TRANSPANTATION AND THE TROLLEY CASE: WHY NOT CONFISCATE
CADAVERIC ORGANS?

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"[a] death resulting from the unavailability of an organ is neither inevitable nor must it be viewed simply as a statistical occurrence. It must be seen for what it is in fact: a senseless tragedy which could be avoided by overcoming needlessly restrictive taboos"1

1. Some preliminaries:

As is well known, the so called "Transplantation Case" comes as the last rebuttal - a sort of reductio ad absurdum- for moral consequentialism in the genre of “Trolley-Case thought experiments” inaugurated by Philippa Foot in 19672. In the first scenario we are asked to consider the permissibility of switching the lever and deviating the trolley onto the track where a single individual stands, therefore saving five individuals who lay on the other track. But then, in the second stage, we are kindly invited to consider whether, for the same sort of reason, we might also push a man standing in a bridge who is big enough to block the trolley for the sake of

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rescuing that same group of five workers who inadvertently stand in the track (the Footbridge Case). Many, if not all, prone to switch the lever in the first case, show deep reluctance to push the fat man, and very few would be willing to even think of the possibility of killing a healthy individual who happened to be at a hospital for a check-up, remove his organs and save five patients who need them (the Transplantation case). How can we justify that seeming incoherent array of choices? Are they so inconsistent in the first place? What do these mental experiments really evince?

The responses, either in the form of an explanation or justification, abound, but it is not my purpose in this paper to deal with them. Instead, following Adam J. Kolber, I am going to use the conspicuous railway scenario to defend the public confiscation of dead bodies for the purpose of removing and transplanting their suitable organs to sick patients. In a sense, mine is a sequel in the “trolley genre”: the “Transplantation Case (cadaver version)”.

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3 As Mikhail states: “...individuals typically have difficulty producing compelling justifications for these judgments: thus, trolley-problem intuitions exhibit a dissociation between judgments and justifications”. See ‘Universal Moral Grammar: Theory, Evidence and the Future’. Trends in Cognitive Sciences, 11, no. 4 (2007): 143-152, at 144. The question has elicited a huge literature, and the discussion, at times full of scholastic subtlety, has proven very difficult to track at this point. The crux of the controversy has to do with the so-called doctrine of “double effect” as the key justification for our not choosing to kill (as opposed to letting die) someone for the sake of saving more lives. There is also the underlying debate as to the possible effect of the personal versus impersonal traits of the action for its overall assessment. For an excellent summary of the discussion, see Michael Otsuka, ‘Double Effect, Triple Effect and the Trolley Problem: Squaring the Circle in Looping Cases’, Utilitas, 20, no. 1, (2008): 92-110. Yet, the most profound and elaborate work on the trolley case is undoubtedly Frances Kamm’s Intricate Ethics. Rights, Responsibilities and Permissible Harm (Oxford: Oxford University Press, 2006). One of the main aims in Kamm’s book is to give a deontological response to the Trolley Case and to defend the existence of a “Triple Effect” in the so-called “Loop Case”. This latter case presumably shows how the doctrine of double effect cannot serve as a justification for the different response we give in the Trolley and Footbridge cases. In the Loop Case the tram will inevitably hit the five workers from behind, even if diverted. So it is only because there is one worker standing in the diversion who blocks the train that we can save the greater number by switching the lever. That case is therefore indistinguishable from the Footbridge Case, but, nevertheless, we feel more justified in turning the lever killing the solitary worker.

If we take the U.S. figures as an example, one wonders at first glance whether we could parallel the US policy as regards to organ transplantation with the bystander who chooses to flip the switch and turn the tram onto the track in which 6,000 individuals lay waiting for an organ, killing all of them. The difference from the original trolley case is that in our scenario those on the other track who are left untouched are approximately 8,000 cadavers, and, eventually, their families asking for “respect”. As Strahilevitz emphatically states: "It is difficult to imagine a more perplexing waste of scarce societal resources." As Strahilevitz emphatically states: "It is difficult to imagine a more perplexing waste of scarce societal resources."

I am not the first one to consider that, regardless of the consent of the deceased or the wishes of the family, we should take cadaveric organs as a means to save lives, or to significantly improve the welfare of patients whose only chance is to receive an organ. Jesse Dukeminier and David Sanders argued for such policy already in 1968. Among more recent defenses, I will consider particularly the ones presented by Cécil Fabre and James Delaney and David B. Hershenov.

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5 These data, roughly presented, are based on the study conducted by D. Kaserman and A. H. Barnett, ‘The US Organ Procurement System. A Prescription for Reform’ (2002) cited by Kolber (see supra note 4 at 675 n. 16).
The nuances between their approaches should be highlighted, although I will not explore them in detail. Because later in the article I will engage in some discussion with her approach, I will point out now that in the case of Cécil Fabre, her aim is not, strictly speaking, to propose a confiscatory public policy of cadaveric organs, but to show, from a principled-rights based conception of justice, that anyone committed to the idea that individuals’ basic needs must be met, necessarily (as a “natural inference”) “must take on board the need of organs”. To that effect, the refusal from families or the posthumous interests of the deceased are trumped by the rights of sick patients to their organs. According to Fabre, only because the person now dead could have genuinely raised an objection that the prospect of removing one of his organs will make his life less than minimally flourishing, we should respect his desire to be left in peace after death

James Delaney and David B. Hershenov have also presented compelling arguments showing how, in due reflection, we should override anyone’s interests or posthumous desires regarding his body after death when someone’s life is at stake. In this sense they proceed along Fabre’s lines, but the scope of their reasoning is more ambitious. They favor a policy of “organ conscription”, and, in doing so, they have relied in the persuasive strategy of pointing out how we already accept that the


12 They invite us to consider that we are visiting a cemetery and a fire breaks out. Our only means of salvation is using a corpse as a shield against the fire. If we are we justified in using it notwithstanding posthumous desires to the contrary it follows that we might take cadaveric organs for transplantation purposes; see ‘Why Consent May Not Be Needed For Organ Procurement,’ The American Journal of Bioethics, 9, no. 8 (2009): 3-10 at 4.
Government regulate, and in a very interventionist manner, the use and disposition of human corpses, and even somehow confiscate them when an autopsy is ordered. Furthermore, as I shall describe, US current legislation conceives the performance of an autopsy as an opportunity for the coroner to remove cornea tissue and the pituitary gland for transplantation purposes.

So, assuming as a justificatory background a liberal-egalitarian ethical framework a la Fabre, this paper follows the path taken by Delaney and Hershenov, although I will consider more objections to their proposal than those already assessed by them, or some variations of the possible criticisms that they already take into account, and I will discuss what I see is also a very important reason for our governments to adopt a confiscatory policy of cadaveric organs, an argument that emerges with particular force in the current global context: the increasing phenomenon of “transplantation tourism”. I will also bring to the floor of discussion, some peripheral cases to the area of organ donation that evince how our public authorities, when it comes the time of balancing someone’s right to life versus the integrity of a dead – or “quasi dead”- person, put more weight in the former.

The structure of the article is as follows. After providing some basic facts to accurately portray the dimension of the problem, I will build my case from the normative standpoint that I have anticipated (a liberal-egalitarian conception of justice) and then I will remind the reader in how many ways we are subject to mandatory rules as to what ought to be done with our bodies after death. My purpose in doing so is to show that our posthumous desires are extensively curtailed, and that we have come to
accept that the government take corpses for the sake of goals that are of no greater importance (if not less) than saving lives or improving the health and welfare conditions of patients. Then I will consider, broadly, some religious objection to the confiscation of cadaveric organs, and several non-religious reasons to stand against it. I will conclude with some final remarks as a way of summarizing the whole argument.

2. The facts:

Since the first successful organ transplantation conducted by Joseph Murray at the Peter Bent Brigham Hospital in Boston in 1954, the procedure has improved spectacularly and millions of patients have seen their lives prolonged and/or the quality of their existence (particularly the living conditions of those who are on dialysis) hugely improved. It is foreseeable that sooner or later we will be capable of building organs “artificially”, or that we will surmount the difficulties posed by xenotransplantation, but in the meantime organs continue to be scarce and thousands of patients die every year while on the waiting list. The well-known American transplant surgeon Francis L. Delmonico, along with others, has described organ shortage as a “worldwide crisis”.

It is difficult to exaggerate the anguish experienced by individuals and families in those countries (98 as to 2010 according to the World Health Organization), in which organ transplantation is technically feasible. This is particularly so in the United States, where the most advanced medical care

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14 F. L. Delmonico, supra note 13
coexists with a huge waiting list. According to official data more than 7,000 people died waiting for an organ in 2010\textsuperscript{15}.

But the United States is not unique in this regard. In Great Britain, Britain a total of 493 patients died in the same year\textsuperscript{16}. In Spain, which holds the world record in organ donation, 173 patients died in 2010\textsuperscript{17}. Approximately 12 patients from the European Union die each day waiting for an organ\textsuperscript{18}.

The most relevant figures that, for the purposes of my case, I would like to highlight are the number of family refusals. In Great Britain, 2348 interviews were conducted in 2009 with the result of 43\% of refusals (1009). In the United States the number of cadaveric organ donors has decreased since 2007, and at least 40\% of solicited families refuse to donate\textsuperscript{19}. In Spain, the percentage of refusals in 2009 was 19\% (353 out of 1855\textsuperscript{20}). Dr. Rafael Matesanz, the Director of the “Organización Nacional de

\textsuperscript{15} See \url{http://optn.transplant.hrsa.gov/latestData/rptData.asp} (last visit November 7\textsuperscript{th} 2011).
\textsuperscript{16} See the Council of Europe’s \textit{Newsletter Transplant}, 16, no. 1, (September 2011).
\textsuperscript{17} According to the latest issue of the \textit{Newsletter Transplant}, the current Spanish rate of donation is 32 per million of population. The peak was reached in 2005 (35 p.m.p). Dr. Rafael Matesanz, the Director of the “Organización Nacional de Trasplantes” (the acclaimed Spanish agency in charge of coordinating organ donation and transplantation), has recently warned that Spain has very likely reached its maximum rate of organ donation. See “Nuevas formas de morir y donación de órganos” \textit{El país}, (December 31st 2010), available at \url{http://www.elpais.com/articulo/opinion/Nuevas/formas/morir/donacion/organos/elpepuopi/20101231/elpepuopi_5/Tes}. The fall in the number of traffic accidents is probably one of the main causes for the decrease in the rate. See the statistics at \url{http://www.dgt.es/portal/es/seguridad_vial/estadistica/accidentes_24horas/evolucion_n_victimas/} (last visited Dec. 8, 2011) and ONT, \url{http://www.ont.es} (last visited Dec. 8, 2011).
\textsuperscript{19} N. L. Cantor, \textit{After We Die. The Life and Times of the Human Cadaver} (Washington D. C.: Georgetown University Press, 2010); at 149-150.
\textsuperscript{20} In a very interesting study conducted by the transplant team at the “Hospital Doce de Octubre” (Madrid, Spain) it is shown that the percentage of family refusals is significantly lower in the case of non-heart beating donors, as opposed to brain death donors. The authors point to a public perception of death which sees the absence of heart beat as a most obvious signal of death, and, also, to the fact that non heart beating donors spend much less time at the hospital: “It is possible – the authors claim- that the prolonged stay in the hospital with greater uncertainty about the patient’s course – survival or death- and with a final
Trasplantes” the acclaimed Spanish agency in charge of coordinating organ donation and transplantation, has recently warned that Spain has very likely reached its maximum rate of organ donation\(^{21}\).

Therefore, it should come as no surprise that many US citizens, along with the citizens of other developed countries (including Spain\(^{22}\)), are desperately seeking organs abroad, namely in poor countries, contributing to the disturbing phenomenon known as “transplantation tourism”\(^{23}\). Aware of the growing number of such transactions in India, Pakistan, and other countries, several international institutions and organizations have issued declarations and resolutions calling the States to adopt appropriate measures for the eradication of transplantation tourism\(^{24}\).


It should be reminded that Spain pioneered the so called “opt-out” model, back in 1979. Although it has never been enforced in practice, presumed consent is the legal hook in Spain for the practice of the first stages of “uncontrolled donation after cardiac death”; see infra note 80.

\(^{21}\) In the Spanish leading journal *El país*, “Nuevas formas de morir y donación de órganos” (December 31st 2010). See http://www.elpais.com/articulo/opinion/Nuevas/formas/morir/donacion/organos/elpesuopii/20101231elpsiiopii_5/Tes (last visit November 11\(^{th}\) 2011). The fall in the number of traffic accidents is probably one of the main causes for the decrease in the rate. In 2003 the percentage of organs coming from traffic accidents were 43%. In 2010 it has been a modest 23%. In 2005 the total number of victims from traffic accidents was 3332. In 2008 the number was 2181. Source: http://www.dgt.es/portal/es/seguridad_vial/estadistica/accidentes_24horas/evolucion_n_victimas/ and ONT (http://www.ont.es).

\(^{22}\) *El país* in its edition of March 12\(^{th}\) 2010 unveiled the case of Óscar Garay, a patient suffering from liver failure who traveled to China and bought a liver in the black market (available at http://www.elpais.com/articulo/reportajes/higado/130000/euros/elpesocmg/20100314elpesomrep_1/Te 9).


\(^{24}\) In 1991 the World Health Assembly issued the Resolution 44.25, which was followed by the Resolution WHA 57.18 issued by the Fifty Seventh World Health Assembly in 2004 (available at http://apps.who.int/gho/ebwha/pdf_files/WHA57/A57_R18-en.pdf, last visited Nov. 8, 2011). The Transplantation Society and the International Society of Nephrology promoted the so called “Declaration of Istanbul” published in July 2008, in which it is stated that organ trafficking violates the “equity, justice and respect for human dignity and should be prohibited”, calling on Governments to increase organ donation. The same concern fueled the Third Global Consultation on Organ Donation and Transplantation organized in 2010 by the World Health Organization in collaboration with the Spanish “Organización Nacional de Transplantes” and The Transplantation Society and supported by the European Commission.
There are several options up for discussion in order to increase the availability of organs, and, with it, the curtailment in the number of transplantation tourists. Within the realm of the so called “donation-model” what has been basically proposed are incentives to the altruist gesture\textsuperscript{25}. We could, on the other hand, abandon the “donation-model” and embrace some version of an organ’s market\textsuperscript{26}. I think that both possibilities have more drawbacks than advantages when compared to what I deem is the most straightforward, fair and efficient way to address the concerns raised by the global community of organ transplantation and meet the goals declared in the aforementioned Declarations: implementing a policy of routine removal of cadaveric organs. Let me remind the reader, again, that, had the 1009 British family refusals in 2009 turned out to be positive answers, at least 1009 organs were have been collected (remember that in that year 493 people died in the waiting list, and that probably more than one organ could have been removed).

3. The dead body and its uses:

which culminated with the so called “Declaration of Madrid” (see Transplantation, 91 Supplement 11S (2011): 29-31). Pursuant to the Declaration of Istambul, Spain has introduced the new article 156bis of its Criminal Code in which it is stated that those who “promote, favor, facilitate or publicize the obtaining or illegal trafficking of an organ or its transplantation will be imprisoned from 6 to 12 years”. It adds that the recipient will be equally punished when consenting to the transplantation knowing the “illicit” origin of the organ.

\textsuperscript{25} The Government could pay the burial expenses or grant tax benefits, as it is defended by Jurgen De Wispelaere and Lindsay Stirton, ‘Procuring Permission: Exploring the (Moderate) Case for Organ Transplant Tax Credits,’ at http://works.bepress.com/dewispelaere/29/ (last visited Dec. 12, 2011) or making conditional the reception of an organ to the willingness to donate; see Cantor, supra note 19, at 150, 162. In Spain, the so called “chain donation” between living kidney donors is a version of that conditionality.

At the outset of my positive building of the argument for empowering the state to take organs from cadavers, I want to consider the following case, which is not science fictional, although hypothetical (I am not aware that it has ever occurred, but it could occur). Someone received an organ, let’s say a liver, which saved his life. Years later this person signs a document in which it is stated that, in the event that “his” liver is suitable for transplantation, he does not consent to donate it. Is there any reason why we should accept this refusal?

I dare to say that a great majority of individuals would, intuitively, say “no”, and would find no objection to the removing of the organ against his wishes if by doing so we save someone else’s life. What I would like to claim is that we can expand this line of reasoning to everyone, whether they have been previously benefited by an organ donation or not.

Our proneness to accept confiscation in my hypothetical case might be sustained, in the first place, for “reciprocity” or “fairness” reasons. The person who once was benefited and now is reluctant to correspond is somehow violating what is considered a “golden rule” in ethics. This argument, however, might prove too much. Does it imply that because we were once benefited we should always benefit a third party in the same fashion? Suppose that our reluctant donor received his liver from a living individual. Is he correspondingly under the duty to donate one of his kidneys, for example? On the other hand, we might think of a patient in need of an organ who is coherently willing to die because he would have never consented to donate any of his organs. My strategy needs something more than mere reciprocity reasons.
Contrary to what others such as Fabre have claimed\textsuperscript{27}, I deem living donations as belonging to the category of supererogatory acts. Now, for our reluctant donor who once was a recipient of an organ, and for everyone, what is at stake in the case of cadaveric organs is nothing as demanding as the submission of the risks and inconveniences of surgery (in the case of donating a liver or a kidney). I, along with Fabre, think that we have positive duties to aid when the sacrifice we have to endure does not jeopardize our basic interests or rights, and this is precisely the case with cadaveric organs, as I will try to show, even if we consider that, by refusing to donate after death, we don’t harm the needed patients in the same way as we would do if we willingly and actively kill them\textsuperscript{28}. As with the cases in which we see a drowning child that we can rescue easily, we have a moral duty to donate after death, although we cannot perform the required action by ourselves\textsuperscript{29}. Our moral requirement is, therefore, not to put hurdles in the process that others, namely the physicians, have the competence and capabilities to carry out. So what I think is at stake in the case of organ transplantation is an institutional framework, the web of practices and norms that govern that procedure, and I would contend that such


\textsuperscript{28} In this I am following Kamm’s suggestion that a positive right to be benefited might be derived from the necessities of life as a moderate cost to others. See Morality, Mortality, Vol. 2: Rights, Duties, and Status (Oxford-New York: Oxford University Press, 1996) at 131. I thank Nir Eyal for pressing me on this point.

\textsuperscript{29} See Jeremy Snyder en “Easy Rescues and Organ Transplantation”, HEC Forum, 2009, 21(1): 27-53, 28-29. Snyder correctly points out how, as opposed to the classical examples of “easy rescue” (the child drowning in the not so deep pond), the duty to donate is an “imperfect” duty because no individual patient might be identified as the rescued from the donor’s action; 2009, 34-35.
institutional arrangement infringe basic rights of patients when it allows human organs to be perished by the passage of time, or by its cremation\textsuperscript{30}.

Even more, following the institutional conception of human rights developed by Thomas Pogge\textsuperscript{31}, I would claim that insofar as our public policies stick to the so-called “altruist model” in organ transplantation, the waste of useful organs is doubly offensive for both the frustrated recipient and the desperate sellers abroad. In this latter case, we are indirectly causing the violation of basic human rights of individuals whose disadvantaged situation is unfairly exploited when they alienate their physical integrity for the sake of saving the life and well-being of citizens from developed countries. It is incumbent on us to make every effort to change that legal framework and the ethos that sustains it.

And the truth of the matter is that, as I will shortly show, there is already a broad public policy, as well as an array of legal norms, that permits the government to take the human corpses and restrict our posthumous interests for very different reasons and purposes, aims having all of them to do with societal interests of variable weight.

The whole area of the ethical assessment of organ transplantation is infected, if I might say so, by the presumption of some form of ownership on our body after demise. We talk about “cadaveric organ donation” (even myself, eventually) presupposing that the corpse still belongs to the person who is now dead (we can only donate what is our property) or to their heirs. The insistence in that we have to ask, or obtain consent, for removing

\textsuperscript{30} John Harris, among others, has been a qualified advocate for this position in the realm of organ transplantation. See ‘The Survival Lottery’, Philosophy, 50 (1975): 81-87, and more recently when defending mandatory participation in clinical research; see “Scientific research is a moral duty”, Journal of Medical Ethics, 31 (2005): 242-248.

cadaveric organs, simply begs the ownership question. That we “own” our body when we are alive, in the sense that we have a right to physical integrity which cannot be infringed but for the more stringent reasons, is certainly a basic tenet of our basic moral outlook that I will not defy.32

Yet things get a bit murkier when we deal with dead bodies. Cadaveric organs might be very well considered worldly resources for the social benefit, and, in that sense, we should not accept the rhetoric of donation with all its accompanying features of the necessary previous consent by the deceased or the current acceptance by the family. In the hypothetical case from which I started up the discussion, we might very well reproach the reluctant donor not to consent the posthumous donation of an organ that was actually a gift. But one can likewise argue that our healthy and functional organs are always conceivable as gifts, as means to our decent life given by pure luck, not “gained” or “deserved”. This does not mean, as I shall claim shortly, that the human corpse is some sort of all-purpose recyclable material, although in extreme circumstances it is morally permissible, for example, to eat human corpses.

Beyond the realm of ethical reasons, the best case for a proposal of organ confiscation is the fact that in every civilized nation the government imposes the way in which a cadaver is to be treated, so nobody is entirely free to arrange how his own body, or anyone else’s, should be managed after death.

There are many examples of the scope of this governmental power: if the body might or might not be exhibited; when it should be buried,

cremated or embalmed after death\(^{33}\); whether the mercury tooth fillings should be removed before cremation\(^{34}\); the measures of the coffin; the features of the funerary car, the possibilities of disinterment. Despite the inertia of ancestral beliefs regarding our fate after death, testamentary directives ordering, for example, the interment of jewels or other items which might be needed in our “trip” are not enforceable\(^{35}\). The examples are endless\(^{36}\).

A longstanding jurisprudential tradition which dates back to the “Haynes case” (1614), harbors the State’s entitlement to regulate the treatment of corpses\(^{37}\). According to this doctrine we don’t have property rights over our dead bodies although there are interests in them that should be respected\(^{38}\). That was also the (influential) opinion of Sir Edward Coke in the *Institutes of the Laws of England* (1641): “… though the heir has a

\(^{33}\) In the Autonomous Community of Madrid (Spain), embalming is mandatory should the corpse be placed in a crypt, or transported by ship or plane or when delivered abroad; see Article 8.2.c) of the Decreto 124/1997 (October 9\(^{th}\)). A hideous 1810 Boston regulation of cemeteries made mandatory to confine in a different space the corpses of “undesirables” such as criminals and African Americans; see Cantor, supra note 19 at 96.

\(^{34}\) In Maine, a 2006 bill made it mandatory; see Cantor supra note 19 at 110.

\(^{35}\) See Cantor, supra note 19, at 36. The most famous case in this regard is the ‘Meskras Case’ (Meksras Estate, 63 Pa. D. & C.2d 371, 371 (Common Pleas 1974)). The court in Meskras stated the public policy reason: should the will dictating the interment of jewels be enforceable, the cemeteries run the risk of becoming places for pillaging. For a commentary on that decision and the mentioned doctrine, see Strahilevitz, supra note 6, at 800-803. In *State of New Mexico v. Hartzler*, the New Mexico Court of Appeals confirmed the previous conviction of Paul S. Hartzler for the “indecent handling” of Jerri Ellen Ulmer’s body, a member of his spiritual Bible study group who died of natural causes. Hartzler’s claim that he was following God’s wish not to bury the corpse was to no avail. See 78 N.M. 514, 433 P. 2d 231 (1967).

\(^{36}\) For other instances on the limits of the right to destroy posthumously, see Strahilevitz supra note 6.

\(^{37}\) 12 Co Rep 113. What had to be decided by the Court in Haynes was whether taking the winding sheets off from a dead body constituted larceny or theft. In *Excelby v. Handyside* (1794) 2 East PC 652; I Hawk PC (8th Ed, 1824) a physician is acquitted from the crime of having robbed the dead bodies of conjoined twins.

\(^{38}\) Until the XVII century, the English ecclesiastical courts were in absolute charge of the cadaver and its burial. In a South Carolina case dated in 1880, the administrator of a dead man’s state sued the railroad company for “negligently mutilating the body” (who had been abandoned on the railroad tracks after his being murdered). The Supreme Court of South Carolina held that only recovery from the damaged to the clothing and the watch was possible, but not in the case of the body because that did not constitute property; see Stuart Banner, *American Property, A History of How, Why, and What We Own*, Harvard University Press, Cambridge (Mass.)-London, 2011, pp. 239-240.
property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor he can bring any civil action against such as disturb their remains... Stealing dead bodies, however, is a misdemeanor at common law, and punishable as such... And if anyone in taking up a dead body steals the shroud or any other apparel it will be felony; for the property thereof remains in the executor, or whoever was at charge of the funeral.  

In the United States, following the Rhode Island Supreme Court decision in Pierce v. Proprietors of Swan Point Cemetery (1872) the cadaver is considered as a “quasi-property”. In the past, that “interest” has been mainly to have a “Christian burial” which for decades excluded the possibility of being cremated, as was the deceased’s desire in the case Williams v. Williams (1882). In general terms, pre-mortem instructions as to what to do with our remains after death, have binding force “within the

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40 10 R.I. 227 (1872). The only exception to this conceptualization was the Indiana Supreme Court, which, in 1885, ruled that the dead body belongs to the surviving relations as property; see Stuart Banner, American Property. A History of How, Why, and What We Own, Harvard University Press, Cambridge (Mass.)-London, 2011, p. 239. In the Colavito’s case, the widow of Peter Lucia, who died in 2002 wishing that one of his kidneys be given to a friend who was suffering from renal disease, suit the New York Organ Donor Network for “fraud, conversion and infringement of the New York Public Health Law”. The reason was that, once the kidney was removed, it proved unsuited for transplantation, and when Lucia’s widow asked for the other kidney to be transplanted learned that it had already been used for another patient. The New York Court of Appeals’ dismissal was based on the argument that, in order for the action to constitute a case of “conversion”, someone, intentionally and without authority, has to assume or exercise control over personal property belonging to someone else, interfering with that person’s right of possession. This could not have happened in this case because Lucia’s kidneys are not property belonging to his widow. See Colavito v. New York Organ Donor Network, N. Y. Court of Appeals, 2006 NY Int. 161 (December 14th). One of the few cases in the legal Anglo-Saxon tradition in which it is said that the dead body could be considered property, involved the dispute between the self-proclaimed owner of a two headed stillborn child (Doodeward) who profit from its public exhibition, and a police inspector (Spence).
41 Williams v Williams (1882) ChD 659. Soon after, cremation was accepted by the courts; see R. v. Price (1884) 12 QBD 247. Cannons 1203 and 1240 of the Code of Canon Law of 1917 made cremation illicit, and those who gave cremation directives in advance were deprived of an ecclesial burial unless they had shown enough evidence of their regret.
limits of reason and decency”; when they don’t evince “extravagant waste” as was said by a Utah court in 1978\textsuperscript{42}.

The historical record shows that public authorities have always disciplined, in different ways and for various motives, the disposal and use of human corpses. Setting aside moral or religious reasons to impose the way of dealing with the dead body, the government has a “public health interest” in regulating how corpses are going to be stored or how the process of its corruption will take place in order to prevent the spread of diseases, and also an “educational” interest that stems from the great knowledge that can be gained by the dissection of human bodies\textsuperscript{43}.

Now, I want to focus on a different area in which we are also driven to confiscate the cadaver for stringent public-interests reasons: medico-legal investigation. As before, across many different legal systems there is the possibility of ordering an autopsy notwithstanding the family’s refusal, or the posthumous desires of the deceased to be left in peace after death\textsuperscript{44}.

\textsuperscript{42} In re Matter of Moyer, 577 P. 2d. 108 (Utah 1978), quoted by Cantor, supra note 19, at 51.

\textsuperscript{43} Since the days of Vesalio, several hurdles have hindered the progress of the anatomical science. First of all, the Christian condemnation of the dismemberment of the corpse, as evinced, for example, in the bull \textit{Detestande Fertiatis} issued in 1299 by the Pope Boniface the VIII, which traces its origins to the cross-cultural belief that before the corpse has turned into ashes by the natural process of decay, the spirit of the deceased is still within the body and the person is not “fully dead”; see Elizabeth R. Brown, ‘Death and the Human Body in the Later Middle Ages: The Legislation of Boniface VIII on the Division of the Corpse’, Viator, 12 (1981): 221-270, at 223. So, before the enactment of the first laws authorizing the dissection of dead bodies (the pioneer Act being the English Anatomy Act of 1832), either executed criminals or snatched corpses from cemeteries were the main source for the work of anatomists. More recently, the case of Joseph Paul Jernigan, executed at a Texas prison in 1993, has arisen a great deal of controversy about the limits of that public interest and the possibility of giving genuine informed consent by death row prisoners. As a way of redeeming his crime, Jernigan accepted to donate his body for the National Library of Medicine’s Visible Human Project, a research and educational project developed by the University of Colorado at Denver which consisted in the digitalization of cryosections, CAT and RMI scans from a representative human cadaver. That involved freezing the body and slicing it in 1871 sections. Although the intention was to keep Jernigan’s identity hidden, it was soon revealed after his execution. A similar controversy arose in 1998 in Germany as regards to the exhibition “Body World and Bodies” organized by Gunher von Hagens. Critics claimed that many of the displayed bodies were of executed prisoners in China. See Sabine Hildebrandt ‘Capital Punishment and Anatomy: History and Ethics of an Ongoing Association’, Clinical Anatomy, 21 (2008): 5-14, at 6, 9-10 and Cantor, supra note 19 at 129, 181-182, 249.

\textsuperscript{44} See for example article 343 of the Spanish “Ley de Enjuiciamiento Criminal”.
Certainly, in the past, and because the autopsy conveys a sort of desecration, the relatives have been granted recovery from the emotional damage caused by the procedure\textsuperscript{45}, but according to current State laws, medical coroners have the power to practice an autopsy to determine the cause of death from an accident, crime, or when death occurred under suspicious circumstances, and also on executed prisoners\textsuperscript{46}. The different versions of the Uniform Anatomical Gift Act (UAGA) have not changed that situation (see Section 4 of the Act), and, according to Perlin, only 5 states expressly establish the possibility of raising an objection based on religious beliefs, although the State may still overcome that hurdle by showing its compelling government interest in performing the autopsy\textsuperscript{47}.

\textsuperscript{45} See Cantor, supra note 19, at 147; Foley v. Phelps 37 N.Y.S. 471 (1896) and Koerber v. Patek (102 N.W. 40, Wis. (1905)).


\textsuperscript{47} See A. A. Perlin, ‘To Die in Order to Live: The Need for Legislation Governing Post-Mortem Cryonic Suspension,’ Southwestern University Law Review, 36 (2007): 33-58, at 41 and R. B. Flowers, ‘Government Accommodation of Religious-Based Conscientious Objections,’ Seton Hall Law Review 1993, (1993): 695-735, at 727. Curiously enough, it was not the case, for example, in Johnson v. Levy, in which the religious objection of the executed prisoner and his wife prevailed over the alleged State of Tennessee’s interest in knowing whether the execution by a lethal injection caused pain and suffering to the inmate. See 2010 WL 119288 (Tenn. Ct. App.), January 14, 2010. In Kohn v. United States a Jew family seek recovery from the emotional damages caused by the performing of an autopsy, embalming and cremation of his dead son’s organs after he was deadly shot. The District Court judge concluded that the United States was liable for the distress caused to the next of kin by the cremation or retention of parts of Kohn’s body and by its embalming, but not for the distress caused by the performance of the autopsy to which the Army was entitled under Kohn’s death circumstances; see Kohn v. United States, 591 F. Supp. 568, 573 (July 31st 1984). Even more recently, the Supreme Court of Ohio had to decide if coroners may retain parts of the autopsied body for further examination after they deliver the remains to the family for their final disposal. The case originated when Mark and Diane Albrecht found out that the brain of his dead son was being kept in the hands of the coroner after having received the corpse. The Supreme Court denied the alleged right of the Albrechts to obtain the body and all the forensic specimens for burial, but in a bitter dissenting opinion judge Pfeifer considered that if the family has a right to a proper burial of his son, that surely includes the brain, not a random piece of tissue but the “… source of the deceased’s every thought, aspiration, dream, fear, laugh, memory, or emotion… the origin of every word spoken, every
In this same vein, the taking of cadaveric organs for the purpose of saving others’ life or welfare, satisfies a compelling governmental interest that has been claimed on many occasions, paradigmatically in the constitutional controversy regarding abortion and physician-assisted suicide. The interest in life, i.e., in preserving the lives of competent adults who can avoid a more or less immediate death by means of a transplant, is, in my opinion, at least as compelling as, if not more than, the interests which are furthered by mandatory autopsies.

There is another realm in which we have witnessed how the courts deal with the conflict between the interest in saving someone’s life and the interest in respecting someone’s dead body: should we withdraw the “life sustaining” machinery of a pregnant woman pronounced death by the whole brain death criterion and let her rest in peace? In *University Health Services v. Robert Piazzi* (1986), for instance, the judge William M. Fleming made the survival of the fetus prevailed because the woman’s constitutional right to privacy (which would have allowed her to abort) have died with her, and also because the State of Georgia have a legitimate interest in preserving the fetus’ life. Currently, 36 States have statutorily declared invalid the

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48 I thank Glenn Cohen for warning me that the kind of justice served in each case is different when the autopsy is conducted as part of a criminal investigation. As opposed to the distributive justice reasons that underpin the confiscation of cadaveric organs, reasons of retributive justice lie behind mandatory autopsies. Being it true, what I claim is that both are relevant and important dimensions of justice that the government should serve, and that both entail the taking of the corpse. Even more, if we judge both practices in terms of efficacy, confiscating organs for transplantation purposes scores higher than the practice of autopsies for public security and retributive justice reasons.

advanced medical directives given by women to have their life-sustaining measures withdrawn if the woman happens to be pregnant\textsuperscript{50}.

As I said, the routine removal of cadaveric organs is not a proposal made from a legal void. Its novelty should not be overstated because, as a matter of fact, in the United States corpse confiscation is authorized since 1968, although in a lesser extent than what I am defending here. According to the UAGA, the coroner might remove the corneas or pituitary glands of the deceased when it does not interfere with the autopsy or impedes other investigation, and when it would not alter the facial appearance of the deceased and there is no objection by the deceased or next-of-kin \textit{known} by the coroner\textsuperscript{51}.

Fifteen States have incorporated this prerogative in their laws raising logical doubts and constitutional challenges in the courts. In two of them, the Supreme Court of Georgia and the Supreme Court of Florida reversed previous decisions that considered the removal a violation of the due process\textsuperscript{52}. The reasons given by the high Courts were, again, the “non-property” character of the remains, and the compelling interest of the State in obtaining resources to restore sight to people\textsuperscript{53}. As the Florida Supreme Court states, the procedure is an “infinitesimally small intrusion” as opposed to the “massive intrusion” that implies the (mandatory) autopsy\textsuperscript{54}. The “liberty interest” also claimed by the family of the minor whose tissue was

\textsuperscript{50} Cantor supra note 19, at 226.
\textsuperscript{51} See Cantor, supra note 19 at 149, 164. Some statues impose to the medical examiner the obligation to display a “reasonable effort” to locate de next of kin and ask for consent; others like Louisiana does not even require the effort; Cantor supra note 19, at 164-165.
\textsuperscript{52} Georgia Lions Eye Bank v. Lavant, 255 Ga 60 (1985) and State v. Powell, 497 So. 2d 1188 (1986).
\textsuperscript{53} The Georgia law was passed in 1978. Before the passage approximately 25 corneal transplants were performed each year. In 1984 the number of corneal transplants were more than 1,000; Georgia Lions Eye Bank v. Lavant, 255 Ga 60, 60. In Florida, the increase is similar; State v. Powell, 497 So. 2d 1188, 1191.
\textsuperscript{54} State v. Powell, 497 So. 2d 1188, 1191.
removed, is considered by the court as lacking “constitutional” dimension. However, in *Brotherton v. Cleveland* and *Newman v. Sathyavaglswaran*, the Court of Appeals of the Sixth and Ninth Circuit asserted that the removal of corneas granted by the laws of Ohio and California was to be considered a deprivation of a “property interest”, and therefore a violation of the due process of the Fourteenth Amendment.

As a result of this debate, the 2006 version of the UAGA has revoked the authority of medical examiners to conduct the removal of corneas without explicit consent (section 22 (b)). Notwithstanding that legislative change, the discussed prerogative may remain, either by a “reinterpretation” of section 22 (b) or because some States may simply omit that section when adopting the latest version of the UAGA. From a constitutional point of view, it is very dubious that, under the XIV amendment, individuals have a right to be respected after death if that implies not being subjected to autopsies or, as I am defending here, avoiding the removal of their organs or tissue for the sake of satisfying the urgent needs of patients. A similar conclusion might be claimed if we consider the free exercise of religion covered by the First Amendment, although this debate goes beyond the purposes of this paper.

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55 State v. Powell, 497 So. 2d 1188, 1193  
56 923 F.2d 477 (6th Cir. 1991)  
57 287 F. 3d 786 (9th Cir. 2002)  
58 Cantor, supra note 19, at 165-166.  
59 Cantor, supra note 19, at 168-171. Contrary to what Cantor claims (see supra note 19, at 69), I don’t think that cadavers have “moral” rights in any meaningful sense of the term. They might be able to have “legal rights” in the same fictional paradigm that it is used when we assign rights to corporations, but neither according to an “interest” theory of rights, nor under a “will” theory of rights, corpses (nor trees, or landscapes) are bearers of rights. Although this is of course debatable, I don’t think that it needs to be addressed in order for my general argument to be sustainable.  
4. The resurrection objection:

For many religions the dead body deserves a sort of “respect” that poses a huge hurdle in the routine recovery of organs. Judaism teaches that the spirit remains in the body as long as three days after death, and some orthodox Jews, based on a literal reading of a passage of the Deuteronomy, are extremely reluctant to the performing of autopsies, not to mention the removal of organs. Hindus or Greek orthodox alike, also share the importance of bodily integrity for the afterlife. The eunuchs of the Forbidden City in Beijing used to carry a small bag with their genitalia, and asked to be buried with them for the same sort of reason, to reincarnate as a “full men”. The etymological origin of the word “cemetery” is the Greek word koimeterion which means “dormitory”.

The concern for corporal resurrection can be traced, therefore, across cultures and times. As Bynum affirms: “... analysis of current philosophical discourse and of contemporary popular culture suggests that Americans, like medieval poets and theologians, consider any survival that really counts to entail the survival of the body... Medical sociologists ... must struggle to provide guidelines for organ transplants exactly because donors and recipients often assume that “self” is being transferred...”

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61 The Deuteronomy states: “If anyone is found guilty of an offense deserving the death penalty and is executed, and you hang his body on a tree, you are not to leave his corpse on the tree overnight but are to bury him that day, for anyone hung [on a tree] is under God’s curse. You must not defile the land the LORD your God is giving you as an inheritance” (21:22-23). In Kohn v. United States (see supra note 57) the rabbi that testified for the family stated that: “The soul of the deceased will find no rest until all parts of the body, or at least those parts which it is possible to find, have returned to the earth”; see Kohn v. United States, 591 F. Supp. 568, 573 (1984). The work done by the Israeli NGO “ZAKA”, in charge of recovering the remains of the victims of terrorist acts as well as catastrophes, is a very good illustration of that belief; see http://www.zaka.us/show.asp?PID=23 (last visited Dec. 12, 2011).

62 Although, as C. W. Bynum affirms, among the so called world religions, the resurrection of the body is a dogma only for Rabbinic Judaism, Islam, Zoroastrianism and Christianity; see The Resurrection of the Body in Western Christianity (200-1336) (New York: Columbia University Press, 1995); at 12.

63 See Bynum, supra note 61, at 15-16. Something akin to that deep feeling of a “still life” after death is exploited as a persuasive strategy frequently used by the procurement agencies when telling the family of
How should we deal with such objections based on the hope of resurrection to a policy of routine removal of cadaveric organs? I think there are basically two strategies. I will call the first one “internal to the practice” because it attempts to point out an internal inconsistency resulting from the adoption of mutually conflictive claims within the belief. Frances Kamm has claimed that publicly debating the “truth” of the religious belief, or disallowing reliance on it, is “socially divisive”\textsuperscript{64}. I consider, to the contrary, that to the extent that the private embracement of a belief has social consequences, it is a requirement of a decent democratic society to publicly confront anyone’s beliefs or reasons for claiming an exemption or objecting to a practice. The second strategy, which is external, is simply a remainder of the greater importance of saving people’s lives. Let’s start with the first of the mentioned strategies.

To what exactly amounts the idea of being “resurrected”? It is surely not an easy question. If the idea is, in a Platonic or Aristotelian fashion, that something immaterial, which is our true essence, our soul, “lives” forever, i.e., ceases to be “incorporated” after death, and therefore, is relieved from its fleshly jail, then the removal of bodily parts cannot harm the believer in any way. The problem comes when we assume the Pauline, i.e. Christian, reading of immortality and resurrection, and we don’t accept a dualistic metaphysics of the body and soul relation. Therefore, when we resuscitate

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our whole person “will be again” in a non-corrupted manner and henceforth will never die\textsuperscript{65}.

Such doctrine is highly problematical – as centuries of theological discussion attest- and does not preclude the raising of more questions, as one can perceive was the case in the writings of the early Christian philosophers such as Saint Augustine or Saint Thomas\textsuperscript{66}. If we take for instance the great deal of reflection and interpretation displayed by the Bishop of Hippo regarding the \textit{Book of Revelation}, what we find is that the general resurrection after the end of the world comes with a sort of general “refurbishing”, so to speak, of our past bodies.

That miraculous scenario, provided by an omniscient and omnipotent God, could not possibly be hindered by the fact that we have removed liver, kidneys or the heart from the cadaver\textsuperscript{67}. As a matter of fact, some advocates of the so called “cremationist movement”, who gained popularity in the US at the end of the XVIII century, considered a “blasphemy” to oppose cremation for the sake of conserving a body in which to resurrect. And the reason was simple enough: such reasoning implied that God could not resuscitate a cremated corpse\textsuperscript{68}. Nowadays, the official Catholic doctrine

\textsuperscript{65} See Saint Paul, Letter to the Corinthians, 15:35-58. In that state we are, of course, immune to the laws of chemistry and physics. The denial of the doctrine of the resurrection of the flesh was a common tenet among various heretic doctrines in medieval times; see Bynum, supra note 61, at 26, 229-230.

\textsuperscript{66} A comprehensive account is given by Bynum, see supra note 61, at 233-246.

\textsuperscript{67} That resurrection is mediated by miracle is stressed by Bynum see supra note 61, and, in the context of a different discussion, by Jeff McMahan, ‘An Alternative to Brain Death,’ Journal of Law, Medicine and Ethics, 34, no. 1 (2006): 44-48, at 45.

\textsuperscript{68} See Cantor, supra note 19, at 106. Since 1983, the Code of Canon Law does not forbid cremation (if it has not been chosen for reasons opposed to Christian doctrine) although still “… earnestly recommends that the pious custom of burying the bodies of the deceased be observed”. See canon 1176 § 3 (available at \url{http://www.vatican.va/archive/ENG1104/__P4A.HTM}, last visit Dec. 12, 2011). The Catechism of the Catholic Church is more explicit in this point: cremation must not constitute a denial of faith in the resurrection of the body (2301). I am quoting from the official version at the Vatican archives: \url{http://www.vatican.va/archive/ENG0015/__P80.HTM#NX}. Several reasons are given for this Christian preference of the interment of the corpse: first of all, the fact that cremation used to symbolize the materialist belief that death implied the complete annihilation of human life; secondly, the intimate link
stated in the Catechism (2296), considers organ donation as a “noble and meritorious” act of “generous solidarity”\textsuperscript{69}.

But there might certainly be variants of the religious argument that can withstand the appeal to coherence, what I am calling the “internal to the practice” strategy. The Hmongs – an ethnic group from Vietnam, Laos, China and Thailand- oppose any form of desecrating the corpse because they believe that the spirit of the dead person would not be free and will take another person’s life\textsuperscript{70}. According to Aramesh, Islam prescribe the absolute respect to the corpse (even the non-Muslim cadaver), which ought to be immediately buried\textsuperscript{71}.

It seems that, from a religious point of view, everything goes and logical or internal consistency does not come as the ultimate test for the validity of the belief\textsuperscript{72}. Take for instance, again, catholic religion. As I said before, the Catechism praises organ donation but adds the following caveat:

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\textsuperscript{69} This doctrine is also stated in the Encyclical Letter Evangelium Vitae (1995), and the Pope Address to the participants in a Congress on Organ Transplants (June, 20\textsuperscript{th} 1991) and to the International Congress of the Transplantation Society (August, 29\textsuperscript{th} 2000), available at http://www.vatican.va/holy_father/john_paul_ii/speeches/2000/jul-sep/documents/hf_jp-ii_spe_20000829_transplants_en.html (last visited Dec. 12, 2011).

\textsuperscript{70} This was the justification given by the Yang family when seeking recovery for the emotional distress they have suffered when his dead son was autopsied; See Yang v. Sturmer, 750 F. Supp 558 (1990). Applying the constitutionality test set up in Employment Division v. Smith, 494 U.S. 872 (1990), the Court finally concludes that, because Rhode Island’s autopsy law is a generally, facially neutral law (not aimed to curtail any religious belief in particular), what the State’s coroner did was not in violation of the First Amendment of the Federal Constitution.

\textsuperscript{71} There are few exceptions: it is permitted to extract the fetus of the pregnant dead woman, or the money that the deceased did eventually swallowed while still alive. Be that as it may, the fact is that in Iran, for example, even after the Islamic Revolution in 1979, autopsies and organ transplantation have been routinely conducted. Some Shites religious authorities have said that is permissible to dissect human bodies of non-Muslims, but only non-Muslims, for educational purposes. See K. Aramesh, ‘The Ownership of Human Body: An Islamic Perspective,’ Journal of Medical Ethics and History of Medicine, 2, no. 4 (2009): 1-4 and Khalil, supra note 52, at 160-161.

\textsuperscript{72} In a hilarious scene of the movie “Undertaking Betty” (2002) that I cannot resist to evoke, being alive the person who remains in the coffin, the character played by the actor Fred Molina yells at the gravediggers that they should postpone their interment and stop their Carterpillars because she is a “non-mechanical Baptist” (i. e. someone who does not accept to be mechanically interred).
“It is not morally acceptable if the donor, or those who legitimately speak for him, have not given their explicit consent”\(^73\). Nevertheless, and with no further restriction, the same *Catechism* (§ 2301) states that: “Autopsies can be morally permitted for legal inquests or scientific research”. Why this difference in the non-exceptionable character of autopsies as opposed to organ donation? As I am defending all along, if it is morally acceptable to perform autopsies absent the explicit consent of the deceased, it should also be morally acceptable to remove cadaveric organs whether consent was given or not.

Although still marginal and, to my knowledge, only circumscribed to the US, there is a contemporary and secular ”resurrection objection” that might be posed against confiscating organs by those who believe in “cryogenics”. The prospects of the procedure are considered highly speculative (if not a fraud) by a huge majority of scientists, and yet the legal consequences yielded by the existence of companies running in the business of immortality, such as Alcor or the Cryonics Institute in Michigan, and prospective “patients” which aim to be “suspended” after death are very real: current cryopreservation requires certain manoeuvres that clash with the performing of an autopsy and other legal norms governing the use of dead bodies\(^74\). The most striking controversy in this regard occurred in

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\(^73\) See § 2296. This is also stressed by the Pope John Paul II in his Address to the International Congress of the Transplantation Society (see supra, note 80): “The human "authenticity" of such a decisive gesture [organ donation] requires that individuals be properly informed about the processes involved, in order to be in a position to consent or decline in a free and conscientious manner. The consent of relatives has its own ethical validity in the absence of a decision on the part of the donor”.

\(^74\) One of the legal disputes has to do with the capacity in which either Alcor or the Cryonics Institute store dead bodies. The 1968 version of the UAGA states that the deceased might will that his remains be given to “procurement organizations” defined as “any bank or storage facility, for medical or dental education, research, advancement of medical or dental science, therapy, or transplantation”. Alcor or the Cryonics Institute could be so considered, although The Michigan Department of Labor and Economic Growth Bureau of Commercial Services, in his legal battle with the Cryonics Institute, has disputed it (the
1991 with the request made by Thomas Donaldson, who, at that time, suffered an incurable and highly destructive brain tumor. In order to stop the progress of his cancer that might eventually completely destroy his brain, he asked the court to declare his constitutional right to a “premortem cryogenic suspension of his body”, which basically entailed hastening his death with the assistance of others in order to keep intact as much of his brain tissue as possible, and preventing an eventual autopsy over his body. Interestingly enough, the court declares that, although Donaldson has every right to commit suicide by himself, or refuse medical life-saving treatment, the State has a compelling interest in protecting society against the abuses that might come with the permission to third parties to assist in suicide, even “in order to live”75.

At the end of the day, what is at stake is the possibility of “privatizing” death, that is, overcoming an institutional framework in which it is determined when we cease to exist as persons. As Foley has stated: “Our ability to sustain a government is severely compromised if each of us can customize our own unique legal definition of death”76. That is what might have happened in New Jersey, for example, when in 1991, following the adoption of the “whole brain death” criterion of the Uniform Determination of Death Act (1981), New Jersey also recognized a religious

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final settlement consisted in giving the category of “cemetery” to the Institute). The 1987 version of the UAGA does not contemplate such possibility, and both versions establish the priority of the rules governing autopsy in cases of conflict. A report of the attorney general of California also denies the possibility that Cryonics facilities could operate under the UAGA. For an assessment of all those legal controversies, see Perlin, supra note 46, at 41 and E. P. Foley, The Law of Life and Death (Cambridge-London: Harvard University Press, 2011): at 44.

75 See Donaldson v. Lungren, 4 Cal. Rptr. 2d 59, 63 (1992).

76 See Foley, supra note 69, at 149. A vast array of legal consequences follow the determination that an individual has died: whether someone has committed murder or whether someone acquires the state as heir, just to mention the most evident. The question could even be posed in broader terms, along the lines of Tim Mulgan: can our liberal democracies remain impartial as regards to the status of the dead? See ‘The Place of the Dead in Liberal Political Philosophy,’ The Journal of Political Philosophy, 7, no. 1 (1999): 52-70, at 52-53.
exemption for those who, based on religious beliefs, do not accept the neurological criterion. In those cases death is to be declared upon irreversible cessation of heartbeat and respiration\textsuperscript{77}.

And the truth of the matter is that, since the legendary report of the Harvard Ad Hoc Committee on Brain Death in 1968, the discussion concerning the definition of death persists\textsuperscript{78}. As is well known, the path to adopting brain death has been winding. In many countries there is still great societal suspiciousness and confusion as to whether someone “brain dead” but who breathes and keeps important body functioning is truly dead\textsuperscript{79}. Even within the medical community, the concept of brain death is not fully grasped and shared\textsuperscript{80}.

The question has come to the forefront in recent times as regards to the so called “donation after cardiac death” or DCD, that is, the possibility of removing organs from individuals who have suffered cardiac arrest but


\textsuperscript{78} The German philosopher Hans Jonas should be credited as a pioneer critic of the conclusions of the Committee; see P. Becchi, Muerte cerebral y trasplante de organos. Un problema de etica juridica (Madrid: Trotta, 2011): at 44. The body of literature on the topic is huge, and it is beyond the purposes of this article to cover it. A good summary can be found in M. Lock, Twice Dead. Organ Transplants and the Reinvention of Death (Berkeley-Los Angeles-London: University of California Press, 2002): at 78-100.

\textsuperscript{79} The reluctance to adopt brain death has been very significant in Japan and Israel, where it was finally embraced in 2008-despite the harsh opposition of conservative and ultraorthodox Jews- under the following twofold condition: the person who is declared dead because of brain death is an organ donor and the family consent to such declaration; see Foley, supra note 73, at 142.

\textsuperscript{80} For the case of the U. S. see L. A. Siminoff, C. Burant and S. J. Youngner, ‘Death and Organ Procurement: Public Beliefs and Attitudes,’ Kennedy Institute of Ethics Journal, 14, no. 3 (2004): 217-234; R. Truog, ‘Brain Death: Too Flawed to Endure, Too Ingrained to Abandon,’ Journal of Law, Medicine and Ethics, 35, issue 2 (2007): 273-281, at 274, and ‘Is It Time to Abandon Brain Death?,’ Hastings Center Report, XXVII/1 (1997): 29-37. Although more anecdotal, when it was known that the premature baby Susan Anne Catherine Torres, the daughter of a “brain dead” pregnant woman, had died, some media stated that the mother “…died shortly after her daughter was born” (my italics). See http://www.catholicculture.org/news/features/index.cfm?recnum=39586 (last visited, Nov. 9, 2011).
whose brain is not wholly dead – although massively and irreversibly damaged. Now the inquiry is, again, what is the proper test to affirm that cardiac death has occurred, namely how much we should wait, in the case of “controlled DCD“, to confirm the irreversible cessation of the cardiorrespiratory function. And of course, the answer is: the lesser the better if our aim is to optimize the chances of organ transplantation. The so called “Pittsburgh Protocol” (1993) established a waiting period of two minutes appealing to the fact that there is no documented autoresuscitation of any patient beyond the 2 minutes threshold. Yet, if we look at the practices in other countries, we find a range from 5 minutes (Spain, United Kingdom) to more stringent requirements in Canada, Australia or Italy (20 minutes). However, if the heart could be reinitiated through some external stimuli, how can we still claim the occurrence of an “irreversible” cessation of the cardiac function?

An excellent and detailed summary of the procedure, relevant data and the differences between “controlled” and “uncontrolled” DCD can be found in B. Domínguez-Gil et. al., ‘Current situation of donation after circulatory death in European countries,’ Transplant International, 24, no. 7 (2011): 676-686 and Foley, see supra note 73, at 87-110. For the ethical pros and cons of DCD see L. Whetstine et. Al., ‘Pro/con ethics debate: When is dead really dead?‚’ Critical Care, 9, no. 6 (2005): 538-542. Controlled DCD is routinely practiced in the United States and Great Britain, but not in Spain or France, whereas uncontrolled DCD is the standard procedure. Uncontrolled DCD raises serious doubts and the reason should be clear enough: someone who has died accidentally out of the hospital, is declared “pre-death” after a 30 minutes period of unsuccessful resuscitation, and hereafter undergoes several medical actions that take place absent the explicit consent of the patient and not for the sake of his welfare or survival.

See Domínguez-Gil et. al., supra note 76, at 676-686 and Foley, supra note 69, at 87-90.

In this vein, see R. M. Veatch, ‘Donating Hearts after Cardiac Death: Reversing the Irreversible,’ N. Engl. J. Med., 358, no. 7 (2008): 672-673, at 673. The final stage in this progressive relaxation of cardiac death’s criterion came in 2008 when the pediatric heart transplant team lead by Dr. Mark M. Boucek at the Denver Children’s Hospital announced that they have performed some pediatric transplantation with a waiting period as short as 1.25 minutes. The organ that was removed and transplanted was the heart itself which was previously pronounced dead but, it seems, could be revived in a new patient with a much better prognosis than the deceased premature baby (M. M. Boucek et. al., ‘Pediatric Heart Transplantation after Declaration of Cardiocirculatory Death,’ N. Engl. J. Med., 359, no. 7 (2008): 709-714, at 711.). Not surprisingly many commentators concluded that the procedure followed at the Denver Hospital was not in compliance with the “dead donor rule”; and that the idea that we could deem some function, such as the
Add to all that bulk of uncertainty over the proper determination of death, the use of sedation and anesthetics during the process of organ procurement. In the pediatric heart transplant in Denver, the team consigned having “comfort care” sedation and analgesia “typical for withdrawal of life support” (fentanyl and lorazepam). Is this occurring because we are not absolutely sure that the declared dead is not capable of experiencing pain? To what extent is the patient, therefore, dead? Or is it because the administration of those drugs serves the purpose of hastening death, increasing the likelihood of removing suitable organs?

At the end of the day, this evolution in the definition of death and the controversies surrounded by it that I have tried to summarize in its most salient aspects, seems to confirm what Peter Singer and Jeff McMahan, among others, have been consistently claiming: the inescapably evaluative dimension of the issue, and the inextricable link between the definition of death and the permissibility of removing organs from “dead” people. It seems that the event of death is more decided than discovered. As Peter Singer has said, someone is dead when we deem permissible to remove his organs. The best proof for that seemingly shocking way of putting things cardiac one, irreversibly ceased because we will not attempt to reverse it (in the original body, of course) was a mockery (See Veatch supra).

See Boucek, supra note 82, at 710.
See Truog, supra note 79, at 277

See Peter Singer, Rethinking Life and Death. The Collapse of Our Traditional Ethics (New York: St. Martin’s Press, 1994): at chapter 2. In the case of McMahan, what is finally at stake when discussing the criteria of death is the metaphysical conception of what is for human beings to exist. Are we fundamentally or essentially living organisms, as it is presupposed by many in the discussion? Not for
is Israel’s legislation which applies the brain death criterion only for organ donors (see supra).

In conclusion, the fact that death is a multifaceted phenomenon encompassing ethical, legal and metaphysical dimensions along with its pure biological or scientific aspects, yields the cryopreservationist objection to the confiscation of cadaveric organs. So does the lack of a solid consensus amongst the members of the scientific community as to the process of dying.

So the Liberal State faces a fabulous challenge when trying to reconcile, on the one hand, its neutrality among different conceptions of the good, and, on the other, the very possibility of providing the most basic rules for a political society to be functional (namely when we cease to be subjects of law). This challenge is evinced when we consider Foley’s assessment of the New Jersey’s religious exemption to brain death, which she deems reasonable because it remains within the range of two accepted death criteria: neurological (higher brain or whole brain death) and cardiorespiratory death\textsuperscript{88}. But what should we make of the “information-theoretic” conception of death hold by cryopreservationists, according to which death is the loss of memory and personality\textsuperscript{89}?

My internal strategy is of utmost relevance at this point. As with the response to the religious objection based on resurrection, we should accept the belief in the future developments of science and technology, and, for

\textsuperscript{88} See Olick, supra note 76, at 277.
\textsuperscript{89} See Foley, supra note 73, at 149-150.
that very same reason, press the optimism embraced by the cryopreservationists to its ultimate consequences: organ removal should not pose a problem for them because if we trust in a future development of biological resuscitation of cryopreserved human beings, for the very same reason we should trust in the possibility of new organs – very likely artificial and very likely more reliable than those provided by nature- coming to replace the ones that once were removed, or even the possibility of a non-corporeal form of life. Henceforth, the fear of cryopreservationists is irrational (if not their whole project).

But beyond that, there are more stringent reasons coming from what I have labeled “external strategy” which yields from the consideration that, because the goal of saving other’s lives is so compelling, the reasons raised by those who oppose unconsented removal must pass a “reasonableness” test. That test comprises, at least, two filters: being the objection “intelligible” (i.e. “public”) and being capable of confronting the critical conceptions embraced by individuals who do not share the religious stance of the objector.  

There are certainly degrees of intelligibility and reasonableness. In the case of intelligibility, if someone opposes organ removal raising the objection that in his religion God commands not to eat the cadaver’s flesh, the objection does not survive such minimal scrutiny test because transplantation has nothing to do with cannibalism.  

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90 See Foley, supra note 73, at 48.
91 We could be say something similar as regards to the fear of many UK citizens to receive the organ of a serial killer. See http://news.bbc.co.uk/2/hi/health/8084936.stm (last visit, November 14th 2011). Although in this particular point I am following Fabre’s suggestion (see supra note 26, at 89-96), the general idea is inspired by Rawls’ conception of “public reason”; see John Rawls, Political Liberalism (New York: Columbia University Press, 2005): at 440-490.
As to the reasonableness test, consider those systems in which the family is asked for permission to remove the deceased’s organs: they don’t even have to justify their denial (a simple “no” suffices) which I deem unreasonable at its highest degree. Again, we would not accept a simple “no” if what were at stake was the performance of an autopsy which might help to avoid a serious public health problem or to arrest a serial killer.

Could we take a step further and disregard resurrection as a plausible objection? Belief in resurrection is intelligible but unreasonable to the extent that commits us to believing an event that, it is said, has occurred occasionally and will happen to the entire mankind in the end of times, according to certain textual sources whose historical reliability is dubious – to say the least. For the non believer, that commitment has a twofold implication: abandoning a stance about the institutional and physical reality which does not comprise the “fact” of people coming back from death, and the acceptance of that foreseeable future of general resurrection. It seems to me that a Liberal State cannot make its life saving policies dependent on articles of faith. We should not lose sight of the fact that, at the end of the day, what the resurrection objection amounts to is the permission to let the organs perish. But maybe there is an underlying justification for that allowance. To that I now turn.

92 In this sense, I share McMahan’s contention that resurrection, being “incredible” or “false”, is not “nonsensical”; see supra note 66, at 44-45.
93 As Harris states: “The human body cannot for long remain intact after death. It is perishable and will, as has been chronicled in art and literature since time immemorial, inevitably decay, disintegrate and turn to dust... Everyone knows that the idea that bodies can remain intact... is an illusion. It is not a dark secret”; see J. Harris, ‘Law and regulation of retained organs: the ethical issues,’ Legal Studies, 4 (2002): 527-529, at 527. In Mulgan’s terms, I, along with Harris, am embracing the “Dead-Are-Gone” assumption of liberal democracies, which, probably as he claims, cannot be impartial enough towards those non-Western religious or cultural communities in which the dead have some “moral status”; see Mulgan, supra note 92, at 54-55, 57, 69.,
5. Posthumous rights: the “wedding ring” objection

As I said before, there are many good reasons to disregard the posthumous interests as to what is to be done with the dead body, even if we concede, from a conceptual or normative standpoint, that there can be posthumous interests or rights.

Consider the so called “conditional donations”. In 1998 the British public opinion was shocked when it was known that the next of kin of a prospective kidney donor at the Sheffield hospital gave his consent to donate under the condition of making the organ available only to White patients. It seems clear to me that making a donation to a friend – as in the Colavito case that I mentioned previously- or to some relative, is reasonable but it is not so when the condition derives from racist or sexist assumptions.

Nevertheless, the fact that we may curtail posthumous preferences for being unreasonable or specifically racist, does not mean that we do not owe any respect to cadavers. That respect impedes us from treating the corpse as a mere husk: from the most extreme actions of cannibalism or necrophilia, to less outrageous, but equally disrespectful pieces of behavior.

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94 See http://news.bbc.co.uk/2/hi/health/388260.stm (last visit October 28th 2011).
95 See T. Wilkinson, ‘What’s not wrong with conditional organ donation?,’ Journal of Medical Ethics, 29, no. 3 (2003): 163-164; Fabre, supra note 11, at 84 and Kamm, supra note 56, at 208. As Wilkinson correctly states, the British officials were wrong when saying that conditional donation jeopardizes altruism. The reason is simple enough: if altruism means doing something out of pure generosity, with no compensation, one could still donate altruistically even if moved by racist considerations. On the other hand, Wilkinson argues that sometimes, even if the offer is unacceptable – due to the motivation underlying it- it cannot be rejected because of the good consequences that are produced– namely, saving someone’s life. In the British case we seem to face a preference strictly dominated: either we save a white’s life or we save none, being the first option clearly Pareto-superior. This is certainly so but, contrary to Wilkinson’s conclusion – the hospital acted correctly when accepting the conditional donation- in my view this consequence adds to my overall case for empowering the Government to take the organs from dead people notwithstanding their (irrational or biased) preferences.
such as conducting extravagant ceremonies in a cemetery\textsuperscript{96}, the profanation of tombs, or the desecration of cadavers or offensiveness towards the deceased, those are all rightly considered punishable offenses\textsuperscript{97}. In some States of the US, following the provision of the Model Penal Code (Section 250.10): “a person who treats a corpse in a way that he knows would outrage ordinary family sensibilities” commits a misdemeanor\textsuperscript{98}.

What is the wrongness of those actions? Of course the person who is no longer there, the human organism now dead, cannot be affected, and that opens the question of whether there can be wrongness absent the possibility or capacity of being affected. “Treason”, is commonly said, is wrong even if the betrayed person never comes to realize the betrayal\textsuperscript{99}. Why is it exactly that we say so? We will be certainly shocked when knowing that someone has been betrayed, and, in the same vein, we will be very much outraged if all the posthumous interests of dead people or their reputation is stained. So it seems to me that for treason to be a wrong, or posthumous fame to be respected, someone who is still alive has to be in some sense “affected”. Therefore, the reason for respecting posthumous interests is “indirect”. As Eduardo Rivera has stated, the last man on earth

\textsuperscript{97} For a list of cases of disrespectful negligence with corpses (which has constituted a cause for civil or criminal action), see Cantor, supra note 19, at 254-258. Recently, the American public has been outraged when it learned the contemptuous manners displayed by some military personnel when managing the remains of dead soldiers in Afghanistan. See \textit{The New York Times}, November 9\textsuperscript{th} 2011.
\textsuperscript{98} For a full account of the treatment of necrophilia and other offenses to the dead people in the US (although not updated), see Richard A. Posner and Katherine B. Silbaugh, A Guide to America’s Sex Laws (Chicago: The University of Chicago Press, 1996): at 213-216. For a more recent overview see Cantor, supra note 19, at 273-275. See also article 526 of the Spanish Criminal Code or Section 74 (“Sexual penetration of a corpse”) of the Sexual Offences (Northern Ireland) Order (2008), among other provisions.
\textsuperscript{99} It should not be overlooked that, as Fabre says, the betrayed-ignorant person is still capable of becoming aware of the treason, and that will never be the case as regards to dead people. See supra note 26, at 23 note 17.
could very well trump the posthumous desires of those who have already died.\footnote{E. Rivera, Ética y transplante de organos (Mexico: Fondo de Cultura Economica, 2001): at 69.}

And yet, posthumous interests that are not harmful to the public good or to identified individuals, or that are not based on unreasonable or unintelligible beliefs, are an expression of individual autonomy which, arguably, is projected beyond death.\footnote{See See Glannon, ‘Do the sick have a right to cadaver organs?,” Journal of Medical Ethics, 29, no. 3 (2003): 153-156 and C. L. Hammer and M. M. Rivlin, ‘A Stronger policy for organ retrieval from cadaveric donors: some ethical considerations,’ Journal of Medical Ethics, 29, no. 3 (2003): 196-200.} According to Kamm, that includes the decision whether to donate the organs, something which ought to be exclusively in the hands of the individual whose organs are removable. Therefore, what functions as the rationale for the next of kin to be asked for consent, and eventually decide, is not any sort of “property interest” over our body inherited by the family, but the uncertainty as to the true wish of the deceased.\footnote{See Kamm, supra note 56, at 209-211. Should organs be considered “ordinary property” from which some profit could be obtained, then the takings by the state of cadaveric organs should require monetary compensation to the family or the heirs, as in any other taking (Kamm, supra note 56, at 216-217).}

Now, again, considering that organs’ removal or autopsies are procedures that do not convey the features of the crimes or misdemeanors to the dead that I have mentioned,\footnote{As Fabre says, the goal is certainly quite different in each case; see supra note 26, at 82-83, 88.} the benefit derived from the sacrifice of posthumous interests should be taken into account, as Kamm herself assumes.\footnote{See Kamm, supra note 56, at 216. Therefore, the case for the confiscation of cadaveric organs, could success notwithstanding the existence of posthumous rights, i. e., its conceptual conceivability; see Fabre, supra note 11, at 74. I will contend that Fabre’s approach is wrong when we consider the possibility of facial transplant.} But on the other hand, as Fabre has argued, there could be a legitimate objection to the removal of cadaveric organs from those for whom its life would be less than minimally flourishing by knowing in
advance that his dead body will become a sort of public resource.\(^{105}\) Although Fabre does not give us any clue as to when that sort of “harm” is foreseeable, I think that we can point to the “use-history” argument raised by Kamm, as one of the most plausible rationales for that exemption, or for an overall objection to the confiscatory policy.

The idea runs as follows: during our lifetime we have form deep attachments to certain things that we might reasonably not want to survive us, or be used by anyone else, as is paradigmatically the case of our wedding ring.\(^{106}\) We want them to perish, to be destroyed, and this constitutes a sort of “expressive interest”, in Strahilevitz’s terms, not to be lightly dismissed.

Could there also be raised a “use-history” argument opposing the confiscation of cadaveric organs? I think it could, but just in the case of those body parts that have been “publicly” or “visibly” associated with us, and that is, again paradigmatically, the case of the face.\(^{107}\) Our body is quintessentially unique: our unique DNA impregnates every cell which conform us, but, in another sense, we don’t keep the sort of attachment to our organs that we maintain with external objects.\(^{108}\) That is why the question: “what is your favorite organ?” sounds awkward.\(^{109}\) Our internal organs (liver, heart, lungs, kidneys, pancreas…) have a purely functional

\(^{105}\) According to Fabre, we have been regularly accepting religious or conscientious exemptions to the military draft, so it seems that we should also give room to that exemption in our case, particularly if we take into account that organ transplantation, as opposed to the army, does not constitute a public good. To this I will later argue that even if health care systems might not be technically deemed as public goods, they serve public collective goods with no less importance than armies. Be that as it may, it should be underscored that Fabre’s proposal is not tantamount to the current “opt-out” systems in which the simple “no” suffices for respecting the wishes of the family. In Fabre’s approach we should admit the exemption only because the objector has given very compelling reasons; see supra note 11, at 85.

\(^{106}\) See Kamm, supra note 56, at 220-221 and Strahilevitz, supra note 6, at 802.

\(^{107}\) Kamm points it out; see supra note 56, at 221.

\(^{108}\) The paradox that entails this position is also highlighted by Margaret J. Radin in her classical ‘Property and Personhood,’ Stanford Law Review, 34, no. 5 (may 1982): 957-1015, at 959-960, 966.

\(^{109}\) See Kamm, supra note 56, at 213.
dimension that makes them fungible, but that is not the case with the face, and, probably, with the hands. It seems to me, therefore, that the objection or exemption is particularly forceful against the confiscation of those body parts, but not with the rest. Besides, in the trade-off between posthumous interests and the benefits brought by confiscation, life is not at stake when we consider removing hands or faces.

What if the next of kin wishes to donate the face disregarding the posthumous wishes of the deceased to be buried or cremated with it for “use-history” reasons? Will that be wrong? Following the analogy, we have to ask ourselves if it would be wrong if the widow takes their dead husband wedding ring and keeps it, or use it, or sells it, against his wishes. Again, as before, if absolutely nobody is negatively affected by the disregarding of those interests, I think no wrongness has been done. So the deceased’s decision not to donate his or her face, or his or her hands, ought to be respected should someone who is relevantly closed to him upholds his or her decision arguing the reasonable harm that he or she can experience if the face or the hands of someone who once was personally attached to him or her still remains in another body. But, as with other rights, the holder can waive its exercise. And it seems to me that, for the same sort of reason, the next of kin might successfully oppose the previous consent of the deceased to donate his or her face if that is going to cause him or her true psychological harm with no life-saving benefit\textsuperscript{110}.

There is another consequence of the “use-history” argument that we should assess. We are quite sympathetic with the idea of people wanting

\textsuperscript{110}This might be also a legitimate reason that someone could raise against the cloning of an individual to whom it was (for good or bad) particularly attached, even if the cloned person has consented posthumously.
their very personal objects to “die” with them. But more often than not, people also wish the object to remain in the hands of someone specially designated. This is what Peter Lucia wanted to do for his friend in need of a kidney, and that is what his widow tried to execute unsuccessfully. A confiscatory policy like the one I am defending poses a threat to that possibility of reasonably wanting someone special to receive our organs after death.

That fear can be tempered once we take into account the context in which such designation occurs: scarcity. And scarcity is precisely what we will not have once a confiscatory public policy of cadaveric organs is enforced. Again, as opposed to “unique” objects such as wedding rings, or jewels, or signed pictures or paintings, what Peter Lucia and his widow probably wanted for his friend was his enjoying a better life more than “carrying Peter’s kidney” which is, probably, as any other kidney. Moreover, in a context in which organs are no longer scarce and nobody else’s life is compromised, there is still space for a special donation like Peter’s.

6. The libertarian objection:

Both Kamm and Fabre, although prone to the idea that confiscating cadaveric organs is a justifiable sacrifice for the sake of saving patient’s lives, have also shown their reluctance to such attribution of power to the state. From a libertarian point of view, Tristram Engelhardt has expressed the same fear: “If sufficient numbers of organs are not available, it will be unfortunate, but from the point of view of general secular morality, not

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112 See Kamm, supra note 56, at 223 and Fabre, supra note 26, at 76.
unfair. Free individuals will have valued other goals (e.g., having an intact body for burial) more highly than the support of transplantation. One will have encountered again one of the recurring limitations on establishing and effecting a general consensus regarding the ways in which society ought to respond to the unfortunate deliverances of nature.”

It seems that Kamm, Fabré and Engelhardt, when envisioning the possibility of the State confiscating cadaveric organs, have in mind something close to Willard Gaylin’s dystopia: a state with the power to “harvest” dead bodies for the sake of satisfying all sorts of purposes beyond transplantation (experimentation, or exhibition of the corpses for the enhancement of anatomical knowledge in schools, etc.)

113. For Fabre, the prospective of such “totalitarianism” might be avoided when we articulate not a “policy” but, as I said, an “individualistic” defense of the right of patients to get cadaveric organs.

Yet, why would such confiscatory policy amount to a “totalitarian” proposal? That of course depends on how we use the term. Totalitarianism, in it common usage among political theorists and historians, designates a form of State in which some holistic ideal or goal is pursued beyond the interests of individuals whose personal autonomy is severely encroached under that sort of regime. I think that this is not the case of a limited confiscatory policy like the one I am advocating. Mine is a more limited defense of confiscation which is based, precisely, in the idea of enhancing

personal autonomy of living people whose life is in serious peril or severely impaired when nothing as important is sacrificed.

At the end of the day, my proposal has a practical outcome which is indistinct to Fabre’s approach. I would also say, as she does, that the state should confiscate organs from a rights-based perspective (as a consequence of claiming the existence of a universal right to health care for every individual). And I would also agree with her statement that an individualistic approach "... claims that an individual in need of an organ has a right against an eligible procurer that the latter relinquish that organ posthumously, and that the state, in mandating medical staff to take that organ and transplant it, would act on behalf of that sick individual".\(^{115}\)

Now, in the same vein as Fabre, the reason why the state has that mandatory power is because we are assuming a governmental duty to meet the health care needs of citizens. It is not only that we can point out to moral reasons that show the existence of a moral duty to donate, as I hope to have done, but that the state ought to enforce such disposition even if it is not voluntary. Surely, not from every moral right or duty flows necessarily a legal right or duty (cheating on my wife is a moral wrong but I don’t think people should be imprisoned for being unfaithful). However, when important individual goods, needs and interests, such as life or physical integrity, are at stake, the absence of the institutional machinery that procures its satisfaction make those rights and duties a mere illusion. This is why I claim the state’s right to take cadaveric organs.

From this follows that it would be certainly odd for the Government to declare that cadaveric organs are public resources, like the air or water,

\(^{115}\) Fabre, supra note 26, at 76 (my emphasis).
and, at the same time, facilitating its non-universal distribution, by, for example, allowing its allocation on a willingness to pay basis. It is because everybody will be benefited from the confiscation, that everyone is, in principle, subjected to the confiscation after death. It would be incongruent if the State takes cadaveric organs and places them in the market for the health care insurers to deliver them to their clients, because although the sacrifice would be universal, the beneficiaries would be only those wealthy enough to pay the premiums that are linked to the expensive procedure of organ transplantation.

Such universalization in the benefit is precisely the result so much objected by Engelhardt who sees, again, the totalitarian shadow hanging over us: “The imposition of a single-tier, all-encompassing health care system is morally unjustifiable. It is a coercive act of totalitarian ideological zeal, which fails to recognize the diversity of moral visions that frame interests in health care, the secular moral limits of state authority, and the authority of individuals over themselves and their own property. It is an act of secular immorality”\textsuperscript{116}.

As I said, my premise is that a policy of confiscating cadaveric organs is a coherent piece in the more general framework of a state which has assumed, as one of its legitimate goals, the duty to satisfy certain basic need of all individuals regardless of his or her economic capacity\textsuperscript{117}. So Engelhardt’s sort of objection forces me to take a further step and defend a broader conception of the legitimacy of government. That is, by all means,

\textsuperscript{117} In the same vein, Fabre, supra note 26 at 5. In her own words: “… justice requires that individuals who are not responsible for the fact that they lack the material resources they need in order to lead a minimally flourishing life be given such resources, provided that the well off would not themselves lead a less than minimally flourishing life as a result of having to give them what they need” (supra note 26, at 70).
beyond the purpose of this essay, so I will restrain myself to point out that providing basic health care – and it is certainly “basic” to remedy the life-threatening conditions which are surmountable by means of organ transplantation in developed countries- is not more violent to individual morality, than providing basic education, or the institutional machinery for law-enforcement (judges, courts, policemen and the penitentiary system). Needless to insist that the exercise of these basic powers of Government is only possible through the taxation on property and income of individuals who might very well aim to see his life, property and welfare sufficiently protected by the state. Is it offensive to reasonable pluralism the current legal provisions regarding the power of coroners to perform autopsies? Is it totalitarian to have a public budget to cover the costs of that procedure? Should the state decline to foster public health conditions or investigate crimes? It seems not.

One final note in this regard. From a constitutional point of view, confiscating cadaveric organs could be deemed as another instance of the so called “police power” of the states, which is exercised in order to protect public safety, security, morality or welfare, and by means of which the states compels, for example, to general vaccination or regulates hospitals. The Courts have insisted in scrutinizing whether certain fundamental liberties or interests of the citizens - the right to privacy, or to procreate, or to travel, among others- are curtailed when the state exercises “police power”, once it has been shown that the goal is legitimate. Following Ogden, I would also claim that the exercise of police power in order to
create a public resource such as transplantable organs taken from cadavers is constitutionally admissible\textsuperscript{118}.

7. Some minor objections and concluding remarks:

In this last section I am going to consider some “minor” objections to a policy of confiscating cadaveric organs. They are minor in the sense that they do not put into question the heart of the proposal, its premises, or the overall approach, but, on the contrary, point out certain pragmatic difficulties, undesirable consequences or a reasonable conflict of interests when we consider specific ways of removing organs. I will start by assessing this latter observation.

7.1. The objection based on advanced directives:

In order to remove suitable organs, death is, to a certain extent, “managed”. So, if this is so, my initial analogy with the “trolley case” is weakened: on one of the arms of the railway bifurcation we don’t have cadavers, but dying people\textsuperscript{119}. When we look at the clinical procedure of organ removal, it is not always the case that we face a dead person from which to take its organs in a “routine”, straightforwardly fashion. At least when we consider those cases in which the dying person is hospitalized and death will be pronounced after cardiac arrest, an eventual conflict of interests might arise: on the one hand, the patient’s wish not to prolong futile treatments, and, on the other hand, the need to do so in order to


\textsuperscript{119} See Dukeminier and Sanders, supra note 8, at 413.
preserve the organs or to optimize its transplantation, as we discuss previously\textsuperscript{120}.

I agree with Truog that this is a genuine clash, and that, because of the prevalence of the right to refuse treatment, the eventual interest in organ removal ought to be sacrificed in favor of the patient’s autonomy\textsuperscript{121}. But notice two important aspects of the case that counteract the objection: first of all, we face the interests of a living individual, someone, therefore, who can still be negatively affected by the imminent decision to remove his organs. So because the not-yet-dead individual is sovereign over his body, the following corollary follows: to a policy of confiscating cadaveric organs it should not be attached a general duty to take care of the body, to renounce to unhealthy ways of life that put at risk the organs for future removals. Otherwise we would have certainly embraced a form of “perfectionist” or even “totalitarian” state so much reasonably feared by Kamm and Engelhardt. Secondly, the conflict of interests arises as regards to certain

\textsuperscript{120} See R. Truog, ‘Consenting for Organ Donation: Balancing Conflicting Ethical Obligations,’ N. Engl. J. Med. 385, no. 12 (2008): 1209-1211. Timothy Quill, the famous doctor who, by assisting her patient “Diane” to die gave raise to one of the most famous legal cases in physician-assisted suicide, described very pertinently for my purposes how he proceeded when finding Diane dead: “I called the medical examiner to inform him that a hospice patient had died. When asked about the cause of death, I said, “acute leukemia”. He said that was fine and that we should call a funeral director. Although acute leukemia was the truth, it was not the whole story. Yet any mention of suicide would have given rise to a police investigation and probably brought the arrival of an ambulance crew for resuscitation. Diane would have become a “coroner’s case”, and the decision to perform an autopsy would have been made at the discretion of the medical examiner”; see “Death and Dignity. A Case of Individualized Decision Making,” N. Engl. J. Med., 324, no. 10 (1991): 691-694, at 694). In this vein Strahilevitz has alerted that a confiscatory policy might well have the effect of forcing the people to display “death-bed” strategies in order to resist the purposes of the state; see supra note 6 at 806.

\textsuperscript{121} In 2007 an amendment to the section 21 of the UAGA sanctions the same priority. In that regard, Truog has denounced that some members of procurement organizations are certainly “manipulative” in their approach to the deceased’s family, presenting themselves as “members of the clinical team” when their true commitment is organ’s collection. It seems that, as Truog contends, the informed consent protocol is extremely rigorous in the realm of clinical experimentation but much more relaxed – if not persuasively oriented- when dealing with consent to donate. But beyond the fact that what is at stake is very different in each case, what that conflict of interests currently prevailing shows is precisely the advantage of a confiscatory policy.
extractions - namely, controlled donation after cardiac death- but not regarding others\(^ {122}\).

### 7.2. The objection based on death penalty:

Although it is not an official public policy, there are serious concerns that some countries, such as Serbia\(^ {123}\) and China, are or have been removing cadaveric organs from executed prisoners in a way that can be deemed as “confiscatory”. In 2005 the World Medical Association issued a Council Resolution on Organ Donation in China demanding the Chinese Medical Association to condemn the practice and to take the necessary steps to ensure that Chinese doctors are not involved in the removal or transplantation of organs from executed prisoners\(^ {124}\). Although some authors have rejected that Resolution arguing that the executed might have given genuine consent for the post-mortem extraction as a way of expressing a deep Confucian commitment to virtue, those same authors recognize that sometimes there is no guarantee that consent was given by the prisoner or his family\(^ {125}\).

Therefore, there is a legitimate concern that a confiscatory policy of cadaveric organs could have the undesirable side effect of reinforcing death penalty or even establishing it. Arguably, the US public might compel the authorities to prioritize death row inmates for organ confiscation after their execution. This policy has been defended, among others, by Louis Palmer.

\(^{122}\) For Cantor, the number of conflicts which might arise is scarce see supra note 19 at 155.

\(^{123}\) That was the case in 2001 according to Harris and Alcom; see ‘To Solve a Deadly Shortage: Economic Incentives for Human Organ Donation’, Issues in Law and Medicine, 16 no. 213 (2001) at 225.

\(^{124}\) The resolution was adopted by the 173\(^{\text{rd}}\) WMA Council Session (Divonne-les-Bains, France, May 2005). See [http://www.wma.net/en/30publications/10policies/30council/cr_5/](http://www.wma.net/en/30publications/10policies/30council/cr_5/) (last visit November 23 2011).

Jr.: “When a capital murderer is buried with his or her transplantable organs intact, an immoral act has been committed. In burying the healthy organs transplantable organs of a capital murderer, society is intentionally and knowingly allowing innocent transplant patients to die. This is wrong and immoral. Therefore, it must logically follow that requiring capital murderers to forfeit their transplantable organs as part of the sentence of death is morally justified”\textsuperscript{126}. Palmer is not alone; he has been joined even by some of the potential “donors”: the Oregon death row inmate Christian Longo has launched the organization GAVE (Gifts of Anatomical Value from Everyone) which advocates that prisoners sentenced to death should be authorized to “donate”\textsuperscript{127}.

The concern regarding the reinforcement of death penalty is genuine and plausible, but it seems to me only peculiar in the US context, where some States that have not formally abolished death penalty - but just make it “dormant”-, might reactivate the executions if they witness how other states, by means of the removal of cadaveric organs from executed prisoners, alleviate their current shortage of organs. The final result, although highly speculative, would certainly be outrageous. Be that as it may, the incentive to reinitiate death penalty presupposes that the demand of organs in that state is not satisfied by the confiscation of organs from non-executed individuals, which, I conjecture, will not be the case.

\textbf{7.3. The objection based on the elimination of altruism:}

\textsuperscript{126} Organ Transplants from Executed Prisoners (Jefferson: McFarland & Company, 1999): at 50. On the literature about death row and organ donation, see the resources of the Indiana University Center For Bioethics: \url{http://bioethics.iu.edu/reference-center/deathrow/} (last visit November, 23 2011).

\textsuperscript{127} See his article at the March 5, 2011 New York Times edition: “Giving Life After Death Row”.
The idea that organs can only be donated, that organ transplantation is the final step of a process which starts up by an act of generosity, is, as I have illustrated, deeply ingrained in the moral outlook of many people and public officials across different cultures and religions. Notwithstanding the fact that, due to scarcity, the phenomenon of transplantation tourism is increasing, the Declaration of Istambul still insists that: “The act of donation should be regarded as heroic and honored as such by representatives of the government and civil society organizations”.

If the Government decides to remove cadaveric organs in a routine fashion disregarding what the deceased had ordained or would have ordained, there is no longer space for altruism in the realm of organ transplantation, and this is something to be regretted. This objection has gained some currency in other contexts as well (health care provision, for example) but is flawed.

First of all because there is nothing necessary or “natural” in organs being only donated as opposed to simply removed for the sort of reasons upon which I have been insisting throughout this paper. The scope of duties, or supererogatory acts, changes when there are good reasons – based, for example, on how well or bad we are meeting worthy collective goals- to do so. If national defense is something valuable and there are insufficient volunteers, it is reasonable to “sacrifice” generosity for the sake of having an army big enough to be effective. So regretting that we don’t give some room for people to become good Samaritans sounds hypocritical given the current context. What is regrettable is that by remaining anchored to the altruistic character of the process of organ transplantation, people die massively because the number of altruists is scarce, and many people in
less developed countries are invited, if not actually coerced, to sell their organs\textsuperscript{128}.

On the other hand, our current “altruist” models based on consent, put some psychological burdens on families and individuals, obstacles whose elimination might also be welcomed. By “simply” taking cadaveric organs we save the family from a decisional process that might add anguish and anxiety to the fact of his beloved one having died\textsuperscript{129}.

Throughout this article I have relied in two different argumentative strategies that may underpin my proposal to empower the government to confiscate cadaveric organs. From a moral perspective, I have defended that individuals have a right to life that encompasses the correlative duty of the state not to waste useful life-saving resources, and, to that extent, allowing the individuals’ decision to have their organs destroyed violates the rights of patients who need one. That \textit{laissez-faire} policy is based on the non-guaranteed assumption of individual property-rights over the corpse, and, in the actual global context, contributes to the exploitation of citizens from less-developed countries.

Secondly, I have also supported my argument in current and accepted institutions, legal norms and jurisprudential decisions that entitle the Government to impose very severe restrictions on how to manage the human corpse, or that even allow to use it as a “life-supporting machine” (as in the case of brain dead pregnant women). Under certain circumstances it is not disputed that the government might greatly affect

\textsuperscript{128} Ben Saunders argues along the same lines; see “Opt-out organ donations without presumptions” \textit{Journal of Medical Ethics}, 2012, 38: 69-72, 70

\textsuperscript{129} Ogden, supra note 117 at 82-86, Kamm, supra note 56 at 219-220.
the integrity of the dead body because, by doing so, we obtain significant social benefits, namely by performing autopsies.

I have assessed what I deem are the most important objections to extend such governmental power for the sake of transplanting organs, particularly, the resurrection objection – in both its religious and non-religious dimension- and the objection based on posthumous interests. I have strived to show that they are not conclusive against my case, either because the alleged objection is incoherent within the belief’s framework or because the weight of the individual claim pales in comparison with the good consequences that derives from the confiscation.

Should a confiscatory policy of organs finally be implemented, a severe opposition from various individuals is to be expected, probably in a higher degree than is the case regarding other public policies which yield the curtailment of powers, interests and desires of citizens. It is foreseeable that those who are in opposition might develop evasive strategies to avoid the removal of their organs, forcing their own deaths at home, even a form of “death tourism” (travelling abroad to die and be let in peace130). This is an important consequence whose assessment will have to wait for another occasion. For the moment I will insist, again, in the positive dimension of the proposal, in the fact that we might very well live in a community in which the tragic contingency of organ failure is collectively and effectively tackled, and surmounted by means of the relatively marginal sacrifice of renouncing to the destruction of our organs after death. I think it is a scenario worth pursuing.

130 I thank Glenn Cohen for warning me to this possible effect.