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- Moore, G. E. 1903. *Principia Ethica*. Cambridge, UK: Cambridge University Press.
- Nelson, J. L. 2003a. *Hippocrates' Maze*. Lanham, MD: Rowan & Littlefield
- Nelson, J. L. 2003b. Harming the dead and saving the living. *American Journal of Bioethics* 3(1): 13–15.
- Nelson, J. L. 2005. Trust and transplants. *American Journal of Bioethics* 5(4): 26–28.
- Peters, D. A. 1986. Rationale for organ donation: Charity or duty? *Journal of Medical Humanities and Bioethics* 7(2): 106–121.
- Spital, A. 1991. The shortage of organs for transplant: Where do we go from here? *New England Journal of Medicine* 335(17): 1243–1246.
- Spital, A. 1996. Mandated choice for organ donation: Time to give it a try. *Annals of Internal Medicine* 125(1): 66–69.
- Spital, A. 2003. Conscriptio of cadaveric organs for transplantation: Neglected again. *Kennedy Institute of Ethics Journal* 13(2): 169–174.
- Spital, A. 2005. Conscriptio of cadaveric organs for transplantation: A stimulating idea whose time has not yet come. *Cambridge Quarterly of Healthcare Ethics* 14(1): 107–112.
- Spital, A., and J. S. Taylor. March 2007. Routine recovery of cadaveric organs for transplantation: Consistent, fair, and life-saving. *Clinical Journal of the American Society of Nephrology* 2(2): 300–303.
- Spital, A., and J. S. Taylor. 2008. In defense of routine recovery of cadaveric organs: A response to Walter Glannon. *Cambridge Quarterly of Healthcare Ethics* 17(3): 337–343.
- Veatch, R. M. 2000. *Transplantation Ethics*. Washington, D. C.: Georgetown University Press.

The Organ Conscriptio Trolley Problem

Adam Kolber, University of San Diego School of Law

Delaney and Hershenov (2009) describe two scenarios intended to elicit the intuition that we have the right to use the organs of a non-consenting deceased donor in order to save a life. I will argue that these scenarios are inadequate to the task. I will instead describe a more convincing thought experiment that I call the “organ conscriptio trolley problem.”

In one scenario, Delaney and Hershenov (2009) ask us to consider mandatory autopsies in cases where foul play is suspected. They claim that we approve of such autopsies even when they contravene the wishes of the deceased and the deceased’s family. Even if we agree, however, the situation is disanalogous to organ conscriptio because after an autopsy, the deceased is usually buried with his organs intact (more or less). By contrast, in cases of organ conscriptio, the deceased is buried without certain organs. So one could argue that mandatory autopsies are morally different from organ conscriptio in that only the latter permanently deprives the deceased of burial with a complete set of organs. Moreover, only organ conscriptio involves the ongoing *use* of the deceased’s organs. Therefore, the mandatory autopsy case does not necessarily support the authors’ intuition-based defense of organ conscriptio.

Another scenario the authors envision concerns a visitor to a cemetery who gets caught in a fire. He “can only escape the fire by taking refuge in [a] mausoleum and using the

fresh corpse as a fire shield” (Delaney and Hershenov 2009, 3). Even though the visitor knows that such use violates the preferences of the deceased, the authors argue that we would nevertheless agree that the corpse may permissibly be used to protect the visitor’s life.

In the mausoleum scenario, however, it appears that the dead body would, regardless of the visitor’s intervention, be destroyed by the fire. At a minimum, the description of the scenario suggests nothing to the contrary. In that case, the scenario is disanalogous to the organ conscriptio context where a non-consenting donor’s body would have remained intact if it had not been conscripted for donation. Moreover, in the mausoleum scenario, the corpse is desecrated by the very person whose life is endangered. By contrast, in the organ conscriptio context, the intervention is made by a third party, like a surgeon. Yet, we may be morally permitted to take actions to save our own lives that we are not permitted to take to save the lives of others. For example, you are permitted to duck to avoid a bullet, even if doing so will lead to the death of the person behind you. Yet, one might claim that you are not entitled to cause a person to duck when doing so will lead to the death of the person behind him. Thus, the fit between the authors’ scenarios and the intuitions they hope to elicit are not as tight as they could be. While Delaney and Hershenov (2009) may be right about their conclusion, they fail to clearly elicit the right intuitions.

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In “A Matter of Priority: Transplanting Organs Preferentially to Registered Donors,” I proposed a more convincing thought experiment (Kolber 2003, 691–696). Suppose that a runaway trolley is approaching a living person tied to the trolley tracks. The only way that you can stop the trolley is to push a large corpse in its path to make the trolley gradually grind to a halt just before it would have smashed into the living person. Most people share the intuition that you are permitted to use the corpse to stop the trolley, even if you know that the deceased would have objected to this use and even if the deceased’s relatives are currently standing right next to the trolley pleading with you to leave the corpse alone.

The organ conscription trolley problem elicits the intuition that, in order to save a life, we may override a deceased’s wishes to be buried intact. We may do so even though the trolley will permanently destroy the deceased’s organs. Moreover, the destruction of the organs is not merely an unfortunate side effect of the effort to stop the train. We may assume that it was the deceased’s internal organs that slowed the speed of the trolley just enough to preserve the life of the person tied to the tracks.

Of course, even if my trolley problem demonstrates that we have the right to use the organs of non-consenting deceased donors when doing so is *the only method* of saving a life, it still provides little support for the authors’ suggestion that we abandon a consent-based organ procurement policy. While we may be permitted to use the organs of a non-consenting donor to save a life when there are no other options, when time permits, we may well be obligated to explore options to induce consent before we can conscript. To

illustrate, suppose that, while alive, one of two people gave advance consent to have his body used to stop a runaway trolley. After both die, we are confronted with the organ conscription trolley problem and must select one of the two bodies to use. Surely, we should pick the body of the person who gave consent. Moreover, it is arguably *impermissible* to use the body of the non-consenting person under such circumstances.

In the real world, we have many possible methods of saving lives that do not require us to conscript non-consenting donor bodies. For example, we may be able to induce consent by financially compensating donors or donor families or by offering priority incentives which give those who agree to donate some preference should they ever need to receive an organ (Kolber 2003, 682–714). The authors concede that such policy proposals may be desirable on grounds of political feasibility (Delaney and Hershenov 2009, 3). They do not, however, seem to fully appreciate that the moral permissibility of using non-consenting donor bodies to save lives turns on the range of alternative methods we have to obtain organs without violating donor preferences.

REFERENCES

- Delaney, J., and D. B. Hershenov. 2009. Why consent may not be needed for organ procurement. *American Journal of Bioethics* 9(8): 3–10.
- Kolber, A. J. 2003. A matter of priority: Transplanting organs preferentially to registered donors. *Rutgers Law Journal* 55: 671–739.

Hypotheticals, Analogies, Death’s Harms, and Organ Procurement

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Delaney and Hershenov (2009) have produced an important and interesting target article, ambitious in scope and argument, significant in conclusion. These remarks are sparked by their hypothetical case, their chief analogy, and their Epicurean views about death—all of which topics deserve much more extended consideration.

Consider first their “fire shield” case. Like Delaney, Hershenov, and their students, I think that the cemetery visitor has not acted wrongly in taking the only available response to a life-or-death emergency despite having contravened the wishes of the deceased, and this quite apart

from any worries about whether the dead can be wronged. Amend the hypothetical: make it necessary for someone to shield behind a piece of property owned by a living person who had forbidden its so being used. I still have no problem using it to save a life.

However, it is far from clear that my response to their hypothetical reveals that my ‘deepest values’ entail the permissibility of routine conscription of the organs of unwilling people, for purposes of responding to a continuing threat that, at least in principle and likely in practice, could be met in other ways. I am equally skeptical that my reaction to

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