

Why Consent May Not Be Needed For Organ Procurement

Introduction

It is widely held that it is ethically impermissible to take organs from the dead if they earlier expressed an unwillingness to donate. 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 act contrary to the wishes of the living regarding the disposal of their remains when doing so saves lives. It appears that our responses are inconsistent. We tentatively put forth an account of 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.

We suspect that much of the repugnance to conscripting organs may be based not on any wisdom but on what Peter Unger calls “distortional features.”¹ These are psychologically efficacious, but morally irrelevant features that play a role in our commonsense moralizing. A good thought experiment can reveal their distortional role and enable us to reason in a way that better represents our deepest moral values. We contend that many of those who initially express opposition to organ conscription will realize, upon reflection, that using the organs of the deceased to save lives more accurately reflects their fundamental values.

There will undoubtedly be people who reject our account of their “fundamental” or “deepest” values. We respond that if they believe that mandatory autopsies are justified, the same life saving rationale should be extended to organ conscription. We argue that there is not a morally relevant difference distinguishing the two policies. Of course, readers are free to reject

¹ Peter Unger, *Living High and Letting Die: Our Illusion of Ignorance* (Oxford University Press 1996), 13.

both the existing policy of mandatory autopsies and our recommended organ conscription policy and insist upon taking their full set of organs to the grave.² We then argue that such readers cannot justify taking viable organs to the grave on the grounds that doing so is in their interest. We defend an Epicurean position that it is an error – in fact, a category mistake - to assume that the deceased have interests. Harm is a state that needs an existing subject and the deceased do not exist. We offer an explanation of why the truth of Epicurus' claim has not been widely recognized and show how a commonsense person-affecting ethics is compatible with the Epicurean view of death.

Alas, there will be readers unconvinced by our Epicureanism. So our final argument is aimed at showing that the most likely candidates for being posthumous harms cannot be defended even if it is not impossible for the deceased to have interests. We provide a metaphysical argument that our body does not survive our demise as a corpse which could then be treated in a way that violates rights of autonomy, bodily integrity or bodily property.

Disturbing the Dead

Our thought experiment involves a man who majored in philosophy with an emphasis on applied ethics. As a result, he has read and discussed scenarios involving dead people thrown in front of trolleys to save the lives of the living, survivors of plane crashes eating their dead fellow passengers to remain alive, and deceased people's bodies used to make lifesaving serums. His

² We suspect a case can be made that their interests in not donating can be overridden just as are the wishes of those opposed to being autopsied. However, defending an override of the wishes of the deceased will not be our strategy. So our defense of organ conscription will not rely upon a consequentialist-based denial of the deceased's rights or interests or a balancing of interest or rights. We believe our defense of organ conscription is consistent with a deontological ethics because the deceased are not the appropriate subjects of the constraints that characterize deontology.

rather morbid, intellectual obsessions had actually led him to purchase a cemetery lot and construct a mausoleum on it. Perhaps as a result of his spending too much time reading Unger, Singer, Harris, Thomson, Kamm, McMahan, Foot, Bennett and others on life and death matters, and not enough time exercising and attending to his diet, his health fails and he dies soon after graduating. Before he expired, he proclaimed to those gathered around his deathbed: “No matter how much good could come from my body being at the disposal of the medical community or anyone else, it is upon my death to be immediately placed in a coffin, interred in my mausoleum and left forever undisturbed!”

Soon after his burial, lightning strike sets the cemetery on fire. A visitor to the cemetery, aware of the deceased’s deathbed declaration, can only escape the fire by taking refuge in the mausoleum and using the fresh corpse as a fire shield. The fire badly burns the corpse, but leaves the visitor unscathed. When we ask our own students what they think about the cemetery situation, most respond, as we do, that the man’s deceased body should be used against his known wish in order to save the life of the man trapped by the fire. But we, and most of our students, are all 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 we maintain both responses? In each case, someone is opposed to her 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 does not.

We propose that it is our reaction to the mausoleum case which is most loyal to our deepest moral convictions and thus it is our attitude to organ conscription that should be abandoned. We think the saliency of the need of the endangered overrides certain 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 involuntary organ acquisition

by pointing out which distortional features are in play. We do not assert that this is the whole story, only that it is the main one behind what prevents most people from advocating nonconsensual organ procurement.

According to Unger, when people in need are in the same vicinity as those whose situation is not as dire, perhaps confronting the same danger as in cemetery fire, we group them all together as participants in a bad situation, and just seek to minimize any harm to innocents. By contrast, 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.” The dead and living persons in the cemetery are grouped together; potential organ donors and those in need of transplants are not. We agree with Unger 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.

Some readers might counter that there is no inconsistency in the disparate reactions to organ conscription and the cemetery fire for there are morally relevant features in one case that are absent in the other. Such readers might think the difference between the two cases is due to the fact that in the one scenario, the organ removal team is violating the patient’s bodily integrity, while in the other case the fire is the physical “transgressor” for no human hands are damaging the deceased’s body. But if the difference lies in that it is human hands that damage the body rather than the flames, why does this objection not arise and then undermine the government’s prerogative to carry out an autopsy in cases where foul play is suspected? This brings us to our second argument in favor of organ conscription. Mandatory autopsies are widely

accepted, despite the expressed wishes of the deceased and that of their surviving families. If there is, as we suspect, no morally relevant difference between required autopsies and organ conscription, then the latter should no longer be considered beyond the pale.

Readers should not contend that only mandatory autopsies are acceptable because they save more lives by facilitating the capture of murderers. It seems safe to say that the number of people saved by organ conscription would be greater than the number saved through the aid autopsies provide law enforcement. Nor do we think readers should appeal to retribution being more important than saving lives through organ procurement. First, it may also be a matter of justice that we take organs from all of the deceased and we do not see why concerns of retributive justice outweigh those of distributive justice.³ Secondly, readers should keep in mind that there are mandated autopsies stemming from a concern that the citizenry may be threatened by an epidemic, not a criminal at large who has escaped his just deserts.

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.

It would also be a mistake to claim that a disanalogy exists between mandatory autopsies and organ conscription that has to do with the deceased being interested in justice being served

³ Even if the body is not property, a Lockean proviso against useful resources spoiling might apply.

and thus less opposed to an autopsy.⁴ There will still be times that the deceased will not want an autopsy, perhaps because they are protecting family members or just do not want a postmortem to reveal their involvement in something disreputable, yet their wishes will be rightfully ignored. It is such cases that support our thesis that organ conscription is justified if mandatory autopsies are.

We do not believe that a justification for the different reactions to mandatory autopsy and organ conscription is that the moral nonequivalence of killing and letting die bestows upon the state a greater duty to prevent people from killing, than it does to prevent diseases from taking the lives of its citizens. The irrelevance of any moral difference between killing and letting die to treating mandatory autopsies differently from organ conscription can be seen by considering a case in which a transplantable organ has been consensually offered to the organization governing transplant matches. Imagine that the only difference between two possible recipients is that one needs the organ because of a disease while the other needs the organ because of a life threatening, intentional gun shot. It does not seem to us, that we should give the organ to prevent someone from being intentionally and maliciously killed rather than just to prevent someone's death from disease. So if any moral nonequivalence between killing and letting die is irrelevant to the question of distributing a donated organ, we do not see why it should play a role in distinguishing organ conscription from mandatory autopsies. While it may be worse, everything else being equal, for an agent to kill a person than let an individual die, that moral difference doesn't give a *third party* a greater duty to save someone from a killing than saving someone else from a disease

Some readers may think that the implementation of an organ conscription policy would be a source of anxiety to the living while the unlikely use of one's body in the mausoleum

⁴ M. Wilkinson pressed us on this point.

scenario or mandatory autopsy would not be.⁵ That might be thought to justify the disparate reactions. We suspect if there is anxiety about nonconsensual organ procurement, it is based more on the fear that organs will be taken prematurely from those near death or that some life saving measures will not be pursued in order to harvest their organs. Our response is to make people recognize that it is more reasonable to be anxious about the much greater chance that they will someday need a life saving organ transplant that is not available than that they will possibly some day be shortchanged in their care so their organs can be taken. Since the odds are much more likely that one will suffer the first type of anxiety under existing policy than the second kind of anxiety under the advocated policy, organ conscription cannot be prohibited and mandatory autopsies permitted on the basis of reducing stress in the public.

Epicurean Reasons to be a Grave Robber

Perhaps we have overlooked a morally relevant difference between organ conscription and mandatory autopsies. Even if we have not, some readers may insist that the lesson of our argument is only that they must be treated alike, so they may very well abandon any earlier belief in mandatory autopsies rather than accept organ conscription. Our response is that they cannot argue organ conscription is impermissible because it harms the deceased by thwarting their interests. The dead cannot be harmed by taking the remains of their bodies for reasons that Epicurus gave centuries ago. Where there is no one to have an interest, no interest can be

⁵ We are 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. 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 lifeboat scenarios and their engaging in some implicit calculations of expected utility.

frustrated. Since the dead do not exist, they are without interests, experiential or nonexperiential, that can be thwarted.

The standard response to Epicurus about the evil of death operates with a counterfactual theory of harm. Death is a harm because if it had not occurred, the deceased 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.⁶ The approach ends up just comparing two lives rather than death with life, which was Epicurus' challenge.⁷ This is really changing the topic rather than explaining why being dead is bad for you. Epicurus was not interested in 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 wrote:

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 don't exist. It does not concern either the living or the dead, since for the former it is not, and the latter are no more.

⁶ Perhaps the error is due to a failure to distinguish the momentary *event* of death, which brings it about that one life was lived rather than another of different length, with the alleged *state* of being dead.

⁷ 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,” *Journal of Philosophy* 77 (1980) p. 406.

If death is bad for a person, 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 Epicurus suggests that this doesn't work. The deceased will not exist during the time they are dead 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. One might be misled into thinking life and death can be compared because levels of pleasures and goods can be numerically ranked. For instance, on a scale of zero to ten, zero being devoid of goods and pleasures and ten indicating their maximal possession, a future that is a five would seem to consist of more goods and pleasures than the zero accorded to the dead. But this is assuming that there is someone to be at the zero level, in other words, to exist in the deprived state. If death brings nonexistence then it is misleading to posit that the dead have zero pleasure because they can't instantiate any amount of pleasure and that includes the state of having none at all. They are not in a state devoid of pleasures and other goods because they are not in any state at all, hence they cannot instantiate or lack anything.

Harms and deprivations cannot float free of substances like the grin of the Cheshire Cat. The Cheshire Cat is an ontological joke. Since it seems to be a category mistake to assume that instantiations such as states and modes can exist without inhering in an object, we should not allow the anti-Epicurean to make an exception for the dead and allow their misfortune or harm to exist when they do not. Deprivations, misfortunes and harms are properties or states of entities. If the entities in question are absent, it makes little sense to say their properties are present.

We aim to do more than just state that that the dead cannot 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. We realize that if

we cannot preserve commonsense morality and prudence, our readers will be more sympathetic to anti-Epicurean claims and, as a consequence of that, accept 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. A typical worry, expressed by McMahan, Bradley and Silverstein, is that the badness of death is a starting point in ethics.⁸ 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 is not just the morality of killing that is threatened by Epicureanism but also the rationality of prudence.⁹ The worry is that if death is not bad, then it might be irrational for someone to make the customary efforts to avoid death.

Death not being a harm does not mean that killing someone (or, in some scenarios, allowing them to die) is not terribly wrong. There is no need to radically adjust our ethics to accommodate Epicurus' insight. We do not 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

⁸ Jeff McMahan, *The Ethics of Killing: Problems at the Margins of Life* (Cambridge University Press 2002), 104.

Ben Bradley, "Why is Death Bad for the One who Dies?" *Nous* 38. (2004), pp.1-28. Harry Silverstein, "The Evil of Death," 413.

⁹ Silverstein, *IBID.* 409.

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 does not make sense to say death is bad for us, i.e., our being dead in the future would not 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 deserves 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 does not entail that he has wronged the deceased in virtue of causing him to suffer the harm of being dead after T_1 .¹⁰

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 prudent to make efforts to stay alive, and killing is very wrong and should be prevented and punished. So by providing Epicureanism with 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 would not be horribly wrong.

A More Liberal Approach to the Body

We have one more argument to offer in favor of organ conscription. We would be happy to learn that it merely reinforces our previous argument, but we expect that there will be sophisticated readers who resist our modified Epicureanism. There may even be readers who share our (non-hedonistic) Epicureanism, but believe that the dead still exist as corpses and thus can be the subject of nonexperiential harms. Either type of reader may insist that they have interests in their bodies remaining undisturbed by the transplant surgeon's knife. They are likely to put this either in terms of their autonomy, bodily integrity or bodily property being violated if

¹⁰ Readers can now also see that there are reasons to be prudent even if death is not a harm to the nonexisting.

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.

their organs are taken. We contend that the claim that organ conscription violates such fundamental liberal principles rests upon a flawed metaphysical assumption that a living body is identical to a later corpse.

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 YOU that is being invaded and cut open by the organ procurement team. Assuming you are opposed to the transplanting of your organs, it would perhaps be your right to control your own body that is infringed when your body is “dismantled and salvaged.” You didn’t want that done to *yourself*. You still exist and thus are a subject of interests and harm, assuming there are non-experiential interests and harms, an assumption which we will just grant for the sake of argument. So it could perhaps be said that your bodily integrity and autonomy would be violated by organ conscription since you would still exist - though it might be better to say that an autonomously decided upon interest is violated since the deceased cannot at that time act autonomously.¹¹

However, we do not think there are good metaphysical or biological reasons for believing any of us will ever become a corpse.¹² If we are persons essentially, necessarily creatures with minds, then we cease to exist when our capacities for thought are destroyed and thus do not remain as a mindless corpse. If we are essentially organisms and only contingently persons, then it seems 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

¹¹ John Harris. “Law and the Regulation of Retained Organs: The Ethical Issues.” *Legal Studies*. 22, 2002, p. 535.

¹² 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.

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.¹³ Our view is that there really is no composite object *the corpse*, what exists posthumously are merely the remains of an earlier living body.

Another reason to be skeptical that a later corpse is identical to the earlier living body is that if dead bodies exist, they will have different part/whole relationships from living bodies. Such bodies would acquire and retain parts in different ways. We think readers should be suspicious of objects whose parts are governed by one compositional relation at T_1 and then a different compositional principle later at T_2 . That is, there are different criteria for what makes something a part of a living body than part of a dead body. Moreover, to avoid the living and dead bodies having different persistence conditions, a fortiori, being distinct objects, it will have to be claimed that bodies have disjunctive persistence conditions. That is, the body continues to exist if either X conditions are met when it is a living body or Y conditions are satisfied when it is dead. Rather than claim a body has disjunctive persistence conditions, we are suggesting that the identity of a living body and the later corpse should be denied.

Some readers may disagree and maintain there is not an asymmetry in part/whole relationships and no need for disjunctive persistence conditions. They may claim there is one symmetrical principle that explains the differences between live and dead bodies and this gives us no reason to deny their identity. To become a part of the body something must be assimilated i.e., caught up in the life processes of the organism as a whole. Joseph LaPorte offers the general

¹³ This argument is due to Eric Olson, *The Human Animal: Identity without Psychology* (Oxford: Oxford University Press (1997), pp. 151-52.

restriction on part replacement that “For a body before death or after, incorporation of new matter is possible just on condition of assimilation.”¹⁴ Dead bodies do not assimilate, so LaPorte concludes that “naturally there can be no part replacement after death even though there can be part replacement before death.”¹⁵ He suggests that there is nothing odd about something getting parts at one time and not at a later time: for example, a city might not be able to any longer extend its boundaries because of natural obstacles when it could earlier. He also suggests disjunctive persistence conditions are not needed. Instead, he argues that a body persists as long as there remains sufficient structures composed of parts that were earlier assimilated via life processes.

LaPorte’s above quoted symmetry principle seems to be suggesting that those who believe in the existence of corpses should deny that they can get new parts and thus there would not be any troubling asymmetry. But most people think dead bodies produce new parts posthumously through bloat, decay, isolated cellular activity and postmortem procedures. Bloating involves the production of gases that were not parts of the body prior to death. Bacteria that may have been considered parts of the body before death, and surely then produced parts of the living body aiding in digestion, create new gases and parts of the deceased body. Putrefaction is caused not just by bacteria already in the body but by insects attracted to the gases they produce and these transform the body thus giving it new parts. Putrescine and cacaverine are both produced by the breakdown of amino acids in dead organisms and the two compounds are largely responsible for the foul odor of putrefying flesh. We assume that if the corpse smells it is in virtue of *its* changing chemistry as some new chemical compounds come to be parts of *it* and

¹⁴ LaPorte, Joseph. ‘On Two Reasons for Denying that Bodies can Outlast Life.’ *Mind*

¹⁵ *Ibid.*

not due to some other compounds which are not parts of the corpse but constituents of something else that stinks. Something similar might be said about the adipocere (grave wax) which the corpse's fats sometimes produce in a process called saponification which slows putrefication.¹⁶ And parts of the head and chest etc. removed in autopsies are then sewed back and widely considered to be restored to the body but not by being assimilated, i.e., caught up in life processes. Moreover, if blood or some other liquid or gas exited the corpse during a postmortem procedure but then flowed back into the body later in the procedure, they would generally be considered to be parts of the body gained after death but were not assimilated. So while the living body could only acquire parts through assimilation, the dead body can only acquire parts in a different manner.

There is also nail growth and hair growth shortly after death that are considered new parts of the corpse but obviously are not assimilated by the life processes into a living organism since there is no longer a *living* organism! Likewise, after the multicellular organism dies, some isolated cells that survive for a time cannibalize adjacent tissues in order to continue producing their cellular products. They thus produce what are widely recognized as new parts of the corpse but they are not assimilated into a living organism. Furthermore, for a short time after somatic death, cells in muscle tissues produce the lactic acid that causes rigor mortis. Blood clots are also new parts of the very fresh corpse. And if brain death is considered the correct criterion for the death of a human organism, then the corpse would acquire all sorts of new parts as some brain dead bodies fight infection, heal wounds, produce scar tissue, manufacture hormones that

¹⁶ That people talk of corpses undergoing bodily saponification, embalment, mummification, and even fossilization implies they might believe such processes involve the addition of body parts rather than the corpses remaining within newer and larger saponified, embalmed, mummified or (partially) fossilized entities.

prevent diabetes insipidus and do much else. Therefore, readers cannot appeal to a single symmetrical principle of part assimilation, like that recommended by LaPorte, to avoid the changing part/whole relations and disjunctive persistence conditions that we find so counterintuitive.

Another reason to deny the identity of the living and dead bodies is grounded in how they maintain and remove parts. For example, what makes a liquid part of the living body than what makes it part of the dead body. It may just belong to the dead body because it pools in some cavity. But it was part of the living body because it was caught up in life processes. And before a body died, a “dead leg” or dead skin that was not caught up in the life processes that integrate the living organism would not properly be considered parts of the organism any more than prosthetics or transplants undergoing rejection would. However, dead limbs and dead skin would surely be considered part of the corpse. It is quite odd that such objects are foreign bodies at one time but not another. So it is not just the assimilation but also those relations that maintain and “disown” parts that are different in corpses and live bodies.

We do not think readers should maintain that the living body survives as a corpse as long as “sufficient structure” remains. Compare the corpse’s alleged sufficient structure to that of frozen cryptobiotic organisms which still have their structure intact and only require heat for the restoration of life processes. Likewise, it makes sense to say sufficient structures remain in many nonfunctioning artifacts if all that is needed is the new battery or missing part to restore function. But there is nothing comparable with the deceased organism. Life functions cannot be restored by adding something since the corpse does not have the requisite structures to be animated. Adding either heat or water or air or blood or an electric shock or a new brainstem or a heart/lung machine or some other mechanical substitute will no more restore function in a corpse

than it would if added to a skeleton or the dust of a decomposed body. Our contention is that once “sufficient structure” is separated from functioning, the concept becomes hopelessly inapplicable. There remains only some physical resemblance of the corpse to the living body and trying to capture that rough similarity by appeals to “sufficient structure” amounts to “perceptual intuition mongering.”

So if we are correct that 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, perhaps just constituted by a body or related to it in a Cartesian fashion, that body is not identical to the later corpse for the same reasons just given. So it is not *our* body that is being posthumously mutilated. We cannot protest that organ conscription does something to our body against our will. So no one can appeal to fundamental tenets of liberalism and therefore claim that the threat of postmortem organ conscription deprives them of their rights of autonomy or bodily integrity.

Some readers might still 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. If they can dispose of their estate, should they not have the right to dispose of their remains? We want to question whether the dead can be said to possess property and, if they can, that their remains qualify as their possessions.

Consider the atoms that you have lost across your life through normal metabolic processes. If you are of a certain age, old enough to comprehend this article, you have replaced virtually all of the matter you had as a child. Now assume those atoms that earlier composed you were somehow reassembled and took the appearance that you had as a child. Let’s stipulate that the reassembled body is not alive but appears as your corpse would have appeared if you had

died in childhood. 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 far from 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 such 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 would no longer be parts of you? Well, it may be that there is something special about the *last* parts that you last possessed. We recognize how important remains are to the relatives that survive their loved one's death. The need for such a physical connection was evident in the aftermath of the World Trade Center disaster when bereaved families, initially without a corpse to bury, expressed considerable relief to belatedly receive the smallest physical remnant of the loved one; they would then arrange a funeral ceremony, and the buried remains and the "final resting" spot would provide a tangible connection to the deceased. However, it is important to bear in mind that our advocated organ conscription is not leaving families without any bodily remains to physically tie them to and facilitate their reflections upon the deceased.

We suggested above that we were skeptical that the corpse could be considered the property of the deceased. We do not think it actually 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.¹⁷

¹⁷ 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.

So one cannot claim that the deceased has a property right to his corpse comparable to the right the living person has to exercise control over their current body parts. Living bodies and their parts can't be sold or inherited. Or if they can, assuming an extreme libertarian position, our earlier metaphysical reflections established that the *remains* are not the same entity that was once alive. So there is no bodily property that persists across the death event that can become the *same* property of the relatives or designated heir. This distinguishes bodies and corpses from houses and jewelry. However, it might be claimed that since atoms and other molecular components composing someone at the moment of their death persist 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 the reader's childhood parts being reassembled. They weren't anything to which you had a compelling claim. Bodies are not identical to the sum of the atoms composing them. If they were, no body could grow. So even if one has a property right to one's body, it does not follow that one has a right to its components after they cease to be parts of one's body. If you do not have a right to the atoms that have *left* your body through metabolic exchanges, it would seem that you do not have a property or other kind of right to the atoms that *survive* the destruction of your body.

If what has been said above is correct, neither appeals to one's bodily integrity, bodily autonomy, or property rights can be effective in keeping people's ante-mortem will from being ignored and their organs taken posthumously. So surprisingly, our advocacy of ignoring the wishes of the deceased is not illiberal despite its initial appearance of being so.¹⁸

¹⁸ There is a further worry that many people refuse to consent to organ donation for religious reasons, perhaps they fear that resurrection requires the burial (or cremation) of an intact body. We are open to the possibility that there should be an exception on the grounds that religious citizens will not accept our Epicurean account of there not

Conclusion

We hope to have shown that there *are* more reasons than previously realized to now seriously consider organ conscription. But we are not 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 presumed consent or required requests of relatives or financial incentives to next of kin is more attractive on grounds of political feasibility. We are well aware that a policy whose appeal is most likely to be recognized after hours of argument in a philosophy seminar room will probably fare rather poorly in state or national legislative bodies. However, no one knows for sure what future public debates will bring. Moreover, we believe that the gravest objection to those just mentioned alternative policies to organ conscription, that the deceased may not have consented, has been met by our modified Epicurean critique of posthumous interests and the metaphysical argument against the identity of the living body and the corpse. 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 seen.

being a posthumous subject and considerations of constitutionality. (Theodore Silver claims that several US Supreme Court decisions suggest that an organ draft would violate the first amendment which establishes the free exercise of religion. Boston U Law Review.68 B.U.L REV. 681.) Our worry is about potential abuses of a system with an exemption. People might intend to deceive the government about their beliefs, and conversely, the government might engage in heavy handed measures to determine their actual beliefs. Our tentative recommendation is that the exemption be withdrawn for those willing to receive transplants since they cannot then claim that resurrection worries justify keeping all of their organs. If they think their persistence conditions are such that they can survive the acquisition of a transplanted organ or two on earth, they surely should accept that God can give them a new pair of organs at their resurrection.