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Khalil Jaafar Khalil

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# **A SIGHT OF RELIEF: INVALIDATING CADAVERIC CORNEAL DONATION LAWS VIA THE FREE EXERCISE CLAUSE**

*Khalil Jaafar Khalil\**

## **INTRODUCTION**

When a person dies, various rituals take place. Family members and friends of the deceased perform religious and/or cultural acts that are essential in the observance of death. Omissions or incorrectness of such acts are grounds for inadequate or incorrect conclusion to the deceased's life. Even more disturbing to burial rights is corpse tampering allowed by government statutes and provisions. The potential conflicts of interest arise from society's need to harvest organs from dead people and the deceased's perceived privacy, possessory, and other rights. Society's needs are reinforced by organ donation laws, which frequently presume consent of the deceased or the next of kin, and allow specially sanctioned persons to harvest organs. Organ donation laws include cadaveric corneal donation laws; permitting removal of corneas to be used in people with ocular disabilities. Like many other organ donation laws, some cadaveric corneal donation laws incorporate the principle of presumed consent. Cadaveric corneal donation laws have been challenged under the Fourteenth Amendment's Due Process Clause and have withstood claims of unconstitutionality. It is the author's intention, through this comment, to scrutinize presumed consent cadaveric corneal donation. More specifically, this comment will discuss the extent of property rights in a corpse under the Fourteenth Amendment. Following the property interest discussion, the topic will shift to the First

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\*Khalil Jaafar Khalil is the Production Editor for the DePaul Journal of Health Care Law. He holds a B.A. degree from Wayne State University (Cum Laude) and is a J.D. candidate graduating in May 2003 from DePaul University College of Law. The author wishes to thank the Almighty for all that He has provided.

Amendment's Free Exercise Clause and its relation to property. Finally, the author will meet at the property crossroads of the First and Fourteenth Amendments to propose that presumed consent cadaveric corneal donation laws are invalid.

## Religious Backdrop

### *Islam*

Cadaveric corneal transplantation laws that presume consent may conflict with at least some Muslims, Jews, various Christians, and other religious groups' First Amendment right to practice religion freely. First, the immense importance of burial rituals is evident in the religion of Islam. This religion requires complete preservation of the body prior to and through the burial process. Although Islam's Holy book, the Qu'ran, is mute on the issue of funerals, the genre of scholarship known as *fiqh*, or religious jurisprudence, offers guidelines for the burial of the dead.<sup>1</sup> While the exact details of funerals vary among sects, general themes abound: upon death, the *shahada* (declaration that there is no god except Allah, and Muhammad [P.B.U.H.] is the messenger of Allah) is recited into the decedent's ear, his or her face is turned towards the *Kaaba* (the holy shrine in Mecca), and *ghusl*, or washing of the body, takes place.<sup>2</sup> Following *ghusl*, the body is wrapped in shrouds made of white cloth, in preparation for an expedited burial.<sup>3</sup> A procession, sometimes through a mosque and then to the cemetery, is conducted, supplications are made, and the body is placed in a pre-dug hole facing Mecca.<sup>4</sup>

"There is no coffin and the corpse must not be violated by cremation, post-mortem examination or dissection."<sup>5</sup> Islamic doctrines declare that the corpse must be respected, emphasized by the statement of the Prophet Muhammad[S] that "the breaking of a bone of a dead

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<sup>1</sup> HANNA KASSIS, LIFE AFTER DEATH IN WORLD RELIGIONS 52 (Harold Coward, ed., Orbis books 1997).

<sup>2</sup> *Id.* The mandatory addition of "P.B.U.H." after the holy prophet's name is the abbreviation for the Arabic phrase "Peace be upon him and his holy household." It is a requirement for Muslims to place this abbreviation after writing the name of Muhammad [P.B.U.H.]. *Id.*

<sup>3</sup> *Id.* at 53.

<sup>4</sup> *Id.* at 53-54.

<sup>5</sup> CEDRIC MIMS, WHEN WE DIE: THE SCIENCE, CULTURE, AND RITUALS OF DEATH 135 (St. Martin's Press 1999).

person is equal to sin to doing this while he is alive.”<sup>6</sup> Prior to a recent ruling by the Muslim Religious Council, Muslims were barred from receiving donated organs. However, the Council now holds that transplantations may be allowed as long as donors provide consent in advance.<sup>7</sup>

### Judaism

Another monotheistic religion, Judaism, has detailed burial rights. Jewish law, *Halacha*, describes cadaver transplants as presenting several problems: *nivul hamet* (mutilation of the dead), *issur hana'ah* (the prohibition against deriving any benefit from a dead body) and *kevurat hamet* (the requirement to bury a dead person and all his parts in tact).<sup>8</sup> As to *nivul hamet*, the source for the prohibition against mutilation or desecration of the dead is from *Deuteronomy* 21: 22,23, which states, “And if a man has committed a capital crime and was executed, you shall hang him upon a tree but do not allow his body to remain on the tree all night.”<sup>9</sup> The Talmud expands the definition of this prohibition by stating that any act which can be construed as desecration of the dead is included.<sup>10</sup> As to *issur hana'ah*, the Talmud, *Sanhedrin* 47b, states that deriving any “benefit” from the dead is prohibited.<sup>11</sup> Finally, in reference to *kevurat hamet*, *Deuteronomy* 21:23 states, “Thou shalt surely bury him,” and the Talmud expands this by commanding against the omission of any limb or organ of the body to be buried.<sup>12</sup>

Still, with regard to deceased donors, another principle which becomes relevant is *kavod ha-met* (the honor of the dead person).<sup>13</sup> Although the body is dead, it continues to be God’s creation, and thus Jewish funeral rites ensure that it be handled and buried in dignity.<sup>14</sup>

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<sup>6</sup> *Id.* at 266.

<sup>7</sup> Donald H. J. Hermann, *Religious Identity and the Health Care Market: Mergers And Acquisitions Involving Religiously Affiliated Providers*, 34 CREIGHTON L. REV. 927, 962 (2001).

<sup>8</sup> Rabbi Reuven Fink, *Halachic Aspects Of Organ Transplantation*, No. V J. HALACHA & CONTEMPORARY SOCIETY 46 (1983).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 47.

<sup>12</sup> Fink, *supra* note 8, at 48-49.

<sup>13</sup> Rabbi Elliot N. Dorff, *Choosing Life: Aspects of Judaism Affecting Organ Transplantation*, in ORGAN TRANSPLANTATION: MEANINGS & REALITIES 170 (Stuart J. Younger et al., eds., 1996).

<sup>14</sup> *Id.*

Even though a cadaveric donation inevitably involves mutilating the body, *pikkuah nefesh* (saving a person's life) is so sacred in Judaism that it is construed to be an honor to the deceased person (*kavod ha-met*) to use his or her bodily parts in that way.<sup>15</sup> Moreover, most rabbis would permit invading the deceased's body to save or improve another's health as well as his or her life, as for instance, in a cornea transplant to restore a person's vision.<sup>16</sup>

Nonetheless, there has been some debate among Jewish scholars in regards to corneal transplants.<sup>17</sup> The debate concerning corneal transplants is as to whether such transplants are deemed to contribute to saving the life of the recipient.<sup>18</sup> Some rabbis believe that the three requirements are waived in the scenario of cornea transplants because the matter is of saving a life<sup>19</sup>, while other rabbis assert that it is forbidden for a person to donate any of his organs, including corneas, after death.<sup>20</sup> Regardless of the jurisprudential positions, it seems that some rabbis, and hence interpretation of Judaic law, forbid corneal harvesting or transplantation.

In traditional congregations, the *Chevrah Kaddisha* (burial society) cares for the deceased by cleansing and dressing the body.<sup>21</sup> Traditional Jews are buried as soon after death as possible in simple white shrouds to signify equality of mankind before God.<sup>22</sup> In traditional Judaism, the decedent's prayer shawl is placed over the shroud, embalming is discouraged, and coffins are simple and made from wood.<sup>23</sup> Lastly, the casket is carried to the grave, with seven

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 170-171.

<sup>17</sup> Fink, *supra* note 8, at 49.

<sup>18</sup> Interview with Rabbi Steven S. Resnicoff, Professor of law, DePaul University College of Law in Chicago, Ill. (Feb. 25, 2002).

<sup>19</sup> See Fink, *supra* note 8, at 49-55. Rabbi I.Y. Unterman holds that corneal transplants should be permitted because it saves lives in that a blind person is constantly confronted by life-threatening situations. *Id.* Rabbi Ezekiel Landau reasoned that by saving a life the autopsy enhances the dignity of the deceased and is thus permissible. *Id.* Several other prominent rabbis take varying positions, with arguments dealing with Jewish and gentile cadavers. *Id.*

<sup>20</sup> See *id.* Rabbi Shmuel Heubner concludes that under no circumstances are corneal transplants permissible. Rabbi Eliezer Waldenberg takes the position that it is forbidden for a person to donate any of his organs after death for the purpose of transplantation.

<sup>21</sup> Constance Jones, *R.I.P.: The Complete Book Of Death And Dying* 15-16 (HarperCollins 1997).

<sup>22</sup> *Id.* at 16.

<sup>23</sup> *Id.*

stops by pallbearers, and the rabbi recites from Psalms while the people recite the *Kaddish*.<sup>24</sup>

### *Other Religions*

The other monotheistic religion, Christianity, takes a different view on organ donation and transplantation. Catholics, for instance, currently view organ donation as an act of charity, self-sacrifice, and love for others.<sup>25</sup> Current Roman Catholic doctrine views organ donation as “meritorious,” and regards transplants as morally and ethically acceptable.<sup>26</sup> Somewhat different than Catholics, members of the Amish community will consent to organ donation if they know it is for the welfare and health of the recipient,<sup>27</sup> and they are reluctant to donate organs if the transplant is unlikely to succeed or if the organs will be used for research.<sup>28</sup> As to the Protestant faith, it respects individual choice and a person’s right to make decisions regarding his or her own body. Followers of Protestantism believe that Jesus Christ came to give life abundantly, and the reasoning that follows is that organ donations enable more abundant life, alleviate pain and suffering, and express love in times of tragedy.<sup>29</sup> As such, most Protestant sects encourage or endorse organ donation, so long as those procuring organ donation give proper respect to the potential donor’s conscience and convictions.<sup>30</sup> Another group situated under the Christian umbrella are the members of The Church of Jesus Christ of Latter-day Saints. Commonly known as “Mormons,” this group believes that the decision to donate organs is a personal one, necessitating the individual to weigh the advantages and disadvantages of transplantation and choose the one that will bring them peace and comfort.<sup>31</sup>

The varying Christian views on organ donation are contrasted with Eastern religions such as Buddhism and Hinduism. Buddhists treat

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<sup>24</sup> *Id.*

<sup>25</sup> Jennifer M. Krueger, *Life Coming Bravely Out Of Death: Organ Donation Legislation Across European Countries*, 18 WIS. INT’L L. J. 321, 336 (2000) (citing William H. Gerson, *Refining The Law Of Organ Donation: Lessons From The French Law Of Presumed Consent*, 19 INT’L L. & POL. 1013, 1032 (1987)).

<sup>26</sup> Hermann, *supra* note 7, at 961. However, the Church formally opposes organ donation. *See id.*

<sup>27</sup> Krueger, *supra* note 25, at 336. *See also*, Herman, *supra* note 7, at 962.

<sup>28</sup> Krueger, *supra* note 25, at 336.

<sup>29</sup> *Id.* at 336-337.

<sup>30</sup> Hermann, *supra* note 7, at 962.

<sup>31</sup> Krueger, *supra* note 25, at 336.

organ donation as a matter of individual conscience,<sup>32</sup> and since organ donation is a noble act, Buddhism honors those who donate their bodies and organs to advance medical science and save lives.<sup>33</sup> Hinduism, like Buddhism, does not prohibit its followers from donating their organs.<sup>34</sup>

In contrast to most other religious groups, Jehovah's Witnesses do not encourage organ donation, but believe it is an issue left to an individual's conscience.<sup>35</sup> However, Jehovah's Witnesses do not strictly forbid organ donation so long as all organs and tissue are completely drained of blood before transplantation.<sup>36</sup>

## ORGAN DONATION LAWS AND PRESUMED CONSENT

### History of Presumed Consent In Relation to Organ Donation

In general, many commentators agree that all presumed consent laws are based on the unclaimed cadaver statutes of the 1700's in England, which were used to provide medical schools with a sufficient supply of cadavers.<sup>37</sup> These laws were later imitated in the United States.<sup>38</sup> Although the presumed consent of organ donation has roots in these unclaimed cadaver laws, the societal problems of organ shortages and medicine's increasing ability to transplant organs successfully have precipitated states to pass presumed consent laws.<sup>39</sup> In 1965, the National Conference of Commissioners on Uniform State Laws began to draft a uniform law dealing with organ transplantation in the United States.<sup>40</sup> The resulting law was the Uniform Anatomical Gift Act of 1968, which encouraged voluntary anatomical gifts and provided a hierarchy under which other persons would be allowed to donate the decedent's organs.<sup>41</sup> A closer look at the 1968 Act reveals that the idea

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<sup>32</sup> Hermann, *supra* note 7, at 962.

<sup>33</sup> Krueger, *supra* note 25, at 336.

<sup>34</sup> *Id.*

<sup>35</sup> Hermann, *supra* note 7, at 962.

<sup>36</sup> *Id.*

<sup>37</sup> Alexander Powhida, *Forced Organ Donation: The Presumed Consent To Organ Donation Laws Of The Various States And The United States Constitution*, 9 ALB. L.J. SCI. & TECH. 349, 354 (1999).

<sup>38</sup> *Id.* at 355.

<sup>39</sup> *Id.* at 352-353.

<sup>40</sup> Thomas M. O'Carroll, *Over My Dead Body: Recognizing Property Rights In Corpses*, 29 J. OF HEALTH & HOSP. L. 238 (1996).

<sup>41</sup> Maryellen Liddy, *The "New Body Snatchers": Analyzing The Effect Of Presumed Consent Organ Donation Laws On Privacy, Autonomy, And Liberty*, 28 FORDHAM URB. L.J. 815, 822 (2001).

of encouraging voluntarism is curtailed by the medical examiner's ability to release a decedent's organs when next of kin are not available to object.<sup>42</sup> This caveat creates a form of presumed consent (discussed *infra*) that seemingly allows an examiner, who is a "person[s] authorized or under obligation to dispose of the body," to assume and act upon the decedent's unexpressed desire to donate organs.<sup>43</sup> This residual component of the 1968 Act is currently the law in the majority of states.<sup>44</sup>

As science and technology advanced organ transplantation and compatibility, states began to modify their versions of the 1968 Act to increase organ donation, albeit with modifications that led to increased uncertainty which undermined one of the objectives of the 1968 Act.<sup>45</sup> Consequently, the National Conference of Commissioners on Uniform State Laws reconvened and passed a new version of the 1968 Act, appropriately called the Uniform Anatomical Gift Act of 1987.<sup>46</sup> The 1987 Act provided some differences from the original Act, most notably a controversial method for harvesting additional organs by coroners - - the residual category (organ donation by persons authorized to dispose of the decedent's body) in the 1968 Act was replaced with a section authorizing a coroner, medical examiner, or other official to release and permit the removal of a part from a body, within that official's custody, for transplantation.<sup>47</sup> However, the official's authorization was predicated on three requirements:

- (1) An organ procurement facility must request the body part from the official, who then makes a reasonable effort to locate the decedent's

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<sup>42</sup> See UNIF. ANATOMICAL GIFT ACT §2(b) 8A U.L.A. 109 (1993). Specifically, the Act commanded that in descending order (spouse, adult son or daughter, either parent, adult brother or sister, guardian of the person of the decedent at the time of his death, and any other person authorized or under obligation to dispose of the body) family members would have the authority to give all or any part of the decedent's body, assuming the family members were available. *Id.*

<sup>43</sup> Liddy, *supra* note 41, at 822.

<sup>44</sup> Liddy, *supra* note 41, at 823. Those states include Alabama (ALA. CODE 1975 § 22-19-42 (2000)); Colorado (COLO. REV. STAT. ANN. § 12-34-103 (WEST 2000)); Kentucky (KY. REV. STAT. ANN. § 311.175 (MICHIE 2000)); Maine (ME. REV. STAT. ANN. TIT. 22, §2902 (WEST 1999)); Michigan (MICH. COMP. LAWS ANN. § 333.10102)); New Jersey (N.J. STAT. ANN. § 26:6-58 (WEST 2000)); New York (N.Y. PUB. HEALTH LAW § 4301 (CONSOL. 2000)); and North Carolina (N.C. GEN. STAT. §130A-404 (2000)). *Id.*

<sup>45</sup> Liddy, *supra* note 41, at 823.

<sup>46</sup> See *id.* at 823-24.

<sup>47</sup> *Id.* at 825.



medical information and inform the individuals listed in the hierarchy scheme;

(2) The official must not know of a decedent's refusal or contrary indication or a family member's objection to organ donation preceding the harvesting; and

(3) The official must make certain that organ harvesting does not interfere with an autopsy, and the body's physical appearance must be restored after the removal, if necessary.<sup>48</sup>

The Uniform Anatomical Gift Act (1987) has been adopted in many jurisdictions; a version of the coroner release statute has been adopted in a significant number of states.<sup>49</sup> The coroner release statute is predicated on necessary immediate removal of organs (viability) and, as such, the coroner may harvest organs, if the decedent's medical records or next of kin cannot be located.<sup>50</sup> In essence, the release statute expressly allows a medical investigator or coroner to release organs in the absence of contrary notice, thereby emulating presumed consent in greater force than the 1968 Act.<sup>51</sup>

In adopting either the 1968 Act or 1987 Act, states have modified the provisions through legislative efforts.<sup>52</sup> Modifications include safeguarding the religious beliefs of both the deceased and appropriate kin.<sup>53</sup> For example, New York limits the coroner's ability to procure organs from a decedent if the coroner has reason to believe that an anatomical gift is contrary to the decedent's religious or moral beliefs.<sup>54</sup> Similar statutes are evident in states such as Iowa and West Virginia.<sup>55</sup> Other modifications by state statutes involve coroner release specification - - i.e., anatomical gift laws limiting the applicability of

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<sup>48</sup> *Id.* See also UNIF. ANATOMICAL GIFT ACT §4, 8A U.L.A. 47 (1993).

<sup>49</sup> Liddy, *supra* note 41, at 826. Those states include including Arizona (ARIZ. REV. STAT. ANN. § 36-842 (WEST 2000)); California (CAL. HEALTH & SAFETY CODE § 7151.5 (WEST 2000)); Hawaii (HAW. REV. STAT. ANN. §327-4 (MICHIE 2000)); Idaho (IDAHO CODE § 39-3405 (MICHIE 2000)); Indiana (IND. CODE. ANN. § 29-2-16-4.5 (WEST 2001)); Minnesota (MINN. STAT. ANN. § 525.9213 (WEST 2000)); Montana (MONT. CODE ANN. § 72-17-215 (2000)); New Mexico (N.M. STAT. ANN. § 24-6A-4 (MICHIE 2000)); Rhode Island (R.I. GEN. LAWS § 23-18.6-4 (2000)); and Utah (UTAH CODE ANN. §26-28-5 (2000)). *Id.*

<sup>50</sup> Liddy, *supra* note 41, at 826.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 827.

<sup>53</sup> *Id.* at 828.

<sup>54</sup> Liddy, *supra* note 41, at 828. See also, NY PUB. HEALTH LAW § 4301 (CONSOL 2001).

<sup>55</sup> Liddy, *supra* note 41, at 828. See also, N.J. STAT. ANN. § 26:6-58.1 (WEST 2000) and IOWA CODE ANN. §142C.4A (WEST 1999).

coroner release to certain body parts or tissues.<sup>56</sup> Specifically, fifteen states have statutes that allow coroners to remove corneas or eyes from decedents based on presumed consent.<sup>57</sup> These states that have adopted presumed consent laws, although limiting removal to corneas by coroners, are most pertinent to our analysis. Before we begin our analysis of litigation on organ donation laws, we must first regress and describe the principle of presumed consent.

### **The Principle of Presumed Consent**

The idea of presumed consent holds that, unless a person has rebutted the presumption of consent affirmatively, society may claim the right to harvest much needed organs.<sup>58</sup> State presumed consent statutes fall into three distinct categories: organ conscription laws, routine request laws, and shifting presumption laws.<sup>59</sup> The first type presumes the consent of the deceased and the deceased's family is not informed or consulted; the second type requires every citizen to elect whether to donate or to withhold consent; the third type creates a presumption of consent to organ donation, but can be curtailed before death by the donor or after death by family members who must be informed of their right to refuse consent.<sup>60</sup> The Uniform Anatomical Gift Act (1987) presumes that one has not consented to donating his/her organs unless either an organ donation card has been produced or a family member agrees to donation. However, the coroner release statute is of the "presumption shift" version of presumed consent because it flips the presumption of the law from one of presuming no consent to presuming consent with several requirements (including request by a facility, no contrary indication, and no interference with an autopsy).<sup>61</sup>

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<sup>56</sup> Liddy, *supra* note 41, at 829.

<sup>57</sup> *Id.* Some states that allow coroners to remove only corneas or eyes include Delaware (DEL. CODE ANN. TIT. 29, §4712 (1999)); Florida (FLA. STAT. CH. 732.9185 (2000)); Georgia (GA. CODE ANN. §31-23-6 (2000)); Kentucky (KY. REV. STAT. ANN. §311.187 (MICHIE 2000)); Maryland (MD. CODE ANN., EST. & TRUSTS §4-509.1 (1999)); Massachusetts (MASS. ANN. LAWS CH. 113, §14 (LAW. CO-OP. 2000)); Ohio (OHIO REV. CODE ANN. §2108.60 (ANDERSON 2000)); and Pennsylvania (20 PA. CONS. STAT. §8641 (2000)).

<sup>58</sup> Liddy, *supra* note 41, at 819.

<sup>59</sup> Powhida, *supra* note 37, at 358.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 359.

## CONSTITUTIONAL ISSUES

### Cases Attacking Organ Donation Laws and Cadaveric Corneal Donation Under The Fourteenth Amendment

One of the earlier cases to address the effect of presumed consent laws in relation to corneal harvesting is *Georgia Lions Eye Bank, Inc., v. Lavant*, where the Georgia Supreme Court decided state-affiliated eye bank officials acting under Georgia's coroner release statute, who removed the corneal tissue of an infant during an autopsy without parents' consent, did not violate any property interests of the parents.<sup>62</sup> The court, however, did recognize a "quasi-property right" to protect family members' interest in the corpse; in this situation, though, the "quasi-property right" did not rise to the level of constitutional protection.<sup>63</sup>

In *Mansaw v. Midwest Organ Bank*, the father of a deceased minor asserted that removal of his son's organs without his consent violated his rights under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment.<sup>64</sup> Furthermore, this case addressed the constitutionality of Missouri Revised Statute §194.220, which permits a hospital to proceed with organ harvesting after gaining consent of only one parent of a deceased minor so long as the hospital does not know the minor's other parent objects to harvesting.<sup>65</sup> The District Court stated the procedures that due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved, as well as of the private interest that has been affected by governmental action.<sup>66</sup> Factors to be considered in due process claims include: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and third, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or

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<sup>62</sup> *Georgia Lions Eye Bank, Inc. v. Lavant*, 335 S.E.2d 127 (Ga. 1985). See also, Thomas L. O'Corroll, *Over My Dead Body: Recognizing Property Rights in Corpses*, 29 J. HEALTH & HOSP. L. 238 (1996).

<sup>63</sup> *Georgia Lions Eye Bank, Inc. v. Lavant*, 335 S.E.2d 127, 128 (Ga. 1985).

<sup>64</sup> *Mansaw v. Midwest Organ Bank*, No. 97-0271-CV-W-6, 1998 U.S. Dist. LEXIS 10307, at \*1 (W.D. Mo., July 8, 1998).

<sup>65</sup> *Id.* at \*24.

<sup>66</sup> *Id.*

substitute procedural requirement would entail.<sup>67</sup> The second factor (risk of erroneous deprivation) is eclipsed by the third factor (Government's interest) because of the exigencies presented in the organ transplant context and, as such, the second factor is not to be considered.<sup>68</sup> Applying these rules to the facts, the court concluded the plaintiff's privacy interest was outweighed or was far less compelling than the Government's interest in providing for and securing a future for the living.<sup>69</sup> In reaching this conclusion, the court noted that the interest of the plaintiff, an "extremely minimal property right," is a low right on the constitutional totem pole, and is further minimized by the interest shared equally with the minor's other parent.<sup>70</sup> Since the statute provides that either parent may consent, "it essentially establishes a rebuttable presumption that one parent's decision expresses the wishes of both parents."<sup>71</sup> The exigency in organ procurement validates Missouri's action to create a rebuttable presumption as constitutional.<sup>72</sup> In upholding the constitutionality of the statute, the court concluded "the only constitutionally protectible [sic] interest that a person may have in a deceased relative's body should be characterized as a property interest . . . [and] any other constitutionally protectible [sic] liberty interest that a parent may have in a minor child dies with the child."<sup>73</sup> Thus, it is evident that at minimum, and similar to the *Lavant* court, the Missouri court did recognize a property right in the decedent's body.

Similarly, in *Brotherton v. Cleveland*, the Sixth Circuit Court of Appeals admitted to a limited property interest in a decedent.<sup>74</sup> Focusing on Ohio's coroner release statute (Ohio Revised Code Section 2108.60) which allowed a coroner to remove both corneas if an eye bank official has requested and certified the use of the corneas, and the coroner has no knowledge of an objection to the removal by someone authorized to dispose of the body, the court addressed the constitutionality of the presumed consent statute.<sup>75</sup> The wife of the

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<sup>67</sup> *Id.* at \*25, n.13.

<sup>68</sup> *Id.*

<sup>69</sup> *Mansaw v. Midwest Organ Bank*, No. 97-0271-CV-W-6, 1998 U.S. Dist. LEXIS 10307, at \*28 (W.D. Mo., July 8, 1998).

<sup>70</sup> *Id.* at \*28.

<sup>71</sup> *Id.* at \*31.

<sup>72</sup> *Id.* at \*32.

<sup>73</sup> *Id.* at \*29.

<sup>74</sup> *Brotherton v. Cleveland*, 923 F.2d 477, 478 (6th Cir. 1991).

<sup>75</sup> *Id.* at 478-79.

decedent had refused to make an organ donation after her husband was pronounced dead; yet the hospital never informed the coroner of her status.<sup>76</sup> The coroner removed the corneas under the Ohio statute and, following discovery, the wife brought suit alleging Fourteenth Amendment Due Process violations.<sup>77</sup> The court decided that although Ohio did not identify a “quasi-property right” in the decedent’s body, the court concluded that the family’s rights rose to the level of a legitimate claim of entitlement under federal law, and reversed the lower court’s dismissal of the case.<sup>78</sup> In successive court proceedings, (which named the above decision *Brotherton I*), the same court reemphasized that plaintiff had a property interest in her husband’s body, that Ohio “failed to provide necessary pre-deprivation procedures,” and that the policy and custom of the county coroner’s office was “an established state procedure necessitating pre-deprivation procedures.”<sup>79</sup>

In a recent case dealing with family interests in a deceased person, *Crocker v. Pleasant*<sup>80</sup>, the Supreme Court of Florida held that the parents of a twenty three year old son who had died and been buried by the city without parental notification had a legitimate claim of entitlement to procedural due process in connection with the burial of their son.<sup>81</sup> The state district court granted a motion for judgment on the pleadings, partly basing its conclusion on another Florida Supreme Court decision, *State v. Powell*, that upheld as constitutional a state statute that authorized removal of corneal tissue from a corpse without permission of relatives.<sup>82</sup> The appellate court affirmed; however, it also certified a question to the Florida high court to determine whether the *Powell* decision precludes all § 1983 claims grounded on interference with an interest in a dead body.<sup>83</sup> The Florida Supreme Court, in answering the question in the negative, stated that *Powell* did not necessarily mean that the right to possess a loved one’s remains for the purposes of burial should never be given protected status under the

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<sup>76</sup> *Id.* at 478.

<sup>77</sup> *Id.* at 479.

<sup>78</sup> *Id.* at 482.

<sup>79</sup> *Brotherton v. Cleveland*, 173 F.3d 552, 557 (6th Cir. 1999). This case is also known as *Brotherton II*.

<sup>80</sup> *Crocker, v. Pleasant, etc., et al.*, 778 So. 2d 978 (Fla. 2001).

<sup>81</sup> *Id.* at 988.

<sup>82</sup> The court in *Crocker* was referring to *State v. Powell*, 497 So. 2d 1188 (Fla. 1986).

<sup>83</sup> *Crocker, v. Pleasant*, 778 So. 2d 978, 982 (Fla. 2001).

Fourteenth Amendment.<sup>84</sup> Furthermore, according to the court, in *Powell* “we explained that Florida recognizes a limited right to possession of the body for ‘burial, sepulture or other lawful disposition.’”<sup>85</sup> The *Powell* conclusion was consistent with the approach of other courts finding that such a right constitutes a legitimate claim of entitlement or a quasi-property right.<sup>86</sup> In reaching the conclusion that a “quasi-property right” existed in a deceased person, the court systematically described federal appellate courts which had recognized such a right<sup>87</sup>: *Lawyer v. Kernodle*<sup>88</sup>, *Fuller v. Marx*<sup>89</sup>, *Arnaud v. Odom*<sup>90</sup>, *Brotherton v. Cleveland*<sup>91</sup>, and *Whaley v. County of Tuscola*.<sup>92</sup> However, in several of these cases, although quasi-property rights existed, litigants did not suffer a constitutional invasion of any property right under § 1983 because the state statutes adequately provided due process of the law.<sup>93</sup> The *Crocker* court’s holding demonstrates Florida’s willingness to accept the “quasi-property” interest in a dead body, in opposition to its previous stance.

The above-mentioned cases have clearly demarcated a type (“quasi”) of property right in deceased persons. Such courts have thus become more merciful in allowing families to have legal interests in dead family members’ bodies, whereas such rights were previously not recognized. However, in the context of corneal transplantation statutes, these courts have been unwilling to invalidate them on the basis of the Fourteenth Amendment. Using some of the principles from these cases and infusing them into other avenues may be more promising.

### Free Exercise Clause of First Amendment And Use Of Property

The Free Exercise Clause of the First Amendment, which is made applicable to the states through the Fourteenth Amendment, states that “Congress shall make no law... prohibiting the free exercise of

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<sup>84</sup> *Id.* at 985.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *See id.* at 985-86.

<sup>88</sup> 721 F.2d 632 (8th Cir. 1983).

<sup>89</sup> 724 F.2d 717 (8th Cir. 1984).

<sup>90</sup> 870 F.2d 304 (5th Cir. 1989).

<sup>91</sup> 923 F.2d 477 (6th Cir. 1991).

<sup>92</sup> 58 F.3d 1111 (6th Cir. 1995). The *Crocker* court also noted an Arkansas case, *Teasley v. Thompson*, 165 S.W.2d 940, 942 (Ark. 1942). *Crocker*, *supra* note 80 at 986.

<sup>93</sup> *Crocker v. Pleasant*, 778 So. 2d 978, 990 (Fla. 2001). Those cases include *Arnaud*, 870 F.2d at 308, and *Fuller*, 724 F.2d at 719. *Id.*

religion.”<sup>94</sup> The Free Exercise Clause removes from legislative power, state and federal, “the exertion of any restraint on the free exercise of religion.”<sup>95</sup> Its function is to “secure religious liberty in the individual” by barring “any invasions thereof by civil authority.”<sup>96</sup> The free exercise inquiry is whether the government has placed a substantial burden on the observation of a central religious belief or practice and if so, whether a compelling governmental interest justifies the burden.<sup>97</sup> Although the Free Exercise Clause orders that the government may not pass laws that stifle religious belief or practice, a law that is religion-neutral and generally applicable does not violate the Free Exercise Clause even if it incidentally impinges on religious practice.<sup>98</sup> Thus, where a law is not neutral or not of general application, it must undergo the most rigorous scrutiny - - it must be justified by a compelling government interest and must be narrowly tailored to advance that interest.<sup>99</sup> Furthermore, in order to obtain strict scrutiny on neutral regulations, one must show that they impose a substantial burden on his/her exercise of religion.<sup>100</sup>

In *Lemay v. Dubois*, plaintiff-prisoner at Old Colony Correctional Center, who practiced the religion of the Native Americans, claimed that in barring him access to his spiritual paraphernalia (necklace and medallion, deer tail hair tie, feathers, sage and cedar), the Corrections Department violated, *inter alia*, his rights under the Free Exercise Clause of the First Amendment.<sup>101</sup> The court held that plaintiff had demonstrated a likelihood of success in establishing that the prison regulation, which allowed certain religious medals but precluded the use of spiritual necklaces of prisoners who followed the Native American religion, did not survive strict scrutiny analysis.<sup>102</sup>

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<sup>94</sup> *Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168, 170 (4th Cir. 1995) *citing* U.S. CONST. amend. I.

<sup>95</sup> *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 384 (1990), *quoting* *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 222-23 (1963).

<sup>96</sup> *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 384 (1990).

<sup>97</sup> *See id.* at 384-385.

<sup>98</sup> *Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168, 170 (4th Cir. 1995) *citing* *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S.Ct. 2217, 2222 (1993) and *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 878-79 (1990).

<sup>99</sup> *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993).

<sup>100</sup> *Lemay v. Dubois*, No. 95-11912-PBS, 1996 U.S. Dist. LEXIS 11645 at \*19-20 (D.Mass. July 29, 1996).

<sup>101</sup> *Lemay v. Dubois*, No. 95-11912-PBS, 1996 U.S. Dist. LEXIS 11645 at \*1 (D.Mass. July 29, 1996).

<sup>102</sup> *Id.* at \*19.

Consequently, the court partially granted plaintiff's application for a preliminary injunction, ordering defendants [Commissioner of Correction and Superintendent of Old Colony Correctional Center] to provide LeMay his necklace and medallion and permit him to wear it in the same manner that other inmates are permitted to wear religious pendants.<sup>103</sup> In deciding the case, the court stated that the prison regulation<sup>104</sup> was non-neutral in that it benefited those who wish to wear medals for religious purposes over those who wish to wear medals for non-religious purposes, and thus was subject to strict scrutiny.<sup>105</sup> As to the remaining items sought by plaintiff (deer tail hair tie, feathers, cedar and sage), he demonstrated a likelihood of success on his claim that the permanent confiscation of those items constituted a substantial burden on religiously motivated conduct that had substantial religious significance.<sup>106</sup> The court discussed the meaning of "substantial burden" as outlined in various federal circuits: The Ninth Circuit has followed the reasoning that a law substantially burdens a follower if it prevents him/her from engaging in conduct or having a religious experience which the religion commands, and the burden must be substantial and an interference with a belief that is central to religious doctrine<sup>107</sup>; the Seventh, Eighth, and Tenth Circuits use broader tests that include conduct that is religiously motivated, whether or not expressly mandated by the religion, explaining that a substantial burden must either:

- (1) "significantly inhibit or constrain conduct or expression that manifests some central tenet of a [person's] individual beliefs,"
- (2) "meaningfully curtail ... a religious practice of more than minimal significance in a way that is not merely incidental,"

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<sup>103</sup> *Id.* at \*24.

<sup>104</sup> Specifically, the court said that, "[T]he regulations permit only two types of necklaces, both subject to certain size and other requirements. Prisoners are allowed to possess one 'religious medal & chain' as follows: (c) Religious Medal & Chain – an inmate may possess a maximum [of] one religious medal to be worn on a chain. The medal shall not exceed a thickness of 1/8" and a diameter of 1 1/2". The chain shall not be longer than 20" in length and shall not exceed 1/8" in diameter. No hollow type, locket type, or gem stone medals allowed. The religious medal and chain must be purchased as a set." *Id.* at \*9.

<sup>105</sup> *Lemay v. Dubois*, No. 95-11912-PBS, 1996 U.S. Dist. LEXIS 11645 at \*10 (D.Mass. July 29, 1996).

<sup>106</sup> *Id.* at \*22-23.

<sup>107</sup> *See, e.g., Freeman v. Arpaio*, 125 F.3d 732 (9th Cir. 1997).



- (3) “force religious adherents to refrain from religiously motivated conduct,”
- (4) “meaningfully curtail a [person’s] ability to express adherence his or faith,” or
- (5) “deny a [person] reasonable opportunities to engage in those activities that are fundamental to a [person’s] religion.”<sup>108</sup>

In adopting the Eighth Circuit’s definition of “substantial burden,” the court reasoned that the regulation was a substantial burden on plaintiff’s exercise of religion.<sup>109</sup>

Another case upholding a religious practice with property is *Black Hawk v. Pennsylvania*.<sup>110</sup> Plaintiff Native American brought an action claiming that defendants violated his right to free exercise of religion by refusing to grant him an exception to a permit fee requirement for the possession of his two bears, which were of religious significance.<sup>111</sup> During the action, plaintiff’s bears escaped and harmed two individuals before being captured; thereafter, defendants sought to have one of the animals destroyed.<sup>112</sup> Plaintiff’s request for preliminary injunction in precluding the destruction of the bear was granted since the plaintiff showed a reasonable probability of prevailing on the merits because defendants did not establish that destruction was the least restrictive alternative to advance their compelling interest in protecting public safety.<sup>113</sup> Although protection of public health is a compelling interest and the destruction of the bear would advance that interest, plaintiff had provided that the destruction is not narrowly tailored to advance the government’s interests.<sup>114</sup> The bear could have been quarantined as an

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<sup>108</sup> *LeMay v. Dubois*, No. 95-11912-PBS, 1996 U.S. LEXIS 11645 at \*21 (D.Mass. July 29, 1996).

<sup>109</sup> *Id.* at \*22. But note, the Eighth Circuit’s broader test of including religiously motivated as well as religiously compelled conduct is consistent with the Religious Freedom Restoration Act of 1993 [RFRA], 42 U.S.C. § 2000 bb. The RFRA was later held unconstitutional insofar as it applied to the states under the Fourteenth Amendment by the U.S. Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997). See *U.S. v. Any And All Radio Station Transmission, et al.*, No. 99-2260, 1999 LEXIS 13967 at \*8 (E.D. Pa. Aug. 31, 1999). Since the *LeMay* case was decided on the basis of the Eighth Circuit (who in turn based its test to be “consistent” with the RFRA) it may not be as forceful in our argument as necessary. However, as noted by the *LeMay* court, “substantial burden” has several definitions, which will be applied in our argument.

<sup>110</sup> *Black Hawk v. Pennsylvania*, 114 F.Supp. 2d 327 (M.D. Pa 2000).

<sup>111</sup> *Id.* at 328.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 333.

<sup>114</sup> *Black Hawk v. Pennsylvania*, 114 F. Supp. 2d 327, 333 (M.D. Pa. 2000).

alternative to destruction and, as such, the public could be protected while preserving the bear.<sup>115</sup> In its decision, the court followed the “substantial burden” definition as suggested by the Supreme Court: “substantial burden” should be restricted to government action that forces individuals into violating their religious beliefs or penalizing religious activity by disallowing the affected individuals an equal share of rights, benefits and privileges enjoyed by others.<sup>116</sup>

### **MESHING OF FIRST AMENDMENT PROPERTY RIGHTS AND FOURTEENTH AMENDMENT PROPERTY RIGHTS IN RELATION TO CADAVERIC CORNEAL DONATION LAWS**

It is evident that courts have inched their way to recognizing a type of interest in a deceased’s body as evidenced in state courts, federal district courts and appellate courts.<sup>117</sup> Whether labeled a “quasi-property” right protected, right of possession, right of entitlement or any other similar label, it is clear that courts have recognized limited rights for decedents’ families.<sup>118</sup> Furthermore, this minimum interest in the dead body can be viewed as allowing a family to practice its religious burial rights appropriately. If courts have been willing to permit limited interests in corpses, and other courts have been willing to uphold uses with religious property (*See supra*, the Free Exercise cases), it may well be that the use of a “religious limited property” (the deceased’s body) is protected under the guise of the Free Exercise Clause of the First Amendment. Cadaveric corneal donation statutes, to at least be attacked by strict scrutiny, must not be neutral nor have a general application. At first glance, these statutes seem to be neutral in that they do not specify any religions. However, since application of the cadaveric corneal donation laws readily affects those religions that forbid tampering with corpses and not religions that allow tampering, corneal statutes are not neutral on their face. Thus, such statutes are not religion-neutral and generally applicable, thereby necessitating strict scrutiny analysis. In other words, the statutes must be justified by a compelling government interest and must be narrowly tailored to advance that interest.

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<sup>115</sup> *Id.* at 333.

<sup>116</sup> *Id.* at 331, n.9. The suggestion was offered in *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 449 (1988). *See id.*

<sup>117</sup> *See supra* notes 63-64; 74;80; 88-92.

<sup>118</sup> *Id.*

Even if the statutes are considered neutral, to achieve strict scrutiny analysis, one must show that corneal donation statutes invoke a substantial burden on the exercise of religion. Applying the various Circuit Court definitions of “substantial burden” on religious activity, all definitions would require strict scrutiny application since cadaveric corneal donation statutes impose a substantial burden. According to the Ninth Circuit’s narrow definition, a law substantially burdens a follower if it prevents him/her from engaging in conduct or having a religious experience which the religion commands, and the burden must be substantial and an interference with a belief that is central to religious doctrine.<sup>119</sup> Although arguably central to religious doctrine (it is central to burial rights), it is clearly a religious command by Islam, and to a significant degree Judaism, that no one tampers with the corpse. Furthermore, corneal harvesting under the presumed consent laws would theoretically be at odds with the Mormons (personal decision and weighing the advantages and disadvantages occurs while the donor is alive), Jehovah’s Witnesses (organs and tissue are rarely ever drained *completely* of blood before transplantation), and Protestants (person’s right to make decisions regarding his or her own body), thereby evincing a substantial burden under the Ninth Circuit’s definition. At a minimum then, the statutes obstruct Muslims (and to a lesser degree Jews) from engaging in conduct which their respective religions command, and frustrate organ donation principles among Mormons, Jehovah’s Witnesses, and Protestants. Hence, under the Ninth Circuit’s test of substantial burden, the statutes probably will elicit strict scrutiny analysis.

Irrespective of the Ninth Circuit analysis, the Seventh, Eighth and Tenth Circuit’s broader definition of substantial burden will surely meet the requirement of strict scrutiny. Several of the five factors are fulfilled: (1) corneal removal significantly inhibits conduct that manifests some central tenet of Muslims or Jewish belief; (2) cadaveric corneal donation laws (in a non-incidental way) meaningfully curtail a Muslim and Jewish practice of burial; and (5) cadaveric corneal donation laws deny a Muslim or Jew all opportunities to engage in burial activities that are fundamental to their respective religions. As these Circuits have discussed, strict scrutiny analysis is satisfied when any of the five factors are met.<sup>120</sup>

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<sup>119</sup> See *supra* note 107.

<sup>120</sup> See *supra* note 108.

Moreover, if the Supreme Court's definition of substantial burden applied – which states that government action that forces individuals into violating their religious beliefs or penalizing religious activity by disallowing the affected individuals an equal share of rights, benefits and privileges enjoyed by others – then strict scrutiny would also be triggered.<sup>121</sup> Cadaveric corneal donation laws force Muslims and Jews into violating their religious beliefs by allowing coroners to tamper with corpses. As noted earlier, such action is in direct opposition with Jewish and Islamic beliefs. These laws also violate religious beliefs of others: they force Mormons to give up their decision on whether or not to donate organs, they preclude Jehovah's Witnesses from fulfilling their requirement of blood drainage, and they eliminate the choice of Protestants to choose a course of action regarding their bodies.

As to the non-neutral analysis of the statutes (or to the neutral analysis of substantial burden which, as noted above, will trigger strict scrutiny), it is obvious that curing blindness and other ocular conditions are a compelling government interest. However, the second prong of the strict scrutiny analysis is not met in relation to corneal donation laws - - narrow tailoring to advance the government's interest. The states that allow cadaveric corneal donation laws under presumed consent could use other means in addressing the societal problems of ocular conditions. Namely, such states could make laws that allow for corneal removal only from religious groups that are not offended by such action. For example, states could pass corneal laws that allow removal with the caveat that Muslims and Jews and other groups are exempt. Alternatively, states could have "religiously sensitive" coroners who are aware of the religious implications as to burial rights among various religions. Thus, under a strict scrutiny analysis by either method (neutral or non-neutral regulation), cadaveric corneal donation laws are unconstitutional for violating the Free Exercise Clause.

## CONCLUSION

From the stances on property interests of several courts, and the current position of Free Exercise analysis, it is quite likely that presumed consent cadaveric corneal donation laws are unconstitutional, as substantially burdening certain religious groups in conducting their

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<sup>121</sup> See *supra* note 116.

religious practices to their limited form of property: their loved one's body.