doing so saves lives. It appears that our responses are inconsistent. We very tentatively put forth reasons why it may be better that our response to the thought experiment should be preserved and support for a consent-based organ procurement policy abandoned.<sup>1</sup>

We present the arguments here with some expectation and even some hope that there is wisdom in our repugnance to taking organs without consent and that someone else may bring the reason behind such a response to our attention. However, we suspect that some of our repugnance to taking organs may be based not on any wisdom but on what Peter Unger calls “distortional features.”<sup>2</sup> These are psychologically efficacious but morally irrelevant

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<sup>1</sup> There is relatively very little in the literature that defends such a view. Spital and Erin have argued for a non-consent based policy, but we think more needs to be said to explain the basic apprehension that most people feel about such a policy. Specifically, we are concerned with the moral reasoning and psychological forces behind our intuitions, the metaphysical relationship between a person and his or her dead body, and the limits that can be placed on using bodily remains to help others. Aaron Spital. & Charles Erin, “Conscription of Cadaveric Organs for Transplantation: ‘Let’s at least Talk About it,’” *American Journal of Kidney Diseases* 39 (2002), pp. 611-15.

<sup>2</sup> Peter Unger, *Living High and Letting Die: Our Illusion of Ignorance* (Oxford: Oxford University Press 1996), p. 13.

features that play a role in our commonsense moralizing. A good thought experiment can reveal their distortional role and enable us to morally reflect in a way that better represents our deepest moral values. Our belief is that it is morally more important to save the lives of the innocent through organ transplants than to respect the wishes people (or their next of kin) may have about the posthumous treatment of their remains. We think we can make this case while respecting even the most libertarian reading of the fundamental liberal principles that an individual controls his own body, its parts are his property, and he is entitled to do what he wants with his body and his parts as long as no one else is directly harmed.

## **II. Take the Trolley to the Transplant Center**

Our thought experiment involves a huge but unhealthy man who has majored in philosophy. Now it turns out that he has a fatal disease and a bad heart on top of that. He will be dead from the disease in a few days if he doesn't undergo cardiac arrest before then. He is well aware of this. One of his last requests is to go out for a stroll with his best friends from school. The walk takes him and his friends near trolley tracks. There he notices a runaway trolley bearing down on some innocents who are trapped on the tracks. The horror of viewing the actual situation causes him to be stricken with a fatal heart attack. Although he has read much of the runaway trolley literature and even debated many of the best known writers on the issue, he has never budged in his belief that it is always wrong to use anyone's body against her will to save the lives of others. Well aware that his body is the only available object that can prevent the trolley from killing the innocents, he cries out to his companions before dying: "Don't use my big dead body to stop the Trolley!" If his schoolmates push his corpse onto the tracks it will be mangled, but it will halt the trolley and no lives will be lost.

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Furthermore, the trapped innocents are fully aware of all this and are pleading with the bystanders to save their lives. What should the bystanders do?

When we ask our own students what they would do if they were the bystanders, most respond that the heavy man's deceased body should be used against his known wishes to stop the trolley in order to save the lives of the innocents. They reach the same conclusion if it is stipulated that the deceased's relatives don't want the body so used. We added this feature since organ procurement procedures commonly involve requests of the next of kin.

However, the same students who are in favor of stopping the trolley with the deceased are already on record as being opposed to taking the organs of people in the hospital when they die if they have expressed their opposition to being donors. How can they (and we) maintain both responses? In each case someone is opposed to his dead body being used to save the lives of others but in one scenario it seems that this wish should be respected, in the other it doesn't.<sup>3</sup>

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<sup>3</sup> Spital & Erin, "Conscription of Cadaveric Organs for Transplantation" pp. 611-15 draw upon an analogy between nonconsensual organ procurement and a military draft. Their argument is tailored to the objection the deceased and his family might have to taking his organs. In both cases, if the state has a compelling need, the objections to the use of the deceased's body can be overridden. We think this analogy does not parallel nonconsensual organ procurement as well as our own. First, the physical "use" of the body is different; organ donation is much more like the large dead man's body being used to save others than it is like soldiers (who may or may not survive) fighting a war. Second, the benefits of citizens in a state fighting a war are dispersed differently than they are for patients in need of transplants. In the case of say World War II, the soldiers and the family members are among those benefiting for their freedoms and possibly lives are more firmly secured by an army drafted to fight the Nazis than they would be in the absence. In the organ scenario, the deceased doesn't benefit from his contribution as soldiers can from theirs. And unless members of the family receive organs from their deceased relative they wouldn't benefit

We very tentatively propose that it is our reaction to the trolley case which is more loyal to our deepest moral convictions. We think the saliency of the need of the trolley victims overrides other distortional factors and puts us in touch with not only our core convictions on the matter, but true ones at that. We shall try to explain away part of the readers' resistance to nonvoluntary organ acquisition by pointing out which distortional features are in play. We don't assert that this is the whole story, only that it is the main story behind what blocks most people from accepting nonconsensual organ procurement. In normal transplant scenarios, the needs of the donors aren't as conspicuous. The intuition that consent is needed for organ transplants is not as strong if one considers a case in which the immediacy of the need for a transplant is more similar to the case of the trolley. Consider a gravely injured soldier being flown back from Iraq to a Stateside hospital in a medically equipped transport plane. It turns out that his injuries are fatal and there is nothing the on board doctors can do except keep him comfortable. It also happens that there are several other wounded soldiers in adjacent beds in the same "flying hospital" in desperate need of a transplant and will otherwise likely die before landing. The injured man's organs are the only ones that could possibly be used given the situation (in much the same way that the heavy man's body was the only object available to derail the trolley). Now imagine that the doctor informs the injured man that the patients in the beds next to his need transplants, but the man says, "I know that I will die of this injury, but I do not want you take my organs to save those soldiers." Like the trolley case, imagine that those who could be saved by using the now dead body are well-aware of all this, their needs are salient, and are pleading with the doctor to save their lives. Our contention is that after the potential donor dies in the adjacent airplane from his "contribution." And if neither the deceased nor his family ever receives *anyone's* conscripted organs, they didn't even benefit from the general policy of organ proscription.

beds, the intuition that consent in organ acquisition can be ignored is stronger here than in those typical cases in which those in need of organs are far away and uninvolved with the potential donor.

It may be that when the people in need are in the same vicinity as those whose situation is not dire, perhaps involved in the same project as the soldiers were, we group them all together as participants in a bad situation, and just seek to minimize any harm to innocents. In standard transplant scenarios, the needy are abstractions, far off, their suffering is not salient, or if it is, their plight seems not to involve or be the particular concern of the potential donor. So one of the distortional features may have to do with how we group people in need, what Unger calls “projective grouping.” Unger believes that projective grouping cannot be justified because the psychological factors that cause the projective grouping are usually not morally relevant. There is no good reason to ignore the needs of those far away or in some other way “distant” from those in need.

Drawing again on Unger’s moral psychological speculations, it may also be that taking organs for transplant from a single person who doesn’t want to donate seems to do little good for it is but “a drop in the bucket” since there are tens of thousands of people with failing or failed organs. Unger calls this outlook “futility thinking”<sup>4</sup> He describes its work in the case of aid to the starving and sick in distant Third World lands. There are so many needy people, so many starving or dying everyday that one’s small contribution to Unicef or Oxfam won’t make much of a difference since many more will die the next day and the day after that from famine and disease. Likewise, there are seemingly countless numbers of people who need organs, so many are going to die regardless of what any individual does, the tendency is to think what good does taking a few organs from one person matter. This is fallacious thinking given the value of a single life and its effects can easily be overcome by focusing on

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<sup>4</sup> Unger, *Living High and Letting Die*, pp. 75-82.

the salient needs of one person who benefits from the charitable donation or the organ donation.

### **III. Are We Getting Carried Away by the Runaway Trolley?**

Since there are a great number of objections to extending the harm minimizing lessons from trolley cases, readers may suspect that we have illicitly made use of the trolley. We don't think so. It is certainly true that there are a great many variations on the trolley case, but in the majority of these the aim is to say something about when (if ever) it is permissible to cause the death of another. How we consider what it means to cause another's death is undoubtedly a very important moral question, and leads to controversial issues such as the killing/letting die distinction and the doctrine of double-effect. And furthermore, given the fact that trolley examples have been used over and over again in philosophical literature, a case could be made that our intuitions regarding them are jaded and untrustworthy.<sup>5</sup> Such objections might be warranted for many of these

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<sup>5</sup> If readers are still skeptical about intuitions regarding trolley cases, we can easily construct a different thought experiment. Imagine a situation in which a number of people are in lifeboats waiting for help to arrive after their freighter filled with toxic chemicals capsized and leaked. They have established radio contact with rescuers, but they know that help won't arrive for a few hours. Two men in a lifeboat are waiting for help although one of them has suffered a terrible injury and will die shortly. Before he expires, the dying man says to the other, "Don't throw my dead body into the water because the chemicals leaking from the boat will corrode it." Yet sure enough, after he dies, the remaining man in the boat comes upon one of the other victims struggling to keep his head above the toxic water that is already damaging his exposed skin. Unfortunately the man in the water is very large and so even if the dead body were thrown overboard there would still not be room for him in the lifeboat. The man is not a strong swimmer and would almost certainly drown if he attempted to tread water until help arrived. The only conceivable way of keeping him alive is to go against the deceased man's wishes and throw his body into the water for the other victim to use a raft. Like the trolley case, we expect many readers will join us in thinking it

other trolley cases, but we maintain those objections don't apply here. For example, our argument doesn't move from redirecting runaway trolleys to taking organs from people's bodies when they walk into hospitals for routine checkups.<sup>6</sup> Nor are we advocating throwing large, *living* people into trolleys, sacrificing them to save the lives of others, which most find objectionable. Our thought experiment involves actively throwing a large *dead* body in the way of the trolley. Since most readers allow us to do this to the deceased's body despite his prior protests, we are then asking why they don't condone taking organs from the dead in Intensive Care Units that the living don't want to give? In both cases we are intentionally using the bodies of the dead against their wishes to save the living.

We think the reactions are inconsistent and appeal to distortional features to explain the disparate reactions. But some readers might counter that there is no inconsistency for there are morally relevant features in one case that are absent in the other. Such readers might think the difference in people's reactions to the two cases is due to the fact that in the one scenario the organ removal team is violating the patient's body's integrity and in the other case the trolley is the physical "transgressor" for no human hands are damaging the deceased's body. Assuming this is psychologically efficacious, the question is then is it a morally justified distinction? We have doubts on both subjects. The trolley is mangling the body – a body we believe should be put in the way of the runaway vehicle. Those who have placed the large body on the tracks have laid their hands on the dead and thus violated the integrity of the deceased's body. So bodily integrity seems to be violated in both cases. It

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permissible to go against the dead man's wishes and throw his body overboard. So we think there is nothing in particular about the trolley example that is tainting our intuitions about using the remains of the deceased to save the lives of the living.

<sup>6</sup> Judith Thomson, "Killing, Letting Die and the Trolley Problem" *Monist* (1976).

would also seem that the terrible violence of the crash is more distasteful and disconcerting than the surgical removal of the organs. But if the difference lies in that it is human hands that open up the bodies, rather than out of control trolleys, why doesn't this objection arise and override the government's right to do an autopsy in cases where foul play is suspected?<sup>7</sup> Why can autopsies occur against wishes of the deceased and that of their surviving families?

Readers can't argue that it is because autopsies save lives by facilitating the capture of murderers. That assumes the murderers would kill again or their noncapture undermines deterrence. But provided that most murderers are not serial murders, 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. Nor do we think readers should appeal to retribution being more important than saving lives through organ procurement. And it may also be a matter of distributive justice that we take organs from all of the deceased. Since all of the living were entitled to receive organs, it may not be fair that one receive what one was unwilling to give.<sup>8</sup> We don't think it is plausible to claim retributive justice overrides the need for consent in the matter of autopsies but distributive justice doesn't override resistance to organ donation.

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<sup>7</sup> Some religious people may think transplants are worse than autopsies for they threaten the resurrection of an intact body since two people may end up dying with vital organs needed by each upon their resurrection. To see why this isn't a problem, see David Hershenov, "The Metaphysical Problem of Intermittent Existence and the Possibility of Resurrection," *Faith and Philosophy* 20 (2003), pp. 24-36. He argues that not only can God provide a new organ but those who shared organs at the time of their death don't have to be resurrected at the same time. One can be resurrected, then after the atoms of his organs are replaced through normal or (divinely sped up) metabolic processes, the released atoms can be reassembled to compose the organs of the other then resurrected person.

<sup>8</sup> Spital & Erin, "Conscription of Cadaveric Organs for Transplantation" p. 614.

Readers may think there are other reasons to justifiably maintain the disanalogous reactions. Some might claim that runaway trolleys are assumed to be quite rare but mandatory organ procurement would not be and this would be a source of anxiety to the living that the trolley scenario is not. We have some doubts about this. We are skeptical that frequency is playing any role in the disparate reactions to the two cases. Of course, that doesn't mean it couldn't supply a good reason to treat the two cases differently even if it was not playing any role in the initial distinct reactions. To offset this, we suggest that readers pretend, hard as it may be, that runaway trolleys which can be stopped by dead bodies are a daily occurrence. Perhaps it is too difficult to take this far fetched scenario seriously and thus readers don't have or don't trust their intuitive response to the possibility. But if readers can, would they react differently to frequently using dead people against the wishes they expressed when alive? We don't think so. Anyway, readers can also imagine that it could be the involuntary organ procurement which was infrequent. That should neutralize the frequency objection basis for the greater anxiety but it doesn't 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 trolley scenarios and their engaging in some implicit calculations of expected utility.

We suspect that if there is anxiety about nonconsensual organ procurement it is based more on the widespread fear that organs will be taken prematurely from those near death or that certain life saving measures will not be pursued in order to harvest their organs. So perhaps those who favor throwing the heavy man in front of the trolley but do not advocate nonconsensual organ procurement can find consistency with their view based on some sort of rule-based utilitarian argument. In localized situations like the trolley, or possibly even bizarrely coincidental cases like that of the dying man and the patients in need of transplants being in the same hospital, it would be permissible to use the dead bodies without consent.

There is no anxiety on the part of the general public about fear of having their deaths caused or hastened because no one seriously considers that they might be in a situation like this. However, people are well-aware that there is a shortage of organs available for transplants, and that there is a very good chance that at the end of their lives (whenever that may be), they will be under the care of doctors who have an interest in saving the lives of others by means of organ transplants.<sup>9</sup> For such an objection to work, however, it would somehow need to be shown that this general public anxiety outweighs the benefits of all the extended life that would result from the post-mortem nonconsensual transplants. Comparing these benefits is tricky business to be sure, but our intuition is that this is not the case. Alternatively, under our current policy, it needs to be shown that the benefits of alleviating the public's anxiety outweigh the anxiety of all of those on waiting lists for organs whose fear is that they may not receive one. Furthermore, these are worries of *any* organ procurement plan that respects the dead donor rule. Perhaps they are magnified in our scenario because people can't opt out and remove such worries. Still, we believe such concerns are irrational, fueled by unrealistic novels and movies, and shouldn't override the pressing need for mandatory organ acquisition. It's also interesting to note that such an objection says nothing against the basic thesis that consent is not needed for procuring organs from the dead.

#### **IV. A More Liberal Approach to the Body**

We think certain metaphysical attitudes readers have towards corpses when combined with fundamental liberal principles may be part of the problem in getting them to agree with us that organs can be taken without the consent of the deceased or their relatives. These

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<sup>9</sup> Those who hold this objection could also respond to our earlier analogy between nonconsensual organ procurement and nonconsensual autopsies. Such autopsies, they can claim, do not create the same kind of public fear and anxiety as nonconsensual organ procurement because physicians have no interest in causing or hastening death for the sake of doing an autopsy.

misconceptions obviously aren't strong enough to override the saliency of the needs in the trolley case, but they may be playing a role in the everyday resistance to mandatory organ acquisition for it is there that human hands are cutting into corpses and taking out organs. So by showing how false metaphysical assumptions may be operating, we can break down some of the opposition to taking organs without consent.

It may be that readers view organ taking without consent as a violation of people's autonomy, an infringement on their bodily integrity, or even an illicit appropriation of their bodily property. All of these are probably objected to because they are understood to be harms and illiberal ones at that. In the next section we shall explain, drawing upon Epicurean-inspired arguments, how difficult it is to argue that the dead can be harmed. But even if the three objections are not based on an account of posthumous harm, we don't think there is much merit to claiming involuntary organ acquisition violates any fundamental liberal principles of autonomy, bodily integrity and property ownership. To think they do depends upon a flawed and often unexamined metaphysical assumption that you are identical to your corpse, or if you are not, it is the same body that you once possessed and remains your property to dispose of as you see fit. Nevertheless, we will suggest that you (or your relatives) might stand in a special relationship to your remains that typically provides a position to say what is to be done with them, but we think that is a much weaker claim than others have realized.

If you are a wholly material being and pass from being alive to dead but still exist, then you would be identical to your corpse. So it would be your body that is being invaded and cut open by the organ procurement team. Assuming you are opposed to the transplanting of your organs, it would be your autonomy right to control your own body that is infringed when your body is "dismantled and salvaged." You didn't want that done to yourself. However, we don't think there are good metaphysical or biological reasons for believing any

of us will ever be a corpse.<sup>10</sup> If we are persons essentially, then we cease to exist when our capacities for thought are destroyed and thus don't remain as a mindless corpse.<sup>11</sup> If we are essentially organisms and only contingently persons, then it seems we should be 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 life ends 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. Olson defends this position well:

All of that frenetic, highly organized, and extremely complex biochemical activity that was going on throughout the organism comes to a rather sudden end, and the chemical machinery begins immediately to decay. If it looks like there isn't all that much difference between a living animal and a fresh corpse, that is because the most striking changes take place at the microscopic level and below. Think of it this way: if there is such a thing as your body, it must cease to exist at *some* point (or during some vague period) between now and a million years from now, when there will be nothing left of you but dust. The most salient and dramatic change that takes place during that history

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<sup>10</sup> Eric Olson, "Animalism and the Corpse Problem," *Australasian Journal of Philosophy* 82 (2004), pp. 265-74. Jay Rosenberg, *Thinking Clearly About Death* (Indianapolis: Hackett Press, 1981). David Hershenov, "Are Dead Bodies a Problem for the Biological Account of Personal Identity?" *Mind* 114 (2005), pp. 31-59.

<sup>11</sup> And if we aren't material beings, that is, if we are ensouled, our soul will not be joined with (Descartes) or configuring (Aquinas) a lifeless, unthinking corpse.

would seem to be your death. Everything that happens between death and dust (assuming that your remains rest peacefully) is only slow, gradual decay.<sup>12</sup>

Also keep in mind that none of those bones and tissues, nor the overall bodily structure of the dead but allegedly still persisting body existed when the embryo was just a few weeks old.<sup>13</sup> But there was an organism at that time. So appealing to the continued existence of bodily shape, skeleton, organs or skin tissues that are not essential to the organism at its origins is an odd basis for persistence conditions. There is also an asymmetry in part acquisition between the living organism and the corpse that should undermine our belief in their being one and the same entity. Matter “added” to the corpse isn’t going to be considered part of the body. Corpses can’t double in size or survive all their parts be replaced. Imagine perverse mortuary workers sewing limbs and tissues onto the dead. Most of us would either say the “additions” were foreign bodies and not part of the corpse or perhaps would not know what to say and may just suggest that their status was indeterminate, they were neither determinately parts, nor determinately not. But this contrasts starkly with what we would say about sewing limbs, tissues and organs onto a living organism, the organism exchanging overtime all of its matter through metabolic processes, its doubling or even halving in size. We know what it is to be part of a living organism – it is to be caught up in the organism’s life processes (metabolism, homeostasis etc.) We find it difficult to believe that the same entity has a different relationship to the extent of its parts that can be replaced without ceasing to exist. So rather than posit disjunctive persistence conditions and asymmetrical part/whole relations across the career of a body, we consider it is best not to

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<sup>12</sup> Eric Olson, *The Human Animal: Identity without Psychology* (Oxford: Oxford University Press (1997), pp. 151-52.

<sup>13</sup> Hershenov, “Are Dead Bodies a Problem for Biological Accounts of Identity?” pp. 31-59.

view the corpse as the body that was earlier alive.<sup>14</sup> The corpse is either a new entity or, even better, to be construed as just the remains of an earlier entity which no longer compose a single entity.

If none of us will ever become a corpse, i.e., be identical to a dead body, then our bodily integrity and autonomy cannot be violated by taking organs from the corpse. Even if we are not identical to our living body, that body is not identical to the later corpse. So it is not *our* body that is being mutilated. We can't protest that something would be done to our body against our will. So no one can appeal to fundamental tenets of liberalism and thereupon claim that the threat of postmortem organ conscription deprives them of their rights of autonomy or bodily integrity. Still, some readers might claim that the remains are their *property* to be disposed of as they wish just as they can make wills about their bank accounts, land, home, jewelry and paintings etc. Since they can dispose of their estate, shouldn't they have the right to dispose of their remains? Michael Gill puts it:

Does the fact that a person is legally dead mean that she will not be wronged if we remove her organs even though she did not want them removed? No, it does not mean that. A person is wronged if after her death we treat her body in a way that she did not want it to be treated. Treating a person's body in death in a way she did not want it to be treated is a wrong done to her in the same way disposing of a person's estate in a way she did not want it to be disposed of is a wrong done to her.<sup>15</sup>

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<sup>14</sup> Hershenov, "Do Dead Bodies Pose a Problem for the Biological Account of Personal Identity."

<sup>15</sup> Michael Gill, "Presumed Consent, Autonomy, and Organ Donation." *Journal of Medicine and Philosophy* 29 (2004), p. 44.

We want to question two things: first, the moral weight that should be given to this claim and secondly, whether the dead can be said to possess property.

It is important to point out that one's remains are a lot less special and valuable than the parts of one's living body. What was once a part of you might be something you should have some input into disposing of, but that input might be easily overridden by weightier needs. We will make this point first, as is our (perhaps annoying) custom, by fanciful cases. Imagine that Rapunzel got a haircut that left her with just shoulder length hair. Right afterwards, someone in the vicinity of the shorn golden locks has fallen off a cliff and is clinging precariously to a ledge a few feet below. Couldn't we use Rapunzel's freshly cut long braids to pull them to safety even if she wished we didn't? We would think so. And we would maintain this even if the braids were ruined in the rescue activity. The cut hair is perhaps her property, but property can be taken to save lives. Maybe compensation is required to the living when their property is used but we doubt it makes sense to compensate the deceased as would have to be the case for organ taking. Keep in mind that even if the dead can own property, which we doubt, it is taken from them all the time in the form of estate taxes. So one model may provide for organs to be taken from the dead just as estate taxes are. However, it may be claimed that organs and other body parts that once belonged to someone are special in some way that the deceased's cash, jewelry and artworks are not.

But what is so special about something that was but is no longer a part of you? Consider the atoms that you have lost across your life through normal metabolic processes. If you are of a certain age, old enough to read this article, you have completely replaced your matter over time. Now assume those atoms that earlier composed you were somehow reassembled and took the appearance that you had half your life ago. Let's stipulate that the reassembled body is not alive but appears as your corpse would have appeared if you had died at half your present age. All of its atoms are the atoms that you had at that earlier time.

Should you have a special right to what happens to the reassembled body or how it is used? It is not obvious to us that you have a claim to something that was once part of you but is no longer. If the matter of the corpse can be used for lifesaving medicinal purposes, we doubt that you should be entitled to block such use.

If that is the case with reassembling atoms that were once part of your body, what then is so special about your corpse and its organs since its atoms too are not parts of you any longer? Well, it may be that there is something special about the *last* parts that you had. We certainly can see how important remains are to the family that survive their loved one's death. The need for a physical connection was evident in the aftermath of the World Trade Center disaster when families without a corpse to bury were quite relieved to belatedly receive the smallest physical remnant of the loved one; they would have a ceremonial burial, and use that "final resting" spot as a connection to the deceased. However, it is important to keep in mind that the advocated organ conscription is not leaving the family without a trace, with nothing to bury to mark the ground as a place of remembrance.

We suggested above that we were skeptical that the corpse could be considered to be the deceased's property. Actually, we don't think it makes any sense to speak of any property of the deceased. To own property, one must exist. If there is no owner, there's no ownership. That is why property must change hands at death – or, at least the item comes to belong to no one.<sup>16</sup> So one can't appeal to property rights to replace the rights that come from the control that one has over one's current body parts. Bodies can't be sold or inherited. Or if they can,

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<sup>16</sup> Recognizing that the dead body cannot be owned, courts have referred to the corpse as "quasi-property." See Theodore Silver, "The Case for a Post-Mortem Organ Draft and a Proposed Model Organ Draft," *Boston University Law Review* 68 (1988), pp. 681-728.

assuming an extreme libertarian position, the remains aren't the same entities that were once alive. So there is no property, assuming the body is that, that persists across the death event that can become the same property of the relatives or designated heir. This distinguishes bodies from houses and jewelry. However, it might be claimed that since atoms composing someone at the moment of their death persisting across the death event, they can be considered a person's property and thus transferred to one's friends or family at death. But recall the earlier thought experiment about parts being reassembled from half of a lifetime earlier. They weren't anything you had a compelling claim to. Bodies aren't identical to the sum of the atoms composing them. If they were, no body could grow. So if one has a property right to one's body, it doesn't follow that one has a right to its components after they cease to be parts of your body. If you don't have a right to the atoms that have *left* your body through metabolic exchanges, it would seem that you don't have a property or other kind of right to the atoms that *survive* the destruction of your body.

Therefore, if what has been said above is correct, neither appeals to one's bodily integrity, bodily autonomy or property can be effective in keeping your will from being ignored and your organs taken posthumously. So surprisingly, our advocacy of ignoring the last expressed wishes of the deceased is not illiberal despite its initial appearance of being so. Still, readers might point out that we have just endorsed paying no heed to people's final wishes. So even if this can't be cashed out in property talk, they might wonder whether it isn't still a harm. Wouldn't you be as wronged by this as you would be if your last will and testament was disregarded and your wealth given to an estranged relative that you had disinherited? We think that, at best, there is reason to give you or relatives some say over the disposal of the remains. But since this is not a property right nor an autonomy right, it may be rather weak and overridden by the needs of those dying from organ failure. We will show in the next section that overriding this alleged right to dispose of one's remains can't be

condemned on the basis that doing so will thwart the interests of the deceased. The deceased don't have interests.

### **V. Epicurean Reasons to be a Grave Robber**

We don't believe that the dead can be harmed by taking their organs for familiar Epicurean reasons. Where there is no one to have an interest, no interest can be frustrated. Since the dead don't exist, they have no interests, experiential or nonexperiential, that can be thwarted. But we aim to do more than just state that that the dead can't be harmed. We want to offer an alternative that will capture why death should be avoided, why those who kill have done a horrible thing, and why the living should quite reasonably strive to avoid death. If we couldn't preserve common sense morality and prudence, we would be more sympathetic to anti-Epicurean claims. And one consequence of that would be that we would admit posthumous interests. Since philosophical positions are often chosen by the preponderance of reasons weighing in their favor, we suspect what appears to be the Epicurean's radical break from commonsense values have played a role in tilting the scales away from Epicureanism.

Typical is the claim of Ben Bradley, who endorses the assumptions of Jeff McMahan "that the view that death is bad for the one who dies seems to me to be what McMahan calls a 'fixed point' or 'starting point' in ethics – a conviction that would require extremely convincing arguments to overcome if it could be overturned at all."<sup>17</sup> Sharing such an attitude is Harry Silverstein who writes "that the morality of killing is another area where the Epicurean view has implications that are seriously disturbing, its acceptance would wreck

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<sup>17</sup> Jeff McMahan, *The Ethics of Killing: Problems at the Margins of Life* (Cambridge: Cambridge University Press 2002), p. 104. Ben Bradley, "Why is Death Bad for the One who Dies?" *Nous* 38. (2004), pp.1-28.

havoc, in my opinion, with our considered judgments.”<sup>18</sup> The threat to our commonsense understanding of the morality of killing is that if death isn’t bad for people, then the usual explanation that it would be wrong to kill them because they would be harmed doesn’t apply. It might seem that the wrongness of killing someone would then have to be due to the effects on survivors and that seems to erroneously leave the wrongness of killing hostage to the existence of friends and family (the latter of whom must be fond of you). Or our commonsense ethics might have to be replaced with consequentialist considerations such as the loss of overall utility. Not only are these utilitarian judgments notoriously capricious - allowing at times for very counterintuitive claims - but when they do cohere with commonsense judgments, they seem to supply the wrong reason for the right judgment about the wrongness of killing.

It is not just the morality of killing that is threatened by Epicureanism but also the rationality of prudence. Silverstein writes of Epicureanism that “just as it does deny that one’s death can be an intelligible evil for oneself, so it denies that one can have a rational prudential desire to continue living.”<sup>19</sup> The worry is that if death isn’t bad, then it might be irrational for someone to make the customary efforts to avoid death.

It could also be that Epicureanism’s apparent break with commonsense values and prudential norms is what often tilts the scales against the approach and motivates the search for a metaphysics compatible with the view that death is a harm to the deceased. One might suspect that such worries are, at least in part, what drives some of those pondering the issue to find more attractive than they otherwise would positions such as the four-dimensionalist

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<sup>18</sup> Harry Silverstein, “The Evil of Death,” *Journal of Philosophy* 77 (1980), p. 413.

<sup>19</sup> Silverstein, “The Evil of Death,” p. 409.

account of the badness of death in which the living timelessly coexist with their dead state<sup>20</sup>), the Meinongian account in which the dead are real though deprived of existence,<sup>21</sup> and the position that death is bad for people but there is no specific time at which it is bad for them.<sup>22</sup> Such concerns may also be somewhat responsible for why people fail to recognize that the standard response to Epicurus -that death is bad for a person in virtue of bringing about a life shorter than that in the relevant nearby possible world - has actually not refuted Epicurus but rather changed the subject.

The standard response to Epicurus about the evil of death operates with counterfactual theories of harm. Death is a harm because if it had not occurred, then one would have lived on and had a valuable existence. It is better, all other things being equal, to live say from 1970 to 2070 than from 1970 to 2000. Death deprives one of the alternative biography and thus it is bad since one lives a shorter life than one would have. This should strike readers as not so much as explaining why it is bad to be dead, but just as stating why a longer life is (usually) better than a shorter life. The approach ends up just comparing two lives rather than death with life, which was Epicurus' challenge.<sup>23</sup> This is really changing the topic rather than explaining why being dead is bad for you.<sup>24</sup> Epicurus wasn't interested in

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<sup>20</sup> Silverstein, "The Evil of Death," pp. 401-424.

<sup>21</sup> Palle Yourgrau, "The Dead," *Journal of Philosophy* 86 (1987), pp. 84-121.

<sup>22</sup> Thomas Nagel, *Death*, *Nous* (1970), pp. 73-80.

<sup>23</sup> Silverstein points out that advocates of the standard objection to the Epicurean argument are "guilty of conflating the life/death comparative and the life/life comparative interpretation...." "The Evil of Death," p. 406.

<sup>24</sup> Silverstein, "The Evil of Death," p. 405. It may be thought that the fact that death brings it about that one lived a particular life rather than a preferable alternative life explains why death can be bad. But the fact

which of two lives is better, he wanted to know why, when you are dead, death could then be considered bad for you and worse than being alive. He didn't think this could be done as he explains in his letter to Menoeceus:

Death, the most terrifying of ills, is nothing to us, since so long as we exist, death is not with us; but when death comes, then we do not exist. It does not concern either the living or the dead, since for the former it is not, and the latter are no more.

Another reason to suspect that the standard account of the evil of death has changed the topic is that it can't give a plausible account of the timing of death. Some philosophers have the harm of death occurring before people die since the fact of their future death frustrates certain of their present interests.<sup>25</sup> Others have the harm of death being eternal.<sup>26</sup> Nagel ends up claiming that death is bad for a person but at no specific time. He writes "Although the spatial and temporal locations of the individual who suffered the loss are clear enough, the misfortune itself cannot be so easily located....Nevertheless there is a loss, someone must suffer it, and *he* must have existence and specific spatial and temporal location even if the loss itself does not".<sup>27</sup> One critic of Nagel's, Neil Feit, responds: "This view strikes me as very implausible... First, the view entails that there are certain events that take place (or certain states of affairs that obtain) but do not take place at any time (or obtain at that the timing of one's death determines which of a number of possible lives one led is not the same as accounting for how when one is dead one can be harmed by not partaking in the alternative life.

<sup>25</sup> George Pitcher, "The Misfortunes of the Dead." *American Philosophical Quarterly* 21, (1984), pp. 183-188. Joel Feinberg, *Harm to Others* (Oxford: Oxford University Press, 1984), pp. 79-95.

<sup>26</sup> Fred Feldman, *Confrontations with the Reaper: A Philosophical Study of the Nature and Value of Death* (Oxford: Oxford University Press, 1992).

<sup>27</sup> Thomas Nagel, "Death" p. 7.

any time.)”<sup>28</sup> Feit also points out that this makes death unlike other harms such as losing one’s job or breaking one’s leg which occur during a particular time. Nagel’s position, at least as construed by Feit, is certainly unattractive. Nagel, no doubt, wants to give an account of why it is obviously wrong to kill someone, why irreversible comas and fatal diseases are horrible things, and why it is rational to avoid death through medical care and other cautious behavior. The answer that Nagel finds obvious is that death is an evil, a great harm. But unable to make sense of when it could be bad he just leaves the loss without a time.

Many of Nagel’s critics claim that if the reason death is bad for you is that you could have had a different, more attractive, (usually) longer life, then it seems that death would be bad for you at the time you would have been living that alternative life.<sup>29</sup> The guiding idea is that death is a deprivation so it is bad when it deprives you of goods. Typical is the view of Bradley: “death is bad for the person who dies at all and only those times when the person would have been living well, or living a life worth living, had she not died when she died.”<sup>30</sup> So it seems that readers who accept that death is bad should claim not only that death is bad for the person who died but bad *when* he is dead. It is rather counterintuitive to insist that death is eternally bad or bad only prior to death or at no *specific* time or no time at all.

If death is bad for people, then it surely must be bad for the dead when they are dead. However, if the harm of death occurs during the period when the deceased could have still been enjoying life, then it is bad for him when he doesn’t exist. But the above quote from Epicurus suggests this doesn’t work. The deceased won’t exist during the time they are dead

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<sup>28</sup> Neil Feit. “The Time of Death’s Misfortune.” *Nous* 36 (2002), p. 361.

<sup>29</sup> PalleYourgrau, “The Dead”; Frances Kamm, “Is there a Right to Choose Death?” *Boston Review*. 22, 20-23; Ben Bradley, “Why is Death Bad for the One Who Dies?”; Neil Feit, “The Time of Death’s Misfortune”; Jeff McMahan, *Ethics at the Margins of Life*.

<sup>30</sup> Ben Bradley, “When is Death Bad for the One Who Dies?” p. 6.

so we would have to compare their nonexistence to a possible life that they could have led and that is a notoriously difficult and perhaps incoherent task.

Death not being a harm doesn't mean that killing someone (or, in some scenarios, allowing them to die) isn't terribly wrong. There is no need to radically adjust our ethics to accommodate Epicurus' insight. We don't have to abandon a person-affecting morality and appeal to death's wrongness resulting in less overall utility or other forms of consequentialism. Nor need we appeal to the effects on the survivors to account for the wrongness of killing. What we should say is that killing is wrong because it *prevents* the victim from having more goods, i.e., a longer, rewarding life. There is no problem with this counterfactual or the timing of the benefits or their occurring in the absence of a subject. If the person had not died in  $W_1$ , he would most likely have enjoyed a longer life. He would have existed and thus could be benefited. That is, we're saying if a certain nearby possible world  $W_2$  had been actualized instead of  $W_1$ , the deceased in  $W_1$  would have lived longer and benefited from the additional life in  $W_2$ . This is unlike the counterfactual deprivation account of the harm of killing where the harm to the victim is said to occur during the time the deceased no longer exists.

The recommended alternative instructs us to imagine a person living longer and to ponder whether that additional life would be good. What is being asked is whether the person would enjoy more life or even whether more life would be objectively good for him. There is no comparison of more life to non-existence. All we have to do is ask if the additional years would have been worth living. If so, we can state that death has prevented someone from benefiting. So while it doesn't make sense to say death is bad for us, i.e., our being dead in the future won't be a harm for us at that time, it is quite plausible to say more life would be good for us since we would exist as we reaped the benefits. And so someone's killer has done

something terribly wrong. This wrongness lies not in harming the deceased, but in *preventing* him from enjoying more life.

Preventing someone from more life can be a terrible act and deserve to be severely punished. Therefore, much of common sense morality and its accompanying attitudes have little to fear from Epicurus' view of death. For example, one can be just as resentful towards a murderer if Epicureanism about death is true as if it weren't. And one can hold that attitude because of what the criminal did to his victim. It just has to be recognized that there is no entailment from the fact that more life would be good for someone to the proposition that death would be bad for him. Likewise, while a killer has committed a grave wrong preventing someone from living past  $T_1$ , this doesn't entail that he has wronged the deceased in virtue of causing him to suffer the harm of being dead after  $T_1$ .

Readers can now also see that there are reasons to be prudent even if death is not a harm to the nonexistent. Although it would be irrational to fear the state of being dead, it wouldn't be irrational to seek the benefits of more life. Since more life would be enjoyable, the living have considerable reason to pursue the means to such an end even if their failing to achieve it due to death wouldn't be bad for them.

So we believe we have illuminated an important aspect of the wrongness of killing and why people have a reason to go on living even though death is not a harm. Thus we can capture what is right about the Epicurean claim without having to abandon the very reasonable claims that (in most cases) more life is good, it is reasonable to make efforts to stay alive, and killing is very wrong and should be prevented and punished. So with Epicureanism given more support, we think we have satisfactorily explained why posthumously taking people's organs contrary to the wishes they expressed when alive is not a harm and we can do so without having to accept bizarre consequences like claiming that taking their lives or hastening their deaths wouldn't be horribly wrong.

## VI. Remaining Concerns

There is a further claim that readers might raise, however, namely that many people refuse to consent to organ donation for religious reasons. Whether we agree with these religious reasons or not, it is widely held that we have an obligation to tolerate religious views. This is a sensitive issue, but we argue that particularly in the cases of dealing with the remains of the deceased, there are limits to what this tolerance entails. The existence of an autopsy against the wishes of the religious is evidence of this. How would readers react for example to 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 override 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. We are aware that 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 won't explain the ignoring of consent for the sake of autopsies.

We don't have a worked out organ conscription policy proposal and are open to the possibility that there should be an exception on religious grounds. But since the major Western religions are not opposed to organ donation, an organ draft won't violate any religious prohibition against organ procurement.<sup>31</sup> We think the most reasonable response is that the state needs to evaluate, based on the needs of its citizens, what religious beliefs about

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<sup>31</sup> But we're somewhat concerned, unlike Silver, that while the major religions don't prohibit transplants, they may prohibit refusing to give a person the choice to donate or not.

respect for bodily remains can be respected and which ones cannot. There is no preexisting algorithm, just various principles with various weights. We are not even insisting that an organ draft policy should be implemented before any other attempt to increase organ supplies. It may be that a policy of routine salvage or even monetary incentives is morally better, not to mention more attractive on grounds of political feasibility. But as we hope to have shown, there *are* more reasons than previously realized to now seriously consider organ conscription.