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**Epicureanism, Presumed Consent, Organ Conscription, and Futures Markets in
Cadaveric Organs**

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(Chapter 8 in Epicurean Thanatology and Contemporary Bioethics.)

In the previous Chapter it was noted that one might believe that the Epicurean view that death is not a harm to the person who dies should be rejected on the grounds that this view would make it both too difficult for the Epicurean to acknowledge that suicide could, in some circumstances, be rational, and too easy for her to endorse the moral acceptability of euthanasia. In that Chapter, then, the plausibility of this Epicurean view was assessed in the light of these two bioethical debates. In both this Chapter and the next, however, a more standard tack will be taken, with the arguments of various contemporary bioethical debates being assessed through the lens of full-blooded Epicureanism.

From the arguments in the last Chapter it is clear that even though the full-blooded Epicurean (as well as her more moderate counterpart) holds that death is nothing to us she is not thereby committed to rejecting the claim that persons whose lives are going well have reason to continue living. Instead, all but the Perverse Epicurean would agree with Lucretius that “For anyone who has been born ought to want to remain alive for as long as sweet pleasure retains him.”¹ Given this, then, it is also clear that a full-blooded Epicurean should be concerned with those debates in contemporary bioethics that are concerned with the ethical restrictions that are imposed upon policy makers and healthcare professionals in their quest to improve and further human life. An Epicurean, then, should be concerned with both the prudential and ethical issues that surround the possibility of the development of life-extending technology that would make possible human immortality, or near immortality, such as the question of whether such immortality is desirable, and the questions of distributive justice that its possibility would raise.² More prosaically, she should also be concerned with those more practical debates that concern policy measures that could be more immediately implementable to extend human life, such as the legitimacy or otherwise of using “libertarian paternalism” to “nudge” persons towards making more healthy choices,³ and the moral legitimacy of using markets or other means to increase the supply of human organs that are available for transplant into those who need them.⁴

Yet while the full-blooded Epicurean should be interested in these bioethical issues her thanatology will not be directly relevant to all of them. (An Epicurean thanatologist, for example, would not have anything to say qua Epicurean thanatologist about the issues of distributive justice that would be raised by the discovery of an expensive but effective elixir of life.) It will, however, be both relevant and important to

some, even if (as was acknowledged in the Introduction to this volume) its truth will not itself decide the debates that it is relevant to. One such debate is the question of whether it is morally legitimate to use policies of presumed consent—or even conscription—to secure an additional supply of cadaveric organs for transplant. And it is to this issue, then, that we will now turn.

Epicureanism and Policies of Presumed Consent

It is widely acknowledged that there is currently a significant shortfall in the number of human organs that become available for transplantation each year.⁵ One proposed solution to alleviating this shortfall is to introduce a system of presumed consent, whereby a person is presumed to have consented to have her transplantable organs removed from her postmortem body unless she has explicitly indicated otherwise.⁶ Such a system stands in contrast to the system of organ procurement (“presumed refusal”) that is currently used in both the United States and the United Kingdom, whereby it is presumed that a person would refuse to have her transplantable organs removed from her postmortem unless she had explicitly indicated otherwise. Unlike the debates over the ethics of other proposed means of alleviating the organ shortage (such as introducing a market for human organs)⁷ the debate over the ethics of introducing a policy of presumed consent has largely focused on a single issue, and one that clearly is of interest to a full-blooded Epicurean: Whether a policy of presumed consent or a policy of presumed refusal would lead to fulfilling the wishes of a greater number of persons with respect to the treatment of their bodies after they are dead.⁸ Persons who favor introducing policies of presumed consent argue that they would be more likely to respect person’s wishes than the practice of presumed refusal.⁹ Conversely, persons who ethically oppose policies of presumed consent do so on the grounds that such policies would be worse with respect to the violation of person’s wishes than the current practice. These persons argue either that such a policy would lead to the violation of the wishes of more people, or else that the wishes that it would violate would be especially important to the persons concerned.¹⁰ Moreover, just as the lines of the debate over the ethical status of presumed consent policies are clear, so too are the reasons that are given by both sides as to why it is morally important to respect the wishes of persons concerning the treatment of their postmortem bodies. Such respect is required, the participants in this debate agree, either out of concern for persons’ autonomy, or to ensure they are not harmed by the thwarting of their wishes concerning the treatment of their bodies.¹¹

Given that (as was argued in Chapters 1, 2 and 3) posthumous harm is impossible those “fewer mistakes” arguments that are based on the concern with avoiding harming persons by thwarting their wishes postmortem can be immediately dismissed. One might also be tempted similarly to dismiss immediately those “fewer mistakes” arguments that are based on the moral concern with personal autonomy on the grounds that (as was argued in Chapter 4) the dead cannot be wronged. Thus, one might think, since the dead can neither be harmed nor wronged there can be no reason to be concerned about the postmortem thwarting of their wishes. However, while this argument is certainly a tempting one for a full-blooded Epicurean to make she should resist its appeal. The ethical concern with respecting the wishes of the dead is deeply entrenched within contemporary bioethical discussions, and especially within those pertaining to the ethics of posthumous organ procurement. Given this, then, it behooves the full-blooded

Epicurean to explain fully why the “fewer mistakes” arguments that are based on the value of personal autonomy are irrelevant to the debate over the ethical status of policies of presumed consent. Moreover, given the revisionary nature of this claim, it is sensible for the full-blooded Epicurean to resist the temptation to rest his case in this area on the arguments against the “Knowledge and Autonomy” view of how posthumous harm is possible that were developed in Chapter 2, and, instead, directly to argue against the relevance of the “fewer mistakes” arguments to the debate over the ethics of posthumous organ procurement. With these points in hand, then, it should be noted that the argument that will be offered in this Chapter against the “fewer mistakes” argument will be based on the view that the moral concern with personal autonomy can be fully satisfied through ensuring that certain procedures are followed to allow persons to express their wishes concerning the disposal of their bodies. Given that following such procedures will satisfy the moral concern for personal autonomy, the number of mistakes that are made in either removing or not removing persons’ transplantable organs from their postmortem bodies is irrelevant to the question of whether one has exhibited the appropriate concern for this moral value.

Yet this Epicurean argument against the relevance of the “fewer mistakes” arguments to debates over the ethical legitimacy of policies of presumed consent can be taken further than this. The proponents of the “fewer mistakes” arguments assume that it is ethically incumbent upon persons to respect the views of others concerning the treatment of their bodies after their deaths. But (and especially for a full-blooded Epicurean) it is not clear that this is so. Indeed, there are good arguments to be made that given the significant costs to others (i.e., those who need the organs to survive) of respecting such wishes there is no ethical duty to be concerned with persons’ consent (or otherwise) to the harvesting of their organs at all, but that, instead, *all* useable organs should be considered available for transplant irrespective of the desires of those persons in whose bodies they were contained. Rather than being concerned with policies of presumed consent, then, perhaps a full-blooded Epicurean should be more interested in moving to implement policies of organ *conscription*.¹² This abandonment of the ethical concern with securing persons’ consent to the postmortem use of their organs is greeted with horror by many, especially classical liberals who regard it as being tantamount to organ theft.¹³ And the ethical qualms of such persons might not be unwarranted for (as will be argued in this Chapter) the standard arguments concerning organ conscription rest on two assumptions that (absent further argument) are unjustified. However, even if it transpires that the ethical qualms of the classical liberal opponents to organ conscription are *not* warranted, they might not be as dismayed by the practical implications of such a policy as they are by its theoretical justification. As will be argued at the close of this Chapter, given the falsity of one of the assumptions that underlies current arguments for organ conscription it is likely that in practice a policy of organ conscription will naturally lead to a *de facto* futures market for cadaveric organs. And this is a consummation devoutly to be wished by the classical liberal opponents of conscription.

The strategy of this Chapter is as follows. First, the “fewer mistakes” arguments that are the focus of the debate over the moral permissibility of policies of presumed consent will be outlined. Second, it will be argued that the autonomy-based “fewer mistakes” arguments that have been developed to show that policies of presumed consent are ethically acceptable are mistaken. Here, it will be shown that these arguments are

irrelevant to the debate concerning the ethical acceptability of policies of presumed consent. With this in hand the main arguments in favor of organ conscription will be outlined, and the assumptions that they are based on exposed and criticized. Finally, it will be argued that given the rejection of these assumptions even if a policy of organ conscription was implemented, it would naturally lead to a *de facto* futures market in transplantable human organs.

Presumed Consent and the “Fewer Mistakes” Arguments

Under a system of presumed consent it is presumed that persons would prefer to donate their organs for transplantation after their deaths. If persons do not wish to donate, they would have the opportunity to register their objection to having some or all of their organs removed, and their objection would be respected. (Systems of presumed consent are thus often referred to “opt out” systems, as persons opt out of having their organs removed.) Thus, under such a system of organ procurement if a person died without registering her objection to the removal of her organs postmortem it would be presumed that she had consented to have them removed were they suitable for transplantation. The presumed consent approach to organ procurement is in contrast to the current system of organ donation, “presumed refusal” (often termed an “opt in” system), in which a person’s organs will not be removed from her postmortem body unless she has explicitly consented to this being done.

The debate over the moral status of policies of presumed consent focuses on “whether or not a policy of presumed consent would do a better job than the current system at respecting people’s wishes about what should happen to their bodies after death.”¹⁴ The proponents of presumed consent argue that acting on the presumption that persons would wish to have their organs removed for transplantation after their deaths would be more likely to respect persons’ actual wishes than the presumption that undergirds the current system (i.e., that persons do not wish to have their organs removed postmortem for transplantation). C. Cohen, for example, notes that about 70% of Americans would be willing to have their organs removed postmortem for transplantation if they were suitable for this.¹⁵ However, he observes, under the current system of presumed refusal the wishes of only a small percentage of these people would be acted upon. This is because very few people adequately indicate that they wish to donate their organs postmortem, and so their antemortem wish to do so is not considered.¹⁶ Under a policy of presumed consent, though, persons’ wishes would be respected at least 70% of the time.¹⁷ As such, concludes Cohen, a policy of presumed consent is more likely that the current system of presumed refusal to respect persons’ wishes.

In contrast to Cohen, R. M. Veatch and J.B. Pitt have argued that presumed consent is ethically unacceptable since it is likely to violate persons’ antemortem wishes concerning the postmortem disposal of their bodies.¹⁸ Drawing on the same data as Cohen, Veatch and Pitt note that 30% of Americans wish not to donate their organs postmortem. Some percentage of this group of persons would, observe Veatch and Pitt, fail to register their objection to having their organs removed after their deaths. Under a policy of presumed consent the organs of these people would, if they were suitable for transplantation, be removed from their bodies after their deaths. These persons’ desires concerning what happens to their postmortem bodies would thus be thwarted. Moreover, argue Veatch and Pitt, under the current system of presumed refusal it is very unlikely that a person’s organs would be removed postmortem if they had not explicitly consented

to this. As such, conclude Veatch and Pitt, adopting a system of presumed consent rather than retaining the current system of presumed refusal is more likely to thwart the wishes of those who do not want their organs removed after their deaths.

Both sides of the debate over the moral status of policies of presumed consent thus focus on establishing one claim: That the method of organ retrieval that they morally favor would lead to the fewest number of mistakes in the postmortem retrieval of organs. That is, persons on both sides of the debate argue that their preferred method of organ retrieval would violate a fewer number of person's wishes concerning whether their organs can be transplanted postmortem than would the alternative method. (Such "fewer mistakes" arguments can be called the *quantitative* "fewer mistakes" arguments.) If this were the end point of the debate then it would seem that the proponents of presumed consent policies would be in a stronger position than their opponents.¹⁹ As Michael Gill has noted, "not only... [do]...a majority of Americans prefer to donate their organs, but...it is plausible to believe that a person who does not want to donate is more likely to opt out under a system of presumed consent than a person who does want to donate is to opt in under the current system."²⁰ A person who does not want to have her organs removed for transplantation after her death is likely to oppose their removal for moral, prudential, or religious reasons that are very important to her. She is thus very likely to register her refusal to have her organs removed after her death. For example, a person who believes that she cannot be resurrected unless her body is intact is unlikely to delay registering her objection to the removal of her organs. By contrast, Gill argues, a person who wishes to donate her organs would be less motivated to register her desire for this, for the effects of her failing to do so would be unlikely to be as significant for her.²¹ Given these motivational differences between persons who wish not to have their organs transplanted postmortem, and those who do, then, it is likely that fewer mistakes will be made in following the antemortem wishes of decedents were a policy of presumed consent to be adopted.

This quantitative "fewer mistakes" argument in favor of a policy of presumed consent rests, however, on an implicit premise that the opponents of this policy do not accept: That "mistaken removals and mistaken non-removals [of organs] are morally equivalent..." and so all that matters is the number of each.²² Some who oppose presumed consent policies claim that this premise is false, holding that rather than being on a par, mistaken removals are morally worse than mistaken non-removals. Those who oppose policies of presumed consent on these grounds charge that even though a policy of presumed consent might lead to fewer mistakes, the gravity of the mistakes that it would lead to (i.e., mistaken removals) would be such that the incidence of even just a few such mistakes would be morally worse than the occurrence of a greater number of lesser mistakes (i.e., mistaken non-removals). This *qualitative* version of the "fewer mistakes" argument, then, rests on the claim that the *type* of desires that are thwarted by mistaken removals of organs are qualitatively different from those that are thwarted by mistaken non-removals.²³

Autonomy-Based "Fewer Mistakes" Arguments

Gill's Arguments

Both those who use "fewer mistakes" arguments to support the adoption of presumed consent policies and those who draw on such arguments to oppose them agree that we should endeavor to treat persons' postmortem bodies as they would wish us to

treat them. The most common reason offered for this concern is that such treatment is required by respect for the autonomy of the persons whose bodies they were.²⁴ (As will be noted below, this claim does not commit one to holding the bizarre view that one should respect the autonomy of the dead. Rather, it should be understood such that respecting the autonomy of persons *while they are alive* commits one to taking their expressed autonomously-formed desires concerning the treatment of their postmortem bodies into account when deciding how to treat them.) An autonomy-based version of the “fewer mistakes” argument of this sort has been developed by Michael B. Gill to support the adoption of presumed consent policies. Gill begins his argument by taking issue with the autonomy-based qualitative “fewer mistakes” argument that is marshaled to oppose the implementation of presumed consent policies. Gill illustrates the core idea of this qualitative argument by comparing “our different attitudes toward punishing the innocent and not punishing the guilty.” Gill notes that we do not believe “that all legal mistakes are morally equivalent,” for although “Mistaken convictions and mistaken acquittals are both bad...mistaken convictions are worse. It’s worse to punish an innocent person than not to punish a guilty one.”²⁵ Similarly, observes Gill, those who oppose policies of presumed consent on the basis of qualitative “fewer mistakes” arguments believe that the mistaken removal of a person’s organs is much worse, morally, than the mistaken non-removal of a person’s organs. These opponents of policies of presumed consent, Gill claims, believe that mistaken removals of organs are morally worse than mistaken non-removals of organs because the former “violate the right of bodily control” while the latter do not.²⁶ As Gill puts it, those who oppose policies of presumed consent on these grounds

...seem to believe that when we remove organs from the body of someone who did not want them removed, we invade her body against her wishes, which constitutes a blatant violation of her autonomy. Mistaken non-removals, in contrast, merely fail to help bring about a state of affairs the individual desired. And while it is unfortunate if we fail to help a person achieve one of her goals, this failure pales in comparison to the violation of a person’s right to decide whether an invasive procedure is performed on her body.²⁷

Against this autonomy-based qualitative “fewer mistakes” argument Gill argues that the mistaken removal of a person’s organs is morally equivalent to their mistaken non-removal. Gill begins his argument for this claim by distinguishing

...between two models of respect for autonomy...The first is what we can call the non-interference model of autonomy: it tells us that it is wrong to interfere with a person’s body unless the person has given us explicit permission to do so. The second is what we can call the respect-for-wishes model of autonomy: it tells us that we ought to treat a person’s body in the way that he wishes it to be treated.²⁸

With these two models of respect for autonomy in place, Gill argues that the respect-for-wishes model should direct our treatment of persons’ postmortem bodies. Gill argues that it would not be reasonable to use the non-interference model of respect for autonomy to

govern our treatment of persons' postmortem bodies because this model implies that we should do nothing to them if the persons whose bodies they were left no specific instructions concerning their treatment. But such complete non-interference is impractical. We would not, for example, simply leave such persons' bodies where they fell. Given this, infers Gill, we should use the respect-for-wishes model of respect for autonomy to govern our treatment of persons' postmortem bodies. And on this model, Gill holds, "each type of mistake is on a moral par, for each type of mistake involves treating a person's body in a way that the person did not want."²⁹ Thus, concludes Gill,

If...our goal is to respect the autonomy of brain-dead individuals, we have no choice but to operate under the respect-for-wishes model of autonomy. And according to the respect-for-wishes model, we ought to implement the organ procurement policy that results in the fewest mistakes. If, therefore, presumed consent will result in fewer mistakes than the current system, presumed consent will be more respectful of autonomy than the current system.³⁰

Why Gill's Argument against the Qualitative "Fewer Mistakes" Argument Fails

Gill attempts to establish three related conclusions with his arguments: That the autonomy-based qualitative "fewer mistakes" argument should be rejected, that the autonomy-based quantitative "fewer mistakes" argument should be accepted—and that this latter conclusion supports adopting a policy of presumed consent. However, Gill's arguments fail to establish any of these conclusions.

There are two mistakes in Gill's argument that the qualitative "fewer mistakes" argument should be rejected. The first concerns his view that the "non-interference" model of respect for autonomy should be rejected and the "respect-for-wishes" model of respect for autonomy should be accepted. Gill is correct to note that if the non-interference model of respect for autonomy should be accepted and the respect-for-wishes model rejected then the autonomy-based qualitative "fewer mistakes" argument should be accepted over his own autonomy-based quantitative "fewer mistakes" argument. This is because if respect for autonomy requires only that a person's body is not interfered with rather than requiring that "we ought to treat a person's body in the way that he wishes it to be treated," then the mistaken removal of a person's organs (an interference with her body) would be worse from the point of view of one who was concerned with respecting autonomy than would their mistaken non-removal (which would merely be a failure to treat her body as she wished). However, in framing the argument this way Gill treats these models of respect for autonomy as though they are competitors. But they are not. The non-interference model of respect for autonomy is plausible as a model of respect for autonomy *only if* we assume that a person would not wish us to interfere with her body. The non-interference model of respect for autonomy is therefore simply a variant of the respect-for-wishes model of respect for autonomy in which the plausible assumption that persons do not want their bodies interfered with has been made explicit. At first sight, this first mistake in Gill's argument against the qualitative "fewer mistakes" argument does not undermine it, but, rather, seems to lend support to it. (Although this appearance is misleading, as will be argued below.) Gill intends his argument to establish that the respect-for-wishes model of respect for autonomy and not the non-interference model of respect for autonomy should be used to

guide decisions concerning which organ procurement policies should be implemented. Thus, insofar as the non-interference model of respect for autonomy is simply a variant of the respect-for-wishes model of respect for autonomy Gill's conclusion here can be accepted.

However, although Gill is right that the respect-for-wishes model of respect for autonomy should be accepted as that which should be drawn upon when considering which organ procurement policies to adopt (assuming that is, that one believes that respect for autonomy is important—an assumption that will be challenged, below, by organ conscriptors) this does not support his rejection of the qualitative version of the “fewer mistakes” argument. Although all parties to the debate over the ethical status of policies of presumed consent should accept that the respect-for-wishes model of autonomy is the appropriate one to use in deciding how to treat persons' postmortem bodies this does not show, as Gill claims, that “each type of mistake [concerning organ retrieval] is on a moral par, for each type of mistake involves treating a person's body in a way the person did not want.”³¹ Gill fails to recognize that the respect-for-wishes model of respect for autonomy is perfectly compatible with the central claim made by the proponents of the qualitative “fewer mistakes” argument. That is, it is perfectly compatible with the claim that respecting certain wishes (e.g., the wish not to have one's organs removed) is more important than respecting others (e.g., the wish for one's organs to be transplanted into another after one's death). That both mistaken removals and mistaken non-removals of organs involve treating a person's body as she did not want it to be treated thus does *not* show that such mistakes are therefore on a moral par, as Gill asserts.

Gill's mistaken distinction between the two models of respect for autonomy that he outlined was thus not as innocuous as it might have first appeared. This distinction appears to have led Gill into believing that the qualitative “fewer mistakes” argument had to be coupled with the non-interference model, and the quantitative “fewer mistakes” argument had to be coupled with the respect-for-wishes model. If this presumption about Gill's thinking is correct, then this distinction appears to have led Gill to believe that all he had to do to show that the latter argument should be accepted and the former rejected was to show that the non-interference model of respect for autonomy would be an inappropriate one to use to direct the treatment of persons' postmortem bodies. Gill's initial distinction between the two models of respect for autonomy and their coupling with the two different approaches to the “fewer mistakes” argument, then, served to gloss over the fact that accepting the respect-for-wishes model of autonomy is perfectly compatible with accepting the qualitative version of the autonomy-based “fewer mistakes” argument. And since this is so, Gill's argument that established that the respect-for-wishes argument should be accepted failed also to show that his quantitative version of autonomy-based “fewer mistakes” argument should be accepted in place of its qualitative rival.

Objections to Gill's Quantitative Autonomy-Based “Fewer Mistakes” Argument

Having shown that Gill's argument against the autonomy-based qualitative “fewer mistakes” argument fails, his autonomy-based quantitative “fewer mistakes” argument in favor of a policy of presumed consent will now be considered.³² Gill's argument here is based on the claim that to respect the autonomy of those persons whose cadaveric organs would be suitable for transplantation one should implement policies that respect their

choices concerning the treatment of their postmortem bodies. For Gill, then, respect for autonomy requires that policies concerning the retrieval of transplantable organs from cadavers be implemented that leads to the fewer number of mistakes being made, where a mistake is made if a person's postmortem body is treated in a way that she would have not wished it to have been treated. At first sight, this argument seems reasonable. It seems clear that respect for the autonomy of deceased persons requires that we attempt to minimize the number of mistakes that might be made (e.g., the mistaken removal of a person's transplantable organs when she opposed this) concerning the treatment of their postmortem bodies. After all, if one did not attempt to minimize the number of such mistakes then it seems that one would be failing to take seriously persons' wishes concerning the treatment of their bodies after their deaths. And if one did this then it would appear that one was failing to respect their autonomy.

Despite first appearances, however, this argument of Gill's is mistaken. Its plausibility rests on the view that if one fails to take steps to ensure that persons' wishes concerning the treatment of their bodies are not likely to be thwarted after their deaths then one will have failed to respect their autonomy. This view requires that for one person to respect the autonomy of another she must act to ensure that his wishes are not likely to be thwarted. (This claim is not, as Gill makes clear, the stronger claim that to respect a person's autonomy one must treat her postmortem body in the way she wanted it to be treated.)³³ But this is an implausibly stringent account of what it is to respect a person's autonomy, and overlooks the fact that there are three ways in which respect for autonomy could be instantiated: *Strong absolutism* (in which a person's consent for her involvement in a procedure is necessary for it to be morally permissible for her to be involved in it); *weak absolutism* (in which a person's involvement in a procedure is impermissible if she has refused to be involved in it), and *proceduralism* (in which even if a person objects to being involved in a procedure requiring her to be involved in it could be permissible if her interests have been given the appropriate moral consideration). Which of these ways of respecting autonomy would be the appropriate one to adopt would depend upon the situation at hand. Assuming that the value of a person P's autonomy conflicts with the value of the well-being of other persons, the decision concerning which of these would be the appropriate approach to take to instantiate respect for P's autonomy would turn on the answers to five questions: (i) the degree of harm or wrong that P would incur were his autonomous decision not to be adhered to; (ii) the degree to which such a failure to adhere to P's decision would advantage or disadvantage the other persons that it concerned; (iii) whether a failure to adhere to P's decision would serve to prevent harm to others, or to provide them with certain benefits; (iv) whether failing to adhere to P's decision would result in his being required actively to provide some good or service; (v) whether the goods that would be produced by the failure to adhere to P's decision could be produced in another way, and, if so, what the costs of doing so would be. Taking each of these in turn, the greater the degree of harm that P would incur were his decision not to be adhered to, the greater the justification for adopting an approach to respecting his autonomy that would lean more towards strong absolutism than towards proceduralism. Conversely, the greater the degree to which others would be disadvantaged by adhering to P's decision in comparison with the harm that would befall him the greater the justification for adopting a proceduralist approach to respecting his autonomy. Moreover, there would be more

reason to lean towards a proceduralist approach to respecting P's autonomy if a failure to adhere to his decision would serve to prevent harm to others rather than to provide them with a benefit, and there would be more reason to lean towards a strong absolutist approach if a failure to adhere to P's decision would require him actively to provide some good or service. Finally, if the good or service that is at issue could be provided in some way other than that which would require failing to adhere to P's decision this should incline one towards strong absolutism with respect to respecting his autonomy, and this inclination should be greater the lower the costs of so doing are.

Naturally, this account of what could be required by respect for autonomy is merely a programmatic one—and a highly formal one at that—and the precise approach that one should take in any given situation would be a matter for debate. Yet, even though this is so, given the arguments of Chapters 1 to 4 it is clear that a proceduralist approach to respecting autonomy would be a justifiable one to adopt with respect to the question of how one should respect persons' autonomous wishes concerning the treatment of their transplantable organs after their deaths. Clearly, the question of (posthumous) harm can be put to one side in addressing (i), as can the question of whether persons would be wronged by the removal of their organs postmortem were they to object to this.³⁴ Second, one should incline towards proceduralism here given that a failure to adhere to persons' decisions not to have their organs removed post-mortem would greatly disadvantage the other persons concerned (i.e., the potential recipients of their organs). The answers to the third and fourth questions also support proceduralism in this case. A failure to adhere to persons' decisions concerning their postmortem bodies is likely to prevent harm to those persons who would otherwise suffer from not receiving his organs, while (in answer to the fourth question) a failure to adhere to their decisions not to have their organs removed would not result in their providing some good to others (for they would not exist at the time of removal).³⁵ Finally, although the organs could be procured for transplant into any particular person could be secured in more than one way (through donation, for example, as well as through policies of presumed consent) in general given the limitations of altruistic donation and the current prohibition on a market in human organs it is unlikely that any significant increase in the number of organs procured will occur without a policy of either presumed consent or straightforward organ conscription.³⁶

As such, then, within the context of this debate over the morality of policies of presumed consent one need not take steps to minimize the likelihood that a person's wishes will be thwarted to respect her autonomy. Instead, one need only take those wishes that she is autonomous with respect to seriously, and give them due weight in one's considerations.³⁷ Since this is so, an organ procurement policy would fully respect the autonomy of those who were subject to it if it included procedures whereby they could express their autonomously-formed wishes concerning the treatment of their postmortem bodies, and if such wishes would be given due consideration. It is thus possible fully to satisfy the moral duty to respect autonomy by allowing persons to opt-in to a system of organ donation when a policy of presumed refusal is in place, or to opt-out of a system of organ donation when a system of presumed consent is in place. Since taking persons' wishes concerning the treatment of their postmortem bodies seriously in this way would suffice for their autonomy to be respected, the number of mistaken removals or mistaken non-removals of person's organs is of no interest to persons concerned with respect for autonomy. As such, the autonomy-based "fewer mistakes"

arguments (both qualitative and quantitative) that focus on which policy of cadaveric organ procurement is required by respect for autonomy are irrelevant to the debate over the ethical status of policies of presumed consent.

The “Fewer Mistakes” Arguments and Violations of Autonomy

Yet even though the autonomy-based “fewer mistakes” arguments that focus on *respect* for autonomy are irrelevant to the debate over the ethical status of presumed consent policies one might still attempt to defend the moral relevance of other autonomy-based “fewer mistakes” arguments to this debate by distinguishing between a *failure to respect* a person’s autonomy, and a *violation* of her autonomy.³⁸ One might argue that even if mistaken removals and mistaken non-removals of persons’ transplantable organs would not themselves evince a failure to *respect* the autonomy of the persons whose bodies were thus mistreated, they would still *violate* it. With this claim in hand, one might argue that if one is concerned with the moral value of personal autonomy one should still be concerned with autonomy-based “fewer mistakes” arguments, for one should identify which system of cadaveric organ procurement would result in the least number of such autonomy violations.

This approach to defending the relevance of autonomy-based “fewer mistakes” arguments to the debate over the ethical status of presumed consent policies has a promising start. One might violate the autonomy of another without failing to respect it, and one might fail to respect a person’s autonomy without thereby violating it. To illustrate the first possibility one might forcibly prevent another person from autonomously crossing a bridge that one believes to be dangerous to ensure that he was not crossing it in ignorance of his danger, and thus unwittingly putting his autonomy at risk. This would be a local violation of another’s autonomy that was performed out of respect for his autonomy. To illustrate the second possibility, consider a person who is utterly indifferent to the autonomy of his colleagues, and, were he to gain some advantage from violating it, would not hesitate to do so. His circumstances, however, are such that he is never faced with the possibility of securing an advantage in this way. In being willing to violate his colleagues’ autonomy, then, this person fails to respect it, even though he never actually violates it. With a failure to respect a person’s autonomy being distinguished from a violation of a person’s autonomy a defender of the autonomy-based “fewer mistakes” arguments now has to show that a mistaken removal or mistaken non-removal of a person’s transplantable cadaveric organs would indeed violate her (antemortem) autonomy.

This task is complicated by the fact that although it is common to write that a person’s autonomy has been “violated” it is not immediately clear what is meant by this. There are, for example (at least) three (non-exclusive) ways in which a person’s autonomy could be violated. First, a person’s autonomy could be violated if her mental capacity for autonomy was adversely affected. For example, one might violate the autonomy of another by inflicting brain damage upon her so that her ability to direct her own life in accordance with her desires and values is now impaired. Alternatively, one might violate the autonomy of another by preventing him from using his autonomy to pursue his goals, for example, by imprisoning him. Finally, one might violate the autonomy of another by usurping control over his actions, whether covertly or overtly. A person who deceives another would violate her autonomy in this third way.

Unfortunately for the defenders of the autonomy-based “fewer mistakes” arguments, once these ways in which a person’s autonomy can be violated have been outlined it is apparent that neither the mistaken removal nor the mistaken non-removal of a person’s cadaveric organs would violate her autonomy. It is clear that neither type of mistake would adversely affect the capacity for autonomy that she possessed prior to the mistreatment of her postmortem body. Similarly, neither type of mistake would adversely affect her ability to exercise her autonomy prior to her death. Finally, neither type of mistake would evince either an overt or a covert usurpation of control over such a person’s actions. Given this, then, the number of mistaken removals and mistaken non-removals that are made would be irrelevant to the question of whether or not the autonomy of the persons whose postmortem bodies are in question would be violated. Thus, just as the autonomy-based “fewer mistakes” arguments that focus on respect for autonomy are irrelevant to the debate over the ethical status of presumed consent in which they are invoked, so too are the autonomy-based “fewer mistakes” arguments that focus on possible violations of autonomy.

Presumed Consent and Respect for Autonomy

Having argued that persons cannot suffer from violations of their autonomy after they are dead it is necessary to clarify the role that the moral concern for respecting autonomy plays in the debate over the moral permissibility (or otherwise) of using policies of presumed consent to procure transplant organs. Just as one cannot violate the autonomy of dead persons, neither can one fail to respect it. As was argued above, to respect a person’s autonomy is to take her desires seriously, such that they are given due weight in one’s deliberations. However, since the dead have no desires, one can only respect (and, thus, can only fail to respect) the autonomy of the living. Since this is so, one might conclude that neither a moral concern with respect for autonomy, nor a moral concern with avoiding violating autonomy, are relevant to the debate over the moral permissibility (or otherwise) of policies of presumed consent.

This conclusion is not at odds with the view argued for above—that the autonomy-based “fewer mistakes” arguments (both qualitative and quantitative) are irrelevant to the debate over the ethical status of policies of presumed consent. However, one should not infer from this that the moral concern with respecting autonomy is irrelevant to the issue of how the bodies of the dead should be treated. As noted above, one can only respect the autonomy of another if one gives those desires that she is autonomous with respect to due weight in one’s deliberations.³⁹ Accordingly, if living persons make their (autonomously formed) desires known concerning the treatment of their postmortem bodies, then respect for their autonomy requires that one give these desires due weight when one is considering *while these persons are alive* how one will treat their bodies after their deaths. To respect a person’s autonomy in this way requires that one perform certain actions while she is alive to ensure that her desires are appropriately considered. For example, if a policy of presumed consent is in place, then, to give due weight in the *current* deliberations concerning the *future* procurement of organs to the desires of persons who do not want their organs removed from their bodies after their deaths it should be ensured that these desires are recorded. (Alternatively, if a policy of presumed refusal is in place, it should be ensured that the desires of persons who wish to become organ donors upon their deaths are recorded.) To fail to do this would be to fail to respect the autonomy of persons who have expressed their desires

concerning the postmortem treatment of their bodies with the intention that these desires be taken into account when decisions are being made about organ procurement. In addition to requiring that persons' desires be recorded, respect for their autonomy precludes recording their desires *without intending to give them due weight* when deliberating whether to remove their organs after their deaths. To see this, note that if Bill asks Ben to do something for him in the future, and Ben agrees to do so, Ben fails to respect Bill's autonomy if he gives his agreement with no intention of keeping it.⁴⁰ Respect for autonomy, then, requires that persons be afforded the opportunity to make their wishes known concerning the treatment of their postmortem bodies, *and that these wishes be recorded with the intent that they be followed.*⁴¹ Thus, unless a reason to treat a person's postmortem body in a manner other than that which she desired arises, and this reason prevails once her relevant desires have been given their due weight, a person's wishes concerning the treatment of her corpse should be followed.⁴² To do otherwise would indicate that the intent to give due weight to the wishes of the person in question was lacking. (Note that if the intent to respect a person's wishes was lacking while she was alive then it is *at that time* that her autonomy failed to be respected. It is *not* the case that her autonomy would fail to be respected when she was dead and her antemortem wishes were not taken into account, for, as noted above, it is impossible to fail to respect person's autonomy once they are dead.) Thus, even though one cannot fail to respect a person's autonomy once she is dead, this does not mean that a concern for respect for autonomy is irrelevant to the question of how the bodies of the dead should be treated.⁴³ And this is so even though, as was argued above, none of the autonomy-based "fewer mistakes" arguments are relevant to the debate over the ethical status of policies of presumed consent.

From Presumed Consent to Conscription

It was noted above that unless there is a reason to treat a postmortem person's body in a manner other than that which she desires and this reason prevails once her relevant desires have been given their due weight, a person's desires concerning the treatment of her corpse should be followed. The proponents of organ conscription, however, argue that given the current shortage of organs available for transplantation there is often a prevailing reason to *fail* to treat a person's postmortem body in the way that she desires it to be treated if she desires it to be left intact: that the organs that are contained within it could be used to save the lives of others.

The Standard Pro-Conscription Argument

From the above observation it is clear that the standard argument in favor of organ conscription is a consequentialist one. It typically begins with the twin observations that there is a chronic shortage of organs available for transplantation, and that this shortage could be eliminated, or at least significantly alleviated, through conscripting transplantable organs from the recently deceased.⁴⁴ It then concludes with the claim that since we have a moral duty to minimize suffering, and since eliminating or reducing the shortage of transplant organs through posthumous organ conscription would achieve this, we have a moral duty to initiate the conscription of transplantable organs from neomorts (the newly dead). The case that the coupling of these observations can be used to make for the implementation of a policy of State organ conscription is often bolstered by those who favor this through comparing this type of conscription with other State-mandated practices. Thus, for example, it is argued that if the State can legitimately

conscript people into military service for the benefit of society as a whole, then it should also be legitimate for it to conscript persons' organs after they are dead to provide a social benefit (i.e., a bank of transplantable organs to be distributed among those citizens who need them). Indeed, proponents of organ conscription often argue that since it is held to be legitimate for the State to conscript people into the military, and that this harms them by coercing them into engaging in an occupation that they did not wish to engage in absent such coercion (and also subjecting them to the risk of even more serious harm), it is even *more* legitimate for the State to conscript organs from the recently deceased, since such conscription is harmless to those subjected to it.⁴⁵ Similarly, proponents of organ conscription often argue that since it is held to be legitimate for the State to require mandatory autopsies in certain circumstances for the benefit of the public (e.g., in cases where foul play is suspected, or a death might have been caused by certain types of communicable disease), then it should also be legitimate for it similarly to work for the public benefit by conscripting organs from neomorts. With these arguments in favor of organ conscription in place its proponents then move to counter the two obvious objections that this policy faces: (1) That it would evince a failure to respect the autonomy of those persons who had explicitly stated that they did not want their organs to be removed upon their deaths, and (2) that it would inflict posthumous harm upon them.

This standard argument in favor of organ conscription is persuasive—and so are its proponents' responses to the two main objections that are leveled against it. Clearly, given the arguments in Chapters 1, 2 and 3 of this volume the second objection to organ conscription can readily be met. And so can the first. As was noted above, one person can respect the autonomy of another by giving her desires due weight in his deliberations. Since this is so, then a State's imposition of a policy of organ conscription could be perfectly compatible with it fully respecting the autonomy of all of its citizens, even those that object to the possibility that their organs could be harvested under it. If such persons were given the opportunity to make their objections to such a policy known, and if these objections were given due weight in the deliberations that preceded its implementation (if, for example, they had the opportunity to campaign against it, and then to vote against it in a fair and democratic election) then their autonomy would have been appropriately respected. As such, then, the proponents of organ conscription conclude, the implementation of such a policy would not necessarily evince a failure to respect the autonomy of those who objected to the conscription of their organs.

However, this response to this objection itself moves too fast—although not in a way that undermines its overall legitimacy. As is acknowledged above, simply taking a person's autonomously formed desires into account and giving them due weight in one's deliberations need not be a sufficient ground for the claim that one has thus respected her autonomy. One could not, for example, plausibly provide a defense of the enslavement of a minority on the grounds that their enslavement respected their autonomy, since they were given ample opportunity to campaign and vote against it during the deliberative process that preceded it. Thus, although it will be *necessary* for one person to respect the autonomy of another by giving due weight to her autonomously-formed desires in his deliberations it will not be *sufficient* for this, for a genuine moral concern for the value of her autonomy will also recognize that (to draw on the terminology introduced above) absolutist responses to persons' autonomy can be justified just as can merely

proceduralist ones. A full account of when such absolutist restrictions would be more legitimate than their proceduralist alternatives is beyond the scope of this Chapter. However, it seems clear that the restrictions placed upon how one person can legitimately treat another while respecting his autonomy will not require that a person should always be protected from the thwarting of his autonomously-formed desires where such thwarting will not benefit him, but only others. It does not, for example, seem contrary to respecting the autonomy of a devoted Humean to prevent him from choosing the destruction of the whole world to prevent the scratching of his finger. However, having noted this, as the above example of the enslaved minority shows, it does seem that a genuine moral concern with respecting a person's autonomy will preclude using him in certain ways for the advantage of others. A complete and defensible account of what respect for autonomy requires will thus have to distinguish between using persons to protect the future exercise of autonomy *simpliciter* by others, and using them to enhance its instrumental value to them. Yet even this distinction would be insufficient on its own, for it would counterintuitively allow that the conscription of (at least some of) a person's organs from him while he was alive would be compatible with respecting his autonomy, provided that they could be used to save the lives of others (and hence protect their autonomy *simpliciter*).

These difficulties that will be faced by anyone wishing to develop a defensible account of what is required for one person to respect the autonomy of another in differing contexts need not, however, concern the proponents of organ conscription as they defend themselves against the charge that their preferred policy would violate the autonomy of at least some of those subject to it. Part of the difficulty in providing a defensible account of what respect for autonomy requires is that it is not clear how to compare the instrumental value accorded to one person's autonomy with the value *simpliciter* of that of another. (Indeed, it is not clear that these two ways of valuing personal autonomy are commensurable with other). Hence, even though on the margins it is clear that respect for autonomy is compatible with compromising the former value of autonomy to protect the latter it is equally clear that this is counterintuitive when applied as a general principle. Yet this commensurability difficulty is not faced by the proponents of organ conscription because it only arises when the instrumental value of one person's autonomy is being assessed against the value *simpliciter* of another's. The removal of a person's organs after she is dead does not have any effect on either the value *simpliciter* of her autonomy or on its instrumental value to her while she is alive. It is clear that the removal of a person's organs postmortem can have no effect on the value *simpliciter* of her autonomy, since corpses are not autonomous beings. It will also have no effect on the instrumental value of her autonomy to her, either. A person's autonomy has instrumental value to her insofar as its exercise will enable her to achieve some end or goal that she values. The instrumental value of a person's autonomy is thus derivative from the value to her of the goal or end that she uses it to pursue. Now, one might argue that the implementation of a policy of organ conscription would compromise the agent-relative instrumental value of the autonomy of those persons who would wish to exercise their autonomy to prevent their organs being removed from their bodies after they are dead. Such an argument would be based on the claim that the non-removal of their organs would have value for the persons who wished to avoid this. Hence, to the extent that this was so a policy of organ conscription would compromise the instrumental value of such persons' autonomy

to them, since they would no longer be able to exercise it to realize the value (to them) of the non-removal of their organs. But this anti-conscription argument is based on the claim that persons can secure value (or be subject to disvalue) through the occurrence of events that occur after they are dead. To put this in more standard terminology, it is based on the claim that persons can be subject to posthumous benefits and harms. But since (as was argued in Chapters 1, 2 and 3) persons cannot be subject to posthumous harms and benefits the instrumental value of their autonomy to them cannot be affected by events that occur after their deaths.⁴⁶ Thus, neither the instrumental nor the intrinsic value of a person's autonomy can be affected by the implementation of a policy of organ conscription, and so the problems associated with weighing and balancing differing ways of evaluating the autonomy of different persons that were a bar to providing a full account of what respecting a person's autonomy requires dissipate. Since this is so, the only issue that would be germane to the matter of whether the implementation of a given policy of organ conscription respected the autonomy of all of those subjected to it would be the question of whether they were able to participate fully in the deliberative measures that preceded it, with the desires that they were autonomous with respect to being given their due consideration.

Two Unjustified Assumptions—Moving Towards Markets

Thus far, then, the arguments in favor of organ conscription appear strong. Yet they are based on two important and (so far) unjustified assumptions. The first of these is that the above two objections to organ conscription should be based on concern for respecting the autonomy of, and avoiding the infliction harm upon, the person whose body the organs are contained in; the second is that the most appropriate body to engage in the conscription of organs should be the State.

The ownership of organs

Both of these assumptions can be challenged. While it is natural to assume that the conscription of bodily organs would be from the person in whose body they are contained (and, hence, if organs are taken from a corpse they are conscripted from no one, since their original possessor no longer exists) this is not the only possibility. There are no theoretical or practical bars to a person's internal organs being the property of another (either morally or legally) even while the original possessor is still alive. There is, for example, no theoretical or practical bar to one person making a gift of (for example) one of his kidneys to another, where this gift could in principle come complete with the full range of entitlements and duties that A. M. Honore has disaggregated the concept of property into, *even if they remained within the body of the giver*.⁴⁷ Were X to, during his life, give his organs to Y (i.e., were he to transfer to Y the full range of duties and entitlements that make up the concept of property) they would be Y's organs even while X was alive, and even if they remained within X's body. As such, if the organs contained within X's body after X had given them to Y were conscripted upon X's death, then they would be *conscripted from Y*, and not merely taken from the dead body of X.⁴⁸ But, if this is the case, then both of the above objections to a policy of organ conscription could be resurrected. Thus, if the organs contained within X's body were the property of Y then their conscription *might* evince a failure to respect Y's autonomy. Their conscription might reduce the instrumental value of her autonomy to her, for it would preclude her from exercising it with respect to their disposal in accordance with those of her desires concerning this that she was autonomous with respect to. As such, then, were the organs

in question conscripted for transplant into (e.g.,) Z the property of Y, the reduction of the instrumental value of Y's autonomy would, for a person concerned with the moral value of autonomy, have to be justified in terms of the protection of the value *simpliciter* of Z's autonomy (assuming that Z would die without the organs being provided to him). And, as was noted above, it is not clear that such a justification would always be legitimate. It is not, for example, clear that it would be legitimate to claim that the removal of Y's spare kidney against her will did not evince a failure to respect her autonomy simply because it was used to save the life of P (and hence protect P's autonomy *simpliciter*). Thus, once the pro-conscription assumption that the conscripted organs are not being conscripted from a live person is challenged, those who advocate organ conscription are forced to abandon their ready response to the autonomy-based challenge to it that was outlined above and justify this practice through a general justification of the moral legitimacy of redistribution.⁴⁹ Moreover, once it is recognized that even though conscripted organs would be removed from postmortem sources they could still be conscripted from living persons (i.e., those who owned the organs contained within the postmortem sources) it must also be recognized that even if posthumous harm is impossible the conscription of organs could still harm the persons from whom they are conscripted. Hence, when this recognition is combined with the fact that such conscription could possibly be more harmful (as more distressing) to a person, P who owns the organs contained within another's body than could the conscription of organs from a *live* source, L, whose "natural" bodily organs were conscripted from him while he was alive, it must be acknowledged that the conscription of organs from a dead source could be *less* justifiable on consequentialist grounds than the conscription of organs from living sources. And since this latter type of conscription (i.e., from live sources) is generally regarded as being ethically unjustified, so too could the former.⁵⁰

These objections to organ conscription are not decisive ones. First, arguments might be forthcoming from the proponents of organ conscription that show that acting to compromise the autonomy of the live owners of cadaveric organs is compatible with respect for autonomy—or if it is not, then it is ethically justifiable to override this Principle in this case.⁵¹ Second, arguments are likely to be forthcoming from the proponents of organ conscription that show that even though in certain cases the harm caused to the live owner of conscripted organs would outweigh the harm caused by a failure to conscript them, in general the balance of harm will go the other way. Thus, such persons could conclude, consequentialist considerations would support a policy of organ conscription, albeit perhaps with an addendum that allows persons successfully to object in such cases, just as persons can offer conscientious objections to being conscripted into military service.

State or healthcare provider conscription?

Yet even if these arguments in defense of organ conscription are forthcoming, they would not establish that organs should be conscripted *by the State*. Instead, all that they would establish is that organs should be conscripted for the benefit of persons who have medical needs for them. And this conclusion is perfectly compatible with the organs being conscripted by *non-State* persons or agencies. Moreover, there are good reasons why such conscription, if justifiable, should be performed by non-State agencies. Transplantable organs are, even absent a legal market in which they could be sold by their original owners, a valuable resource. Their possession is (obviously) necessary for

the performance of lucrative transplants, and this is reflected in the “handling fees” that transplant centers are willing to pay to secure them.⁵² Were hospitals and hospices given a mandate to conscript transplantable organs from those who died within their jurisdiction, then, this would provide them with an incentive to attract persons who are likely to die to do so under their care. Thus, since hospitals and hospices would recognize that others would have a similar incentive this would be likely to lead to a general increase in the quality of end-of-life care afforded to patients as they competed for dying patients.

One might object to such an approach to organ conscription on two independent grounds: that providing hospitals and hospices with a mandate to conscript organs would be to involve them in a clear conflict of interest, and that many persons do not have the luxury of choosing where they are to die. But these objections to a healthcare provider (rather than a State) based system of organ conscription can be readily met. First, the possible conflict of interest in question would not materialize were healthcare providers to be competing both with each other and with hospices for possible organ sources. Their recognition that this potential conflict of interest would be a concern to the very persons that they are trying to attract would lead them to ensure not only that it would not arise, but that it was clear to both current and prospective patients that it would not. This response to the first initial objection would, however, be undermined were the second to be true: that such envisaged competition between hospitals and hospices would not occur since patients would have no say in where they died. This objection is an empirical one, and so the response to it should be grounded in empirical data. However, even in the initial absence of such data it is clear that hospices, at least, compete for patients both between each other and with hospitals. Thus, even if the majority of dying patients genuinely have no say in where they die (and, note, this view is being granted merely for the sake of argument) a non-negligible percentage do—and it would be for the right to conscript the organs of these patients that healthcare providers would compete for.

Conclusion

Much of the debate concerning the ethical status of policies of presumed consent focuses on the “fewer mistakes” arguments. Persons who are in favor of policies of presumed consent claim they that would lead to fewer mistakes (i.e., fewer mistaken removals of transplantable organs, and fewer mistaken non-removals of such organs) being made than under the current policy of presumed refusal. By contrast, those opposed to such policies claim that fewer mistakes are made under the current policy of presumed refusal—or, if more mistakes are made under the current policy, then they are of lesser moral import than those that would be made under a policy of presumed consent. Both sides to this debate, however, agree that its focus should be on the number of mistakes that would be made under each system of organ procurement. In this Chapter it was argued that this agreed-upon assumption is mistaken. (This argument is not only of practical relevance to this bioethical debate, but also of theoretical interest insofar as it further supports the full-blooded Epicurean’s rejection of Grover’s “Knowledge and Autonomy” argument for the possibility of posthumous harm that was first discussed in Chapter 2.) A system of cadaveric organ procurement could fully respect persons’ autonomy by taking their expressed wishes concerning the treatment of their bodies seriously. Moreover, neither the mistaken removal nor the mistaken non-removal of a person’s transplantable organs would violate her autonomy. This being so, the number of

mistaken removals or non-removals of persons' transplantable organs from their postmortem bodies is of no interest to a person concerned with ensuring that personal autonomy is respected and remains inviolate. The autonomy-based versions of the "fewer mistakes" arguments are thus irrelevant to the debate over the ethical status of presumed consent policies. Of course, showing that the autonomy-based versions of the "fewer mistakes" argument are irrelevant to the debate over the ethics of using presumed consent policies (and that the harm-based versions of this argument are unfounded) does not directly address the issue of whether such policies should be adopted. However, the arguments against the usefulness of the "fewer mistakes" arguments within this debate show that antemortem persons will neither necessarily fail to have their autonomy respected nor have it violated if their antemortem wishes are thwarted postmortem. They also show that we have no reason to believe that persons can be harmed by any postmortem mistreatment of their bodies.⁵³ As such, it might appear that the arguments offered above against the usefulness of the "fewer mistakes" arguments can be used as *prima facie* evidence to support the introduction of a policy of presumed consent.⁵⁴ If persons can neither be harmed by the removal of their organs after their deaths, and if their autonomy will neither fail to be respected nor violated by this even if they did not wish it to occur, there seems to be little reason not to attempt to alleviate the current shortage of transplant organs through instituting a policy of presumed consent. And this line of reasoning can be taken further: that given the need for transplantable organs and the impossibility of posthumous harm, it seems morally justifiable (indeed, perhaps morally required) not just to initiate a policy of presumed consent, but a policy of posthumous organ *conscription*. Yet, despite the plausibility of the arguments that have been advanced in favor of this latter position, it was argued above that the two assumptions that they are based on are unwarranted. Once it is recognized that even if organ conscription *is* ethically justified this does not entail that the State should act as a conscripser, it can be seen that allowing organ conscription to occur could lead to the institution of a *de facto* futures markets in human organs. And if this is seen as a good thing owing to the recognition of the advantages that typically accrue to voluntary market transactions, the way is paved for the argument to be made that rather than conscripting organs to solve the shortfall, we should allow markets in them.⁵⁵

NOTES (NB: Currently exegetically incomplete)

¹ Lucretius, DRN 5.177-80. (Hence, the epigraph to this volume is not inappropriate.) Warren argues that this Lucretian view is unsatisfactory, for "The Epicureans appear to offer no significant positive reason for wishing to continue to live, beyond a mere inertia". Warren, *Facing Death*, p.210. A similar concern is expressed by Luper-Foy, who argues that "Epicureans have sabotaged their motivation for living". "Annihilation," p.278 in Fischer. A compelling response to such concerns is developed by Rosenbaum, in "Epicurus and Annihilation," pp. 293-304 in Fischer; see also McMahan's arguments for the reconciliation strategy in the previous Chapter.

² Desirable; Lisa paper; Williams, cites from Lisa paper. Ethical issues; Lisa paper, davis papers (ask!), Wyndham Trouble with lichen.

³ Sunstein; criticized by

⁴ Markets defended in

⁵ According to the Organ Procurement and Transplantation Network there were in the United States alone 89,546 persons waiting for an organ transplant as of September 30th, 2005, while from January to June 2005 only 14,010 transplants were performed. See <http://www.optn.org/> . Accessed September 30th, 2005. Similarly, according to UK Transplant there were in the United Kingdom 6,024 persons on the active transplant list in 2004, and 2,454 transplants performed. See http://www.uktransplant.org.uk/ukt/statistics/latest_statistics/pdf/yearly_stats_for_2004.pdf . Accessed September 30th, 2005.

⁶ Although it is intuitively plausible that the introduction of a system of presumed consent would lead to an increase in the availability of transplantable organs it is difficult to support this view by comparing the procurement rates of countries which have such a system and those that do not, for other differences besides their procurement policies prevent easy comparisons. For example, the different rates of organ procurement that exist between countries that have presumed consent policies in place and those that do not might be owed to the number of transplant centers the countries have, the number of fatal road accidents that each has that generate transplantable organs, and what sort of organs are required by persons on the countries' waiting lists.

⁷ Debates over other proposed means of alleviating the shortage of transplantable organs typically focus on several independent issues. For example, the debate over whether markets could be used to procure additional transplantable organs has several foci, such as whether such markets would enhance or compromise the autonomy of the potential vendors, whether they would illegitimately commodify the human body, and whether they would lead to a diminution in the number of organs procured. For discussion of these arguments see James Stacey Taylor, *Stakes and Kidneys: Why markets in human body parts are morally imperative* (Aldershot, UK: Ashgate, 2005), and Mark J. Cherry, *Kidney for Sale by Owner: Human organs, transplantation, and the market* (Georgetown: Georgetown University Press, 2005). **See also recent JMP issue**

⁸ That this is the issue that the debate over the ethical status of presumed consent policies focus on has been explicitly recognized in a White Paper published by the Organ Procurement and Transplantation Network. See J. Michael Dennis, Patricia Hanson, Ernest E. Hodge, Ridd A.F. Krom, Robert M. Veatch, "An Evaluation of the Ethics of Presumed Consent and a Policy Based on Required Response," June 30th, 1993. See <http://www.optn.org/resources/bioethics.asp?index=1> . Accessed September 30th, 2005. This issue is of interest to a full-blooded Epicurean not because she would endorse this approach, but because, as will be argued below, she will reject it.

⁹ See, for example, Michael B. Gill, "Presumed Consent, Autonomy, and Organ Donation," *Journal of Medicine and Philosophy* 29, 1 (2004): 37-59.

¹⁰ See, for example, R.M. Veatch and J.B. Pitt, "The myth of presumed consent: Ethical problems in organ procurement strategies," *Transplantation Proceedings* 27 (1995): 1888-1892.

¹¹ This latter view was expressed by C.L. Hamer and M.M. Rivlin, "A stronger policy of organ retrieval from cadaveric donors: some ethical considerations," *Journal of Medical Ethics* 29 (2003), pp. 197, 198, and W. Glannon, "Do the sick have a right to cadaveric organs?" *Journal of Medical Ethics* 29 (2003), p.154.

¹² Defended by Spital and Taylor, Fabre, Harris.

¹³ Cherry, personal correspondence.

¹⁴ Gill, "Presumed Consent," p. 39.

¹⁵ C. Cohen, "The case for presumed consent to transplant human organs after death," *Transplantation Proceedings* 24 (1992), p. 2169. This datum is from a Gallup Poll conducted in 1993, and published online as "The American public's attitudes toward organ donation and transplantation," at: http://www.transweb.org/reference/articles/gallup_survery/gallup_index.html Accessed September 30th, 2005. Similarly, survey trends show that about 70% of persons in Britain are willing to have their kidneys removed postmortem for transplantation if they were suitable for this. See the British Kidney Patient Association, "Attitudes Towards Kidney Donating," (1-6 April), Surrey, Gallup Organisation, 1992; British Kidney Patient Association "Transplant Survey," (4-7 May), Surrey, Gallup Organisation, 1994; British Kidney Patient Association, "Organ Donor Scheme, Pre-Study Survey," (20-25 September), Gallup Organisation, 1995; British Kidney Patient Association, "Post-Study Survey," (1-6 November), Gallup Organisation; 1995; British Kidney Patient Association "Transplant Survey," (16-20 May), Surrey, Gallup Organisation, 1997; British Kidney Patient Association "Transplant Survey," (5-11 November), Surrey, Gallup Organisation, 1998. Cited by Gillian Haddow, "'Because you're worth it?' The Taking and Selling of Transplantable Organs," *Journal of Medical Ethics*, forthcoming, notes 2-7. Gill notes that there are several problems associated with using such surveys as the basis for the debate over the ethical status of presumed consent policies. First, the data are old, and attitudes might have changed since they were taken. Second, persons might have said that they would be unlikely to donate their organs after their deaths might have answered this way not because they were opposed to their organs being transplanted, but because they believed that they would not be suitable for this. Third, the persons polled might have misinformed about organ retrieval procedures, and, finally, such polls might not indicate how a person would actually behave in the hypothetical situation he is faced with. "Presumed Consent," p.40.

¹⁶ Cohen, "The case for presumed consent," p. 2169.

¹⁷ At least in the United States and the United Kingdom, given the data cited above. Indeed, it is likely to be even more than this, since persons would have the option of registering their refusal to have their organs removed, and many persons who would so refuse would do this.

¹⁸ Veatch and Pitt, "The myth of presumed consent," pp. 1888-1892.

¹⁹ At least within the American and British contexts.

²⁰ Gill, "Presumed Consent," p. 41

²¹ *Ibid.*, p. 41.

²² *Ibid.*, p. 41.

²³ Versions of this argument can be found in E.H. Kluge, "Improving organ retrieval rates: Various proposals and their ethical validity," *Health Care Analysis* 8 (2000), p. 286, and Veatch and Pitt, "The myth of presumed consent," p.1890.

²⁴ See, for example, J. Savulescu, "Death, us and our bodies: personal reflections," *Journal of Medical Ethics* 29 (2003), p. 129. It should be noted that the claims made in this paper concerning autonomy will be claims that would be uncontroversial to contemporary autonomy theorists, for they do not rely on the acceptance of any particular

model of autonomy for their truth. See James Stacey Taylor, "Introduction," *Personal Autonomy: New essays on personal autonomy and its role in contemporary moral philosophy* (Cambridge: Cambridge University Press, 2005): 1-32, for an outline of contemporary models of autonomy.

²⁵ Gill, "Presumed Consent," p. 42

²⁶ *Ibid.*, p. 43.

²⁷ *Ibid.*, p. 43.

²⁸ *Ibid.*, p. 44.

²⁹ *Ibid.*, p. 45.

³⁰ *Ibid.*, pp. 44-45. Gill writes of the "non-interference model of autonomy" and the "respect-for-wishes model of autonomy". As he notes, however, these are not really "models of autonomy" at all, for they are not accounts of what it is for a person to be autonomous with respect to her actions or her desires. Rather, these are models of how one should respect the autonomy of persons.

³¹ Note that while all parties to the internecine debate over presumed consent (i.e., that between those who are concerned with respecting those desires that persons are autonomous with respect to concerning the disposal of their postmortem remains) should accept this, this does not mean that persons with other ethical qualms about policies of presumed consent (e.g., organ constrictors) should do so too.

³² Before doing so, however, it is first necessary to rectify some conceptual unclarities in this argument. First, Gill's argument is not really concerned with respecting the autonomy of the brain-dead individuals whose organs are suitable for transplantation, as he writes. ("Presumed Consent," p.45.) Such individuals have no autonomy to respect. They are, after all, brain-dead. Rather, Gill's argument is concerned with respecting the autonomy of such individuals as they were prior to their becoming brain-dead. Second, despite what Gill implies in naming the model of respect for autonomy that he endorses the "respect-for-wishes" model of autonomy, respecting an agent's wishes and respecting her autonomy are not the same. One might, for example, respect the wishes of a non-autonomous agent without thereby respecting her (non-existent) autonomy. Alternatively, one might respect a person's autonomy without respecting her wishes. For example, one might institute a prohibition against voluntary slavery on the grounds that the enslavement of persons, even if voluntary on the part of the enslaved, serves to compromise their autonomy to an extent that is incompatible with its value. If one institutes and enforces this prohibition without regard to the wishes of the population on subject to it one will fail to respect their wishes where such a failure arises out of one's respect for their autonomy. Thus, with this final conceptual clarification in hand it is clear that rather than being concerned with respecting an agent's wishes *per se*, respect for a person's autonomy requires that those of her wishes that she is autonomous with respect to be respected, where such respect might *possibly* (but *not* necessarily) be conjoined with the caveat, "provided that the satisfaction of such wishes would not itself compromise her autonomy".

³³ *Ibid.*, p. 48

³⁴ Note that it would be to beg the question to claim that such removals would wrong the dead on the grounds that they would evince a failure to respect their autonomy, for it is being argued here that a proceduralist approach to respecting autonomy is justified in this

instance—and this is compatible with legitimate takings of organs even if the persons concerned would not have wanted this.

³⁵ It should be acknowledged here that this answer to (iii) is controversial, for one could readily argue that persons whose organs are taken for transplant are being used to provide benefits to others, rather than to prevent them from being harmed. This issue could only be resolved through a clear account of where to draw the appropriate baseline for the assessment of harms and benefits—and this will not be an easy matter. However, even with this acknowledgement in place, the answers to the other four questions to be asked in deciding how to respect a person's autonomy with respect to her wishes concerning the treatment of her postmortem body clearly support a proceduralist approach.

³⁶ This situation might change were markets in organs to be legalized. For arguments to this end see Cherry, Taylor.

³⁷ Note that giving due weight to a person's wishes does not commit one to abide by them. One might, for example, after given due weight to a person's wishes decide that other considerations justify their being overridden. See John Harris, "Organ procurement: dead interests, living needs," *Journal of Medical Ethics* 29 (2003), p. 131.

³⁸ Gill mistakenly treats these as being coextensive. See, for example, "Presumed Consent," p.43.

³⁹ Although, as will be noted below, this is a necessary but not a sufficient condition for one person to respect the autonomy of another.

⁴⁰ For this reason the malevolent conspirators in Feinberg's Case C fail to respect the autonomy of the woman whose trust they betray, with this failure occurring while she is still alive. Feinberg...

⁴¹ This intent is defeasible.

⁴² It does not matter whether one believes that the reasons that a person gives for her desire to have her postmortem body treated in a certain way are mistaken, or not. This is because respect for a person's autonomy requires that her desires be taken into account whether or not the person who is considering them as part of his deliberations believes them to be justifiable. An atheist, for example, would fail to respect the autonomy of a believer if he discounted her religiously-based desires on the grounds that they were mistaken.

⁴³ There might also be other moral reasons as to why the wishes of persons who are now dead should be respected, in addition to the concern that this is required by the respect shown to their autonomy while they were alive. See the discussion at the end of Chapter 4, as well as, for example, Joan C. Callahan "On Harming the Dead," *Ethics* 97 (1987), pp. 350-352, and Ernest Partridge, "Posthumous Interests and Posthumous Respect," *Ethics* 91 (1981), pp. 259-261.

⁴⁴ (Spital and Taylor, 2007, pp. 300-303).

⁴⁵ While this argument is sound if the referent of "those" is taken to be the dead, it might well be unsound if it is taken to include the living, for they could be harmed by the knowledge that their organs would be subject to postmortem conscription.

⁴⁶ Given Portmore's arguments, discussed in Chapter 1, this argument would not be one that a desire theorist of well-being could offer.

⁴⁷ (Honore, 1961, pp. 107-147).

⁴⁴ One might hold that (morally, even if not legally) a person's bodily remains would become the property of his heirs, and so any policy of organ conscription would be conscripting organs from them. However, that a person's remains should become the property of his heirs cannot merely be assumed, but must be argued for, and so this objection to a policy of organ conscription will not be raised here.

⁴⁵ Absent such a justification the classical liberals would be right: the conscription of organs would simply amount to theft.

⁴⁶ Three points must be noted here, however. First, this argument from subjective harm does not rest on the observation that the conscriptive taking of organs from postmortem sources could involve conscripting them from living persons, for it could also be made with respect to the distress felt by the relatives of the organ source as the taking of her organs. Second, it must be recognized that not everyone believes that it is unethical to conscript organs from living sources—see, for example, Fabre's arguments in *Whose Body is it Anyway?* (Fabre, 2006, pp. 98-125.) Finally, it must be admitted that simply because the conscription of organs from living sources is generally held to be unethical this does not in itself make it so, and so this anti-conscription argument is weakened to the extent that this (albeit plausible) assumption on which it is based lacks theoretical support.

⁵¹ Beauchamp and Childress p of respect for autonomy

⁵² (Mahoney, 2001, pp. 67-70).

⁵³ Of course, persons might be harmed by the *belief* that their bodies would be mistreated after their deaths. But to accept this is not to accept that the cause of such harm would be the mistreatment itself.

⁵⁴ Although the proponents of policies of presumed consent will still need to address other ethical worries that such policies give rise to. For example, they will have to address the worry that such policies evince an illegitimate relationship between the State and the individual. For such a worry, see Amitai Etzioni, "Organ Donation: A Communitarian Approach," *Kennedy Institute of Ethics Journal* 13 (2003), p. 2. For a response to such worries see D.R. McNeil, "Constitutionality of 'presumed consent' for organ donation," *Hamline Journal of Public Law and Policy* 9 (1989): 343-372.

⁵⁵ Cherry, Taylor, JMP issue