TREAT THIS COPY AS THE ORIGINAL.

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 67,755

Corrected Brief

STATE OF FLORIDA, et al.,

Appellants,

vs.

WADE POWELL, et ux., et al.,

Appellees.

ON APPEAL FROM THE FIFTH JUDICIAL CIRCUIT,
MARION COUNTY, FLORIDA,

CORRECTED INITIAL BRIEF OF APPELLANTS WILLIAM H. SHUTZE, M.D., THOMAS M. TECHMAN, M.D., AND KEITH GAUGER

Andrew G. Pattillo, Jr.
Russell W. LaPeer
PATTILLO & McKEEVER, P.A.
Post Office Box 1450
Ocala, Florida 32678
(904) 732-2255
Attorneys for Defendants-Appellants,
William H. Shutze, M.D., Thomas
M. Techman, M.D., and Keith Gauger

TABLE OF CONTENTS

	PAGE NO.
STATEMENT OF CASE AND FACTS.....	1
SUMMARY OF ARGUMENT.....	9
ARGUMENT.....	11
I.CORNEA REMOVAL STATUTE, FLA. STAT. § 732.9185, DOES NOT DEPRIVE PROPERTY WITHOUT PROCEDURAL DUE PROCESS.....	11
A. PROCEDURAL DUE PROCESS ONLY FOR PROPERTY INTERESTS.....	12
B. NO PROPERTY INTEREST UNDER FLORIDA LAW.....	14
II. THE CORNEA REMOVAL STATUTE DOES NOT DEPRIVE PLAINTIFFS OF EQUAL PROTECTION OF THE LAW, SUBSTANTIVE DUE PROCESS, OR ANY RIGHT OF PRIIVACY.....	24
A. EQUAL PROTECTION.....	25
B. SUBSTANTIVE DUE PROCESS.....	34
C. RIGHT OF PRIVACY.....	43
CONCLUSION.....	49
CERTIFICATE OF SERVICE	
APPENDIX	

TABLE OF CITATIONS

	PAGE NO.
Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976).....	13, 14
Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).....	9, 12, 14
Brooks v. South Broward Hospital District, 325 So.2d 479 (Fla. 4th D.C.A. 1975)..	18
Carey v. Population services Int'l, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.3d 675 (1977).....	37, 38, 43, 45
Chevan v. Bocaccio, Inc., 379 So.2d 105 (Fla. 1979).....	25
City of Akron v. Akron Center for Reproductive Health, Inc., 103 S.Ct. 2481 (1983).....	45
Cleveland Board of Education v. Loudermill, 53 U.S.L.W. 4306, 4307 (1985).....	13
Connell v. Sledge, 306 So.2d 194 (Fla. 1st D.C.A. 1975).....	25
Department of Ins. v. Southeast Volusia Hospital District, 438 So.2d 815, (Fla. 1983).....	25
Dirt, Inc. v. Mobile County Commission, 739 F.2d 1562, 1565 (11th Cir. 1984)..	35
Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 93, 98, S.Ct. 2620, 2641, 57 L.Ed.2d 595 (1978).....	17, 25
Dunahoo v. Bess, 200 So. 541 (Fla. 1941)...	14, 15, 18
Dunn v. Blumstein, 405 U.S. 330 92 S.Ct. 995, 31 L.Ed.2d 274 (1972).....	27
Eastern Air Lines, Inc. v. Dep't of Revenue, 455 So.2d 311 (Fla. 1984).....	25
Exxon Corp. v. Eagerton, 103 S.Ct. 2296, 2308 (1983).....	28

Fillingin v. State, 446 So.2d 1099, (Fla. 1st D.C.A. 1984)..... 36

Florida Board of Bar Examiners re Applicant, 443 So.2d 71, 74-76 (Fla. 1983)..... 48

Florida Canners Ass'n v. State Department of Citrus, 371 So.2d 503, 513 (Fla. 2d D.C.A. 1979, aff'd 406 So.2d 1079 (Fla. 1981) appeal dismissed for want of substantial fed. question sub nom.. 36

Georgia Lions Eye Bank, Inc. v. Lavant, S.E. 2d ____ (Ga. Oct. 9, 1985)..... 18, 19

Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971)..... 18, 19, 27, 29

Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 7, 99 S.Ct. 2100, 2104, 60 L.Ed.2d 668 (1979)..... 13

Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965)..... 46

Guyton v. Jensen, 445 U.S. 916, 100 S.Ct. 1276, 63 L.Ed.2d 600 (1980)..... 40

Guyton v. Phillips, 606 F.2d 248 (9th Cir. 1979)..... 40, 44

Harrah Independent School District v. Martin, 440 U.S. 194, 99 S.Ct. 1062, 59 L.Ed.2d 248 (1979)..... 25, 34, 45

Harris v. McRae, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980)..... 25, 27

Jackson v. Rupp, 228 So.2d 916 (Fla. 4th D.C.A. 1969)..... 15, 16, 18

Jago v. Van Curen, 102 S.Ct. 31, 34-5 (1981)..... 13

Jones v. Smith, 278 So.2d 339 (Fla. 4th D.C.A. 1973)..... 45, 47

Kimple v. Riedel, 133 So.2d 437, 439 (Fla. 2d D.C.A. 1961)..... 18

Kirksey v. Jernigan, 45 So.2d 188 (Fla. 1950)..... 15, 17, 18, 47

Kraft, Inc. v. Florida Dep't of Citrus, 456 U.S. 1002, 102 S.Ct. 2288, 73 L.Ed.2d 1297 (1982) 36

Laird v. State, 342 So.2d 962 (Fla. 1977) .. 45

Lasky v. State Farm Ins. Co., 296 So.2d 105 (Fla. 1979) 25

Lehr v. Robertson, 103 S.Ct. 2985 (1983) ... 26, 39

Leis v. Flynt, 439 U.S. 438, 99 S.Ct. 698, 58 L.Ed.2d 717 (1979) 13

Logan v. Zimmerman Brush Co., 455 U.S. 422, 430, 102 S.Ct. 1148, 1155, 71 L.Ed.2d 265 (1982) 14

Markham v. Fogg, 458 So.2d 1122 (Fla. 1984) 25

Martinez v. Bynum, 103 S.Ct. 1838 (1983) ... 28

McKinnon v. Pengree, 455 So.2d 1134, (Fla. 2d D.C.A. 1984) 18

McLaughlin v. Florida, 379 U.S. 184, 85 S.Ct. 282, 13 L.Ed.2d 222 (1964) 27

Meyer v. State of Nebraska, 262 U.S. 390, 43 S.Ct. 625 (1923) 36

Minnesota v. Cloverleaf Creamery Co., 449 U.S. 456, 101 S. Ct. 715, 66 L.Ed.2d 659 (1981) 25, 28, 32

Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) 25, 35, 40, 41, 45

North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 94 S.Ct. 407, 38 L.Ed.2d 379 (1973) ... 42

Parham v. Hughes, 441 U.S. 347, 99 S.Ct. 1742, 60 L.Ed.2d 269 (1979) 27, 28, 29, 30, 31, 33

Patch Enterprises, Inc. v. McCall, 447 F.Supp. 1075, 1080-81 (M.D. Fla. 1978) 35, 36

Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155 47 L.Ed.2d 405 (1976) 39, 40, 45

Personnel Administrator of Mass. v. Feeney, 422 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979) 26, 27, 32

Pollard v. Cockrell, 578 F.2d 1002 (5th Cir. 1978) 27

Prince v. Commonwealth of Massachusetts, 21 U.S. 158, 64 S.Ct. 438 (1944) 46

Przybyszewski v. Metropolitan Dade County, 363 So.2d 388 (Fla. 3rd D.C.A. 1978) 18

Quilloin v. Wolcott, 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978) 39

Roberts v. United States Jaycees, 104 S.Ct. 3244 (1984) 36, 37, 38, 39

Roe v. Wade, 410 U.S. 113, 98 S.Ct. 705, 35 L.Ed.2d 147 (1973) 37, 39, 45, 46

Rupp v. Jackson, 238 So.2d 86 (Fla. 1970) 16, 18, 47

Sasso v. RAM Property Management, 431 So.2d 204, n.18 (Fla. 1st D.C.A. 1983) 25

Scheuer v. Wille, 385 So.2d 1176 (Fla. 4th D.C.A. 1984) 18

Schreiner v. McKenzie Tank Lines & Risk Management., 408 So.2d 711, (Fla. 1st D.C.A. 1982), approved 432 So.2d 567 (Fla. 1983) 25

Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) 27

Sherer v. Rubin Memorial Chapel, Ltd., 444 So.2d 1176 (Fla. 4th D.C.A. 1984) 18

Shevin v. Byron, Harless, Schaffer, Reid, and Associates, 379 So.2d 633, 636-39 (Fla. 1980) 48

Silkwood v. Kerr-McGee Corp., 637 F.2d 743 (10th Cir. 1980)..... 44, 48

Smith v. Organization of Foster Families For Equality & Reform, 431 U.S. 816, 97 S.Ct. 2994, 53 L.Ed.2d 14 (1977)..... 39

State of Florida v. Mathews, 526 F.2d 319 (5th Cir. 1976)..... 26, 27, 28

State v. Walker, 444 So.2d 1137, 1138-39 (Fla. 2nd D.C.A. 1984)..... 36

Tillman v. Detroit Receiving Hospital, 360 N.W. 2d 275 (Mich. App. 1984)..... 20, 46, 47

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 96 S.Ct. 282, 49 L.Ed.2d 752 (1976)..... 17

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161, 101 S.Ct. 446, 450, 66 L.Ed.2d 358 (1980)..... 22

Western & Southern Life Ins. Co. v. State Board of Equalization of Calif., 451 U.S. 648, 101 S.Ct. 2070, 68 L.Ed.2d 514 (1981)..... 26, 29

Whitehurst v. Wright, 592 F.2d 834 (5th Cir. 1979)..... 43, 44

Wilson P. Abraham Construction Corp. v. Texas Industries, Inc., 604 F.2d 897, 904 (5th Cir. 1979)..... 34, 35

Winfield v. Division of Pari-Mutual Wagering, Dep't of Business Regulation, 10 Fla.L.W. 548, (Fla. 1985)..... 47

Zablocki v. Redhail, 98 S.Ct. 673, 54 L.Ed.2d 659 (1981)..... 25, 35, 45

OTHER

Fla. Constitution (article I, section 23)..... 24, 47

Fla. Stat. § 406.11..... 1, 4, 7, 33

Fla. Stat. § 732.918..... 9

Fla. Stat. § 732.9182..... 1

Fla. Stat. § 732.9185..... 1, 2, 3, 4, 7, 9, 11, 33

Georgia Corneal Removal Statute:
O.C.G.A. §32-23-6..... 19, 20

Michigan Cornea Removal Statute:
M.C.L. §333.10202, M.S.A. §14.15 (10202)..... 21, 22, 23
M.C.L. §333.10203, M.S.A. §14.15 (10203)..... 21, 22, 23

42 U.S.C. § 1983..... 44

42 U.S.C. § 1985..... 44

STATEMENT OF CASE AND FACTS

In this brief, Appellees, Wade and Freda Powell and Erwin and Susan White, are referred to as 'Plaintiffs' (as they were in the trial court), or as 'the Powells' and 'the Whites'. Similarly, Appellants, William H. Shutze, M.D.; Thomas M. Techman, M.D.; and Keith Gauger, are referred to as 'Defendants'. References to the record on appeal are designated by '(R.____)'.

A. Proceedings and Disposition in Court Below

Plaintiffs, Erwin and Susan White, filed their Second Amended Complaint (R. 259-85) in the trial court on February 9, 1984, alleging (1) that an autopsy was wrongfully performed on the body of their son, James E. White; (2) that corneal tissue was wrongfully removed from the body of their son; (3) that the statute which authorizes the medical examiner to perform autopsies, Fla. Stat. § 406.11, is unconstitutional on its face and as applied; and (4) that the statute which authorizes the removal of corneae, Fla. Stat. § 732.9185, is unconstitutional on its face and as applied. They seek more than $505,000 in damages from Defendants William H. Shutze, M.D., Fifth District Medical Examiner; Thomas M. Techman, M.D., Associate Medical Examiner; and Keith Gauger, investigator for the Fifth District Medical Examiner's Office. Additionally, the Whites sought a declaration that the medical examiner statute, authorizing autopsies, Fla. Stat. § 406.11, and the cornea removal statute, Fla. Stat. § 732.9185, are unconstitutional facially and as applied.

Plaintiffs, Wade and Freda Powell, filed their First Amended Complaint (R.809-18) in the trial court on November 4, 1984, alleging (1) that corneal tissue was wrongfully removed from the body of their son, Anthony Wayne Powell, and (2) that the cornea removal statute, Fla. Stat. § 732.9185, is unconstitutional on its face and as applied. They seek more than $10,000 in damages from an additional Defendant, Munroe Regional Medical Center (the hospital facility in Ocala, Marion County, Florida where the body of their son was taken after the motor vehicle accident in which he died), as well as from William H. Shutze, M.D., Fifth District Medical Examiner. Additionally, the Powells sought a declaration that the cornea removal statute, Fla. Stat. § 732.9185, is unconstitutional facially and as applied.

On April 30, 1985, the two cases were consolidated (R.931-32) before the trial court for further proceedings. A number of parties were allowed to intervene in the two actions, to address the issues of constitutionality of the medical examiner statute authorizing autopsies, and of the cornea removal statute: (1) the State of Florida (R.50-51); (2) Medical Eye Bank, Inc. (R.94-95; 912); North Florida Lions Eye Bank, Inc. (R94-95;912); and Florida Lions Eye Bank, Inc. (R.94-95;912); (3) the Florida Society of Ophthalmology, Inc.(R.109-10;910); (4) the Florida Medical Association (R.593); and (5) Metropolitan Dade County (R.655-56).

Intervenors, Medical Eye Bank, Inc.; North Florida Lions Eye Bank, Inc.; and Florida Lions Eye Bank, Inc. (the Eye Banks),

moved for summary judgment on Counts II of both Complaints (R.591-92), that the cornea removal statute, Fla. Stat. § 732.9185, is constitutional on its face and as applied, as a matter of law. The Eye Banks supported their motion for summary judgment with several affidavits (R.571-85) and a memorandum of law (R.549-90) and authorities. Intervenors, Metropolitan Dade County (R.662-63), Florida Society of Ophthalmology, Inc. (R.659-61), and Florida Medical Association (R.652-63), joined in the Eye Banks' motion for summary judgment.

Plaintiffs Erwin and Susan White filed a motion (R.594-96) for summary judgment as to Count II of their Second Amended Complaint, that the cornea removal statute, Fla. Stat. § 732.9185, was unconstitutional on its face and as applied, supporting their motion with their own affidavit (R.597-602). Likewise, Plaintiffs Wade and Freda Powell filed a motion for summary judgment (R.921) as to Count II of their First Amended Complaint, that the cornea removal statute, Fla. Stat. § 732.9185, was unconstitutional; and they supported their motion with an affidavit (R.539-43) by Plaintiff Wade Powell.

Defendants William H. Shutze, M.D., Fifth District Medical Examiner; Thomas M. Techman, M.D., Associate Medical Examiner; and Keith Gauger, investigator for the Fifth Medical Examiner District, filed motions for summary judgment (R.626-632; 610-16; 603-09) as to all counts of both amended complaints by Plaintiffs White and Powell, supporting the motions with a memorandum of law (R.549-590). Dr. Shutze and Dr. Techman filed affidavits

(R.617-25; 633-42) in support of their motions for summary judgment.

On August 6, 1985, the trial court heard argument on all motions for summary judgment by all parties. At the close of the hearing, the court ruled that the medical examiner statute authorizing autopsies, Fla. Stat. § 406.11, was constitutional on its face; but the court took all other matters and issues in the various motions under advisement (R.1184-85).

On August 22, 1985, the trial court entered an order (R.760-68) (served August 23, 1985) finding the medical examiner statute authorizing autopsies, Fla. Stat. § 406.11, to be "constitutional on its face and . . . constitutionally applied in these cases." The court, however, ruled that the cornea removal statute, Fla. Stat. § 732.9185, was facially unconstitutional. From that order the present appeals have been taken, for which this Court has accepted jurisdiction pursuant to Florida Constitution, article V, section 3(b)(5).

B. Statement of Facts

On June 15, 1983, James E. White, a 15-1/2 year old single male, drowned while swimming in the Rainbow River at the city beach in Dunnellon, Marion County, Florida. His surviving parents are Plaintiffs Erwin and Susan White.

The body of James White was taken to Munroe Regional Medical Center in Ocala, where Plaintiff Erwin White met and conversed with Defendant Keith Gauger, an investigator for the office of

the Fifth Medical Examiner District. At that time, although opposed to an autopsy being performed, Plaintiff Erwin White voiced his apprehension that his son's death was the result of foul play. Defendant Keith Gauger told Plaintiff White that, although there was no indication of foul play, an autopsy would be necessary. Plaintiff White persisted in his concern about foul play, which apparently was due to the fact that his son, a good swimmer, had drown in 10 feet of water, in the presence of witnesses.

No mention, and no request for consent, concerning the removal of corneal tissue was made to Plaintiff White, nor did he express any objection. Eye bank personnel removed the corneae before the body was transported to Leesburg Community Hospital in Leesburg, Lake County, Florida.

The next day, on June 16, 1983, at Leesburg Community Hospital, Associate Medical Examiner Thomas M. Techman, M.D., performed a full autopsy on the body of James E. White. At that time, Dr. Techman first learned that the corneae had been removed.

On July 11, 1983, Anthony W. Powell, a 20-year old single male, was severely injured as a passenger in a one-motor-vehicle accident in Marion County. He died as a result of the injuries and his body was taken to Munroe Regional Medical Center in Ocala. His surviving parents are Plaintiffs Wade and Freda Powell. They were notified of their son's accident at about 4:45 a.m. on July 11, and Plaintiff Wade Powell identified the body at approximately 5:15 a.m. At that time the corneae had not been

removed. The Powells went into an adjoining room where they remained until about 7:30 a.m. During that time, no mention, and no request for consent, concerning the removal of corneal tissue was made to the Powells, nor did they express any objection. Eye bank personnel removed the corneae at about 5:45 a.m., before the body was taken to Leesburg Community Hospital in Leesburg. There a full autopsy was performed on July 11, by Fifth District Medical Examiner, William H. Shutze, M.D. This was when Dr. Shutze first learned of the cornea removal.

Both the White and the Powell autopsies were authorized under the medical examiner statute, because the decedents died suddenly, when in apparent good health, unattended by a practicing physician, and in suspicious or unusual circumstances. Additionally, in 1983 James Phillips, Assistant State Attorney in charge of the Marion County office, had requested that autopsies be performed on victims of drownings and motor vehicle accidents (R.987, 988, 990-91). During those autopsies, organs are removed, and tissue, blood, and urine samples are taken (R.618, 634-35, 644).

On June 15, 1983, and July 11, 1983, when the corneae were removed, no particular patient in need of corneal tissue was known to the Fifth Medical Examiner District. However, the Fifth Medical Examiner District was aware of a continuing need, expressed by the Eye Banks as a standing request for corneal tissue (R.621, 637, 646), required by over 2,000 people a year in Florida alone for transplant (R.579).

Eye Bank technicians, experienced in obtaining, processing, and distributing corneae, determine the gross suitability of corneal tissue for transplant before removal. They also examine it microscopically after removal (R.621, 637, 647). Removal of corneal tissue does not affect a deceased's facial appearance, because the tissue is clear and only about .5 mm in thickness (R.578-79), and because on death, the vitreous humour, a gel-like fluid which fills and shapes the eyes, is lost, and the eyes lose their normal shape, requiring placement of eye-caps over the surface of each eye, regardless of whether corneal tissue has been removed (R.582).

Removal of corneae pursuant to the corneal removal statute, Fla. Stat. §732.9185, occurs only when an autopsy is required under Fla. Stat. §406.11, (the medical examiner statute authorizing autopsies), and when the other conditions are met. Removal of corneae in such circumstances provides youthful, high-quality corneal tissue for more than 90% of the corneal transplants performed (R.573, 575-76, 579). As a result, successful transplant surgery has increased, and patient waiting time has decreased to 1-2 weeks (R.572, 576).

In 1976, before passage of the corneal removal statute, Fla. Stat. § 732.9185, there were only about 500 corneae available for transplant (R.572). In 1984 there were 3,406 corneal transplants in the State of Florida and 80-85% of those transplants are successful (R.572-73). Removal of corneal tissue pursuant to the conditions set forth in Fla. Stat. § 732.9185 provides corneae

within the four to six hours after death that is required for tissue to be usable and successful in transplant (R.577). Costs and expenses of the State of Florida in providing services to the blind exceeds $138,000,000 per year.

SUMMARY OF ARGUMENT

The Florida cornea removal statute, Fla. Stat. §732.9185, does not deprive property without procedural due process. The procedural safeguards of the Due Process Clause--notice and an opportunity to be heard--apply only if there is genuine property interest under state law. Under Florida law, Plaintiffs' interests in disposing of the remains of their deceased sons is not a property right. Instead, it is a personal right to be free from malicious interference in so disposing of the body of the deceased. Removal of corneal tissue from those bodies, without Plaintiffs' consent, under circumstances where nonconsensual autopsies are necessary, deprives Plaintiffs of no property interest for which they would be entitled to the basic requirements of procedural due process. (Nor does it constitute a taking of any property interest belonging to Plaintiffs, for which they are entitled to compensation.)

Neither does the corneal removal statute deprive Plaintiffs of equal protection, substantive due process, or any right of privacy. The statute's classification, authorizing removal of cornea without next-of-kin consent, in circumstances where the deaths already necessitate the nonconsensual intrusion of an autopsy, is not an invidious discrimination. The deceased are not a suspect class; and Plaintiffs' interest in disposing of the bodies of the deceased is not a fundamental, constitutional right.

Moreover, the classification is a reasonable one, furthering

the legitimate public purpose of making sight available to greater numbers of blind people. As such, the statute's classification is entitled to presumptive validity.

Since Plaintiffs' right to dispose of the bodies of their deceased sons is not a fundamental liberty guaranteed by the Due Process Clause, there is no constitutional right of privacy that encompasses plaintiffs and corpses. Finally, the statute is a reasonably related means to achieving the legitimate governmental goal of providing sight to blind persons by making an increased supply of usable corneal tissue available for transplant. The legislature constitutionally enacted the cornea removal statute, therefore.

ARGUMENT

I. THE CORNEA REMOVAL STATUTE, FLA. STAT. § 732.9185, DOES NOT DEPRIVE PROPERTY WITHOUT PROCEDURAL DUE PROCESS.

The trial court ruled (1) that "Plaintiffs have a right to receive, possess, and dispose of the body [sic] of their son [sic] in the same condition as death left it [sic]"; (2) that this right "has been characterized by the Courts of the State of Florida as a property right enjoyed by the next of kin"; and (3) that the cornea removal statute, Fla. Stat. § 732.9185,[1] "deprives Plaintiffs of this right without affording them procedural due process of law guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution . . . because it allows an alteration of and removal of a part from the body [sic] of the

---

[1] Florida Statute 732.9185 Corneal Removal by Medical Examiners.

(1) In any case in which a patient is in need of corneal tissue for a transplant, a district medical examiner or an appropriately qualified designee with training in ophthalmologic techniques may, upon request of any eye bank authorized under s. 732.918, provide the cornea of a decedent whenever all of the following conditions are met:

(a) A decedent who may provide a suitable cornea for the transplant is under the jurisdiction of the medical examiner and an autopsy is required in accordance with s. 406.11.

(b) No objection by the next of kin of the decedent is known by the medical examiner.

(c) The removal of the cornea will not interfere with the subsequent course of an investigation or autopsy.

(2) Neither the district medical examiner nor his appropriately qualified designee nor any eye bank authorized under s. 732.918 may be held liable in any civil or criminal action for failure to obtain consent of the next of kin.

son [sic] without notice or an opportunity to be heard." (R. 760, ¶¶ 2a, 3, and 2d and h).

A. Procedural Due Process Only for Property Interests

"The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property"; and "...the range of interests protected by procedural due process is not infinite." Board of Regents v. Roth, 408 U.S. 564, 570, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972).

> To determine whether due process requirements apply in the first place, we must look...to the nature of the interest at stake....We must look to see if the interest is within the Fourth Amendment's protection of liberty and property.

Id. at 570-71, 92 S.Ct. at 2705-06 (emphasis in original).

Only when a liberty or property interest has been identified do the basic procedural safeguards of due process apply.

> The Due Process Clause applies when government action deprives a person of liberty or property; accordingly, when there is a claimed denial of due process we have inquired into the nature of the individual's claimed interest.
>
> > [T]o determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake....
>
> This has meant that to obtain a protectible right
>
> > 'a person clearly must have more than an abstract need or

> desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.'

Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 7, 99 S.Ct. 2100, 2104, 60 L.Ed.2d 668 (1979).

A property interest entitled to the basic procedural safeguards of due process, under the Due Process Clause, is created and defined by the authority of rules or mutually explicit understandings under state law. Cleveland Board of Education v. Loudermill, 105 S.Ct. 1487, 1491 (1985); Jago v. Van Curen, 102 S.Ct. 31, 34-5 (1981); Bishop v. Wood, 426 U.S. 341, 344 and nn.6 and 7, 96 S.Ct. 2074, 2077 and nn.6 and 7, 48 L.Ed.2d 684 (1976). "Property interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" Cleveland Board of Education v. Loudermill, 105 S.Ct. at 1491, quoting Board of Regents v. Roth, 408 U.S. at 577, 92 S.Ct. at 2709. The Supreme Court has

> [O]bserved on numerous occasions [that] that Constitution does not create property interests. Rather it extends various procedural safeguards to certain interests that stem from an independent source such as state law.

Leis v. Flynt, 439 U.S. 438, 441, 99 S.Ct. 698, 700, 58 L.Ed.2d 717 (1979). "A claim of entitlement under state law, to be enforceable, must be derived from statute or legal rule or through a mutually explicit understanding." Id. at 442, 99 S.Ct. at 701. The sufficiency of such a claim of entitlement

"must be decided by reference to state law." Bishop v. Wood, 426 U.S. at 344, 96 S.Ct. at 2077.

> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents v. Roth, 408 U.S. at 577, 92 S.Ct. at 2709. "The hallmark of property, the [Supreme] Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except 'for cause'." Logan v. Zimmerman Brush Co., 455 U.S. 422, 430, 102 S.Ct. 1148, 1155, 71 L.Ed.2d 265 (1982).

B. No Property Interest Under Florida Law

Neither the Powells nor the Whites have any genuine property interest, under Florida law, in the remains (including the corneae) of their deceased children. In Dunahoo v. Bess, 200 So. 541 (Fla. 1941), a plaintiff sued in two counts (for breach of contract and for negligence) for the careless and negligent manner in which the body of his wife had been embalmed. In determining if a cause of action had been stated by the plaintiff, the Court framed the issue as whether the surviving spouse had "a property right in the corpse of the other sufficient to predicate an action for a trespass or wrong committed." Id. at 542. That issue was "answered in the affirmative," id.: "[T]here is a

property right in the corpse." Id. at 543. The Court then explained that "[t]he right of the surviving spouse to have, protect and dispose of the remains of the other is a right recognized by law." Id. at 542.

Nine years later, however, the Court explained, in Kirksey v. Jernigan, 45 So.2d 188 (Fla. 1950), that the right recognized in Dunahoo v. Bess is the limited right of a surviving spouse or next of kin

> [T]o possession of the body of a deceased person for the purpose of burial, sepulture or other lawful disposition which they may see fit. [citing Dunahoo v. Bess]...And the invasion of such a right by unlawfully withholding the body from the relative entitled thereto is an actionable wrong, for which substantial damages may be recovered.

Id. at 189-90. In Kirksey v. Jernigan, an undertaker had taken the body of the plaintiff's deceased daughter, refused to return it, embalmed it without authority to do so, and held it as security for the embalming fee. This Court ruled that the allegations of wrongful conduct were sufficiently egregious to state a cause of action for invasion of the right to dispose of the body of the deceased.

Finally, in Jackson v. Rupp, 228 So.2d 916 (Fla. 4th D.C.A. 1969), the court of appeal reversed a directed verdict for a physician who, despite twice being refused permission, nevertheless performed an autopsy on the body of a patient who had died in the hospital. The patient's death did not fall within any of the categories of the statutes authorizing autopsies. Hence, the

physician's "intent in performing the autopsy irrespective of great indifference to the plaintiffs and their refusal to grant permission" raised an issue of fact concerning malice which was "sufficient to withstand....a motion for directed verdict." Id. at 920.

As the court of appeal noted, "early English common law recognized no property or property rights in the body of a deceased person." Id. at 918. However, the court recognized "a cause of action for an unauthorized autopsy," based on "the personal right of the decedent's next of kin to bury the body rather than any property right in the body itself." Id. (emphasis added). It is this "personal right to bury a body [which] falls on the person or persons who are in closest relationship to the deceased." Id. To recover "in an action for an unauthorized autopsy founded solely in tort,

> [T]he wrongful act must be such as to reasonably imply malice or such that from the entire want of care or attention to duty or great indifference to the person, property, or rights of others such malice would be imputed as would justify assessment of exemplary or punitive damages.

Id. at 918-19. Despite this "exclusive right" vested "in the surviving spouse, relative, or next of kin to dispose of a corpse, autopsies may be authorized by public authorities for the protection of health or the discovery of crime." Id. at 919.

This Court reviewed that case and expressly "agree[d] with the District Court's decision in all respects." Rupp v. Jackson, 238 So.2d 86, 89 (Fla. 1970). "An unauthorized autopsy will

support a tort action." Id. (emphasis added), citing Kirksey v. Jernigan, supra. The Court explained that because the patient's death had not fallen within any of the limited circumstances specified in the statutes authorizing autopsies, the "defense of authority of law fails" and "attention now focuses upon the question of malice," id. at 90, as a necessary element of the cause of action[2] for interference with the right to dispose of a deceased's remains.

In ruling that Plaintiffs "have a right to receive, possess, and dispose of the body [sic] of their son [sic] in the same condition as death left it [sic]," and that this right "has been characterized by the courts of the State of Florida as a property right enjoyed by the next of kin," the trial court failed to appreciate the significance of this Court's express approval in

---

[2]A right of action is not a property interest recognized by, and entitled to procedural safeguards under, the Due Process Clause.

> "Our cases have clearly established that '[a] person has no property, no vested interests, in any rule of the common law.'...The 'Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object,'...despite the fact that 'otherwise settled expectations' may be upset thereby."

Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 88 n.32, 98 S.Ct. 2620, 2638 n.32, 57 L.Ed.2d 595 (1978). See also Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752 (1976). Hence, by authorizing the removal of corneal tissue, and granting immunity from liability for doing so, the cornea removal statute does not deprive Plaintiffs of any constitutionally recognized property interest in a cause of action for interference with the right to dispose of the body of a deceased.

Rupp v. Jackson, of the district court's decision "in all respects." 238 So.2d at 89. If the district court had erred in stating that "the personal right of the decedent's next of kin to bury the body" is not "any property right in the body itself," Jackson v. Rupp, 228 So.2d at 918, this Court would have scarcely "agree[d] . . . in all respects" with that decision, upon review of it.

Plaintiffs' right, which is established under Florida law, therefore, is not an interest in a body itself as personal property. It is a personal right of the next of kin to dispose of the remains of their deceased children without malicious interference. See Rupp v. Jackson, 238 So.2d at 89-90; Kirksey v. Jernigan, 45 So.2d at 189-90; Dunahoo v. Bess, 200 So. at 542; McKinnon v. Pengree, 455 So.2d 1134, 1135 (Fla. 2d D.C.A. 1984); Sherer v. Rubin Memorial Chapel, Ltd., 444 So.2d 1176, 1177 (Fla. 4th D.C.A. 1984); Scheuer v. Wille, 385 So.2d 1076, 1077-78 (Fla. 4th D.C.A. 1980); Przybyszewski v. Metropolitan Dade County, 363 So.2d 388, 389 (Fla. 3d D.C.A. 1978); Brooks v. South Broward Hospital District, 325 So.2d 479-80 (Fla. 4th D.C.A. 1975); Kimple v. Riedel, 133 So.2d 437, 439 (Fla. 2d D.C.A. 1961).

Courts of two other states have come to the same conclusion when faced with like challenges to their cornea removal statutes. In Georgia Lions Eye Bank, Inc. v. Lavant, _____ S.E. 2d ____ (Ga. Oct. 9, 1985), (Appendix A) the Georgia Supreme Court reversed a lower court ruling that the Georgia cornea removal

statute (very similar to the Florida statute)[3] violated due process because it deprived the next of kin of a property interest in the corpse, without notice and opportunity to object. The Court noted that Georgia law employed the concept of "quasi-property right," in recognizing "the interests of surviving relatives in the possession and control of decedents' bodies." Id. at _____. The Court, however, rejected the contention that this interest was one entitled to the safeguards of procedural due process--notice and opportunity to be heard: "There is no constitutionally protected right in a decedent's body." Id.

---

[3]The Georgia cornea removal statute, O.C.G.A. §31-23-6, provides in pertinent part as follows:

> "(b)(1) Upon a request from an authorized official of an approved eye bank for corneal tissue to be used for transplants or research, a coroner, a medical examiner, hospital, funeral director, or an authorized official acting for the coroner may permit the removal of the corneal tissue of a decedant by individuals designated by the eye bank for delivery to the eye bank for such purposes if all of the following conditions are met:
>
> (A) The decedent from whom the tissue is to be taken is under the jurisdiction of a coroner or a medical examiner pursuant to Code Section 45-16-27;
>
> (B) No objection by the decedent during his lifetime or, after his death by the appropriate person listed in Paragraph (2) of this subsection is known to the coroner, medical examiner or authorized official acting for the coroner at the time the tissue is removed;
>
> (C) The person designated by the eye bank to remove the tissue is a person authorized to do so under Code Section 31-23-5.

Likewise, in Tillman v. Detroit Receiving Hospital, 360 N.W. 2d 275 (Mich. App. 1984), the Court of Appeal upheld the Michigan cornea removal statute (highly similar to the Florida

---

> (2) Objection to the removal of corneal tissue may be made known to the coroner, medical examiner, hospital, funeral director, or authorized official acting for the coroner by the decedent during his lifetime or by the following persons after the decedent's death:
>
> (A) The decedent's spouse;
>
> (B) If no spouse survives him, any of the decedent's adult children;
>
> (C) If no adult children or spouse survive him; or either of decedent's parents;
>
> (D) If no parents, adult children or spouse survive him, any of the decedent's brothers or sisters; or
>
> (E) If none of the foregoing survive him, the decedent's next of kin.
>
> (3) No coroner, medical examiner, hospital, funeral director, or authorized official acting for the coroner authorizing the removal of corneal tissue nor any eye bank, its personnel or other person requesting or participating in the removal of corneal tissue for the eye bank shall be liable in any civil or criminal action for removing corneal tissue from a decedent and using same for transplant or research purposes without obtaining prior consent from any individual listed in Paragraph (2) of subsection (b) of this Code Section if such individual failed to object prior to such removal as authorized in this Code Section and the removal was in accordance with this Code Section.

statute)[4], against a challenge that the statute violated fundamental rights of privacy of the surviving next of kin. The Court recognized "a common law cause of action on behalf of the person or persons entitled to the possession, control, or burial of a dead body for the tort of interference with the right of burial of a deceased person without mutilation." 360 N.W. 2d at 277. Nevertheless, the Court flatly stated that "there is no property right in the next of kin to a dead body," and this right

---

[4]The Michigan cornea removal statute, M.C.L. §§333.10202 and 333.10203, M.S.A. §§14.15(10202) and (10203), provides in pertinent part as follows:

> "(1) In any case in which an autopsy is to be done by a county medical examiner or a county medical examiner causes an autopsy to be done, the cornea of the deceased person may be removed by a person authorized by the county medical examiner.
>
> (2) Removal under subsection (1) may be made only under the following circumstances:
>
> (a) An autopsy has already been authorized by the county medical examiner.
>
> (b) The county medical examiner does not have knowledge of an objection by the next of kin of the decedent to the removal of the cornea.
>
> (c) The removal of the corneae will not interfere with the course of any subsequent investigation or autopsy or alter post-mortem facial appearance.
>
> The county medical examiner, the assistant medical examiner, a bank or storage facility, or any person authorized by the county medical examiner to remove the cornea of a deceased person, shall not be liable in a civil action if it is subsequently alleged that authorization for the removal was required of the next of kin.

to be free of tortious interference with the disposition of the dead body the Court found not "to be of constitutional dimension." Id.

By the same token, under Florida law, Plaintiffs have a right to be free from tortious interference of a character sufficient to warrant imputing malice; but it is not a property right to which the constitutional safeguards of procedural due process, guaranteed under the Due Process Clause (and article I, section 9 of the Florida Constitution) apply. Hence, removal of corneae from a decedent's body, without consent, does not deprive the next of kin of any property interest[5] entitled to the

---

[5]The trial court also ruled that "[r]emoval of corneae from decedents under the jurisdiction of the medical examiner for transplantation into other persons constitutes a taking of private property by state action for a non-public purpose," violating the constitutional guarantees. (R.760, ¶ 2g).

For this constitutional provision to apply, Plaintiffs must have a genuine property interest "defined by existing rules or understandings that stem from an independent source such as state law." Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161, 101 S.Ct. 446, 450, 66 L.Ed.2d 358 (1980). Having no property interest entitled to the procedural safeguards of the Due Process Clause, Plaintiffs likewise have no property interest that is susceptible of being taken, and for which compensation would be required.

While not property of Plaintiffs, the corneal tissue removed was undeniably in furtherance of a legitimate public interest -- providing sight to those otherwise blind. Even Plaintiff White recognizes the beneficial purpose of the statute in making corneae available for transplant (R.968). That only two or four persons are able to realize that benefit in the present cases does not alter the public character of the good intended by the statute.

protections of procedural due process.

Nevertheless, Plaintiffs persist in their demand to be compensated for the value of the corneal tissue removed. There is no fair market value for corneal tissue, however, because Fla. Stat. § 873.01 prohibits the sale of anatomical matter. Moreover, even if it did not, there does not seem to be any reasonable basis for calculating the fair market value of corneal tissue. To the blind recipient it is no doubt invaluable. At the same time, the eye banks, as not-for-profit distributors, at most, charge less than their operating expenses, and in some circumstances provide the corneae totally free.

II. THE CORNEA REMOVAL STATUTE DOES NOT DEPRIVE PLAINTIFFS OF EQUAL PROTECTION OF THE LAW, SUBSTANTIVE DUE PROCESS, OR ANY RIGHT OF PRIVACY.

The trial court held that Plaintiffs' "right to receive, possess, and dispose of the body [sic] of their son [sic] in the same condition as death left it [sic] . . . is an intimately personal and fundamental one implicit in the concept of ordered liberty and may not be transgressed or interfered with by State action without a compelling state interest." The trial court then ruled (1) that the cornea removal statute "deprives Plaintiffs of this right without affording them . . . substantive due process of law guaranteed by the Fifth and Fourteenth Amendments . . . because it . . . creates [sic] and placed Plaintiffs in an invidious classification"; and (2) that this "invidious classification and the resultant action also deprives Plaintiffs of their right to equal protection of the law guaranteed them by the Fourteenth Amendment". Finally, the trial court ruled that "[r]emoval of the cornea from the remains of their son [sic] and without notice to them and without their consent and against their wishes and desires is an unconstitutional invasion of Plaintiffs' rights of privacy under the Fourth and Fourteenth Amendments of the United States Constitution" (as well as article 1, section 23 of the Florida Constitution) (R.760, ¶¶ 2b, 2d, 2e and 2f).

Although the trial court confused the terms and concepts of the equal protection and substantive due process analyses, they are two closely related, and often alternative, ways of considering

constitutional challenges to state activity and legislation[6].

A. Equal Protection

The Equal Protection Clause[7], unlike the Due Process Clause, "is not a source of substantive rights or liberties." Harris v. McRae, 448 U.S. 297, 322, 100 S.Ct. 65 L.Ed2d 784 (1980).2691. Rather, it is "a right to be free from invidious discrimination in statutory classifications and other governmental activity." Id.

> The concept of equal justice under law requires [a] State to govern impartially.... The sovereign may not draw distinctions between individuals based solely on differences

---

[6]See Minnesota v. Cloverleaf Creamery Co., 449 U.S. 456, 470 and n.12, 101 S.Ct. 715, 727 n.12, 66 L.Ed.2d 659 (1981); Harrah Independent School District v. Martin, 440 U.S. 194, 197-201, 99 S.Ct. 1062, 1063-65, 59 L.Ed.2d 248 (1979); Zablocki v. Redhail, 98 S.Ct. 673, 686, 688, 54 L.Ed.2d 618 (1978)(Stewart, J. and Powell, J., concurring in the judgment)(often the "equal protection doctrine...is no more than substantive due process by another name." Id., Stewart, J.); Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 93, 98 S.Ct. 2620, 2641, 57 L.Ed.2d 595 (1978)("[T]he equal protection arguments largely track and duplicate those made in support of the due process claim."); Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 501-03 and n.10, 97 S.Ct. 1932, 1936-37 and n.10, 52 L.Ed.2d 531 (1977).

[7]The standard and method of reviewing constitutional challenges to legislation under the equal protection guarantee of the Florida Constitution is identical to the analysis of similar challenges under the Equal Protection Clause of the Fourteenth Amendment. See Markham v. Fogg, 458 So.2d 1122, 1126-27 (Fla. 1984); Eastern Air Lines, Inc. v. Department of Revenue, 455 So.2d 311, 314 (Fla. 1984); Department of Ins. v. Southeast Volusia Hospital District, 438 So.2d 815, 821 (Fla. 1983); Chevan v. Bocaccio, Inc., 379 So.2d 105, 106 (Fla. 1979); Lasky v. State Farm Ins. Co., 296 So.2d 9, 17-20 (Fla. 1974); Sasso v. RAM Property Management, 431 So.2d 204, 211-24 n.18 (Fla. 1st D.C.A.1983) approved 452 So.2d 932 (Fla. 1984); Schreiner v. McKenzie Tank Lines & Risk Management Services, Inc., 408 So.2d 711, 716-17 (Fla. 1st D.C.A. 1982), approved 432 So.2d 567 (Fla. 1983); Connell v. Sledge, 306 So.2d 194, 196-97 (Fla. 1st D.C.A. 1975).

> that are irrelevant to a legitimate governmental objective.

Lehr v. Robertson, 103 S.Ct. 2985, 2995 (1983).

> The Fourteenth Amendment forbids the States to 'deny any person within [their] jurisdiction the equal protection of the laws,' but does not prevent the States from making reasonable classifications among such persons.

Western & Southern Life Ins. Co. v. State Board of Equalization of Calif., 451 U.S. 648, 656-657, 101 S.Ct. 2070, 2077, 68 L.Ed.2d 514 (1981). "The equal protection guarantee of the Fourteenth Amendment does not take from the States all power of classification." Personnel Administrator of Mass. v. Feeney, 422 U.S. 256, 271, 99 S.Ct. 2282, 2292, 60 L.Ed.2d 870 (1979). "[T]he due process and equal protection doctrines do not constitute an absolute ban upon classifications." State of Fla. v. Mathews, 526 F.2d 319, 325 (5th Cir. 1976).

> Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law. When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern.

Id. at 271-72, 99 S.Ct. at 2292.

Legislative classifications which affect fundamental

rights[8], or which are defined according to suspect criteria[9], are subject to an exacting or strict scrutiny; only if the state demonstrates a substantial and compelling interest, for which the least restricted mean has been employed, will such a classification be upheld under the Equal Protection Clause. Dunn v. Blumstein, 405 U.S. 330, 335-42, 92 S.Ct. 995, 999-1003, 31 L.Ed.2d 274 (1972); Graham v. Richardson, 403 U.S. 365, 372, 375-76, 91 S.Ct. 1848, 1852, 1854, 29 L.Ed.2d 534 (1971); Shapiro v. Thompson, 394 U.S. 618, 638, 89 S.Ct. 1322, 1333, 22 L.Ed.2d 600 (1969); McLaughlin v. Florida, 379 U.S. 184, 191-93, 85 S.Ct. 282, 288-89, 13 L.Ed.2d 222 (1964); Pollard v. Cockrell, 578 F.2d 1002, 1012 (5th Cir. 1978).

Classifications not based upon suspect criteria, and which do not restrict fundamental rights, however, need only be tested under the lenient standard of rationality traditionally employed by the Supreme Court for equal protection challenges to legislation. Under this standard, a classification by a state

---

[8]Examples of fundamental rights, affected by statutory classification and subjecting them to strict scrutiny, are voting, interstate travel, and first amendment freedoms, such as speech, exercise of religion, etc. See Dunn v. Blumstein, 405 U.S. 330, 336, 338, 92 S.Ct. 995, 999, 1001, 31 L.Ed.2d 274 (1972); State of Fla. v. Mathews, 526 F.2d at 325.

[9]"[R]ace is the paradigm," Personnel Adminstrator of Mass. v. Feeney, 442 U.S. at 273, 99 S.Ct. at 2292, or principal example of a suspect criterion on which a classification is defined. Harris v. McRae, 448 U.S. at 322, 100 S.Ct. at 2691. Similar criteria, which subject classifications based on them to strict and exacting scrutiny, are those of other involuntary and immutable human attributes, such as national origin, alienage, illegitimacy, and gender. Parham v. Hughes, 441 U.S. 347, 351, 99 S.Ct. 1742, 1745, 60 L.Ed.2d 269 (1979); Personnel Administrator of Mass. v. Feeney, 442 U.S. at 273, 99 S.Ct. at 2293.

will be sustained if the legislature "could have reasonably concluded that the challenged classification would promote a legitimate state purpose." Exxon Corp. v. Eagerton, 103 S.Ct. 2296, 2308 (1983). See Martinez v. Bynum, 103 S.Ct. 1838, 1842 and n.7 (1983); Minnesota v. Cloverleaf Creamery Co., 449 U.S. 456, 470, 101 S.Ct. 715, 727, 66 L.Ed.2d 659 (1981). The appropriate standard of scrutiny for legislative classifications under the Equal Protection Clause is determined according to federal constitutional law, Minnesota v. Cloverleaf Creamery Co., 449 U.S. at 461 and n.6, 101 S.Ct. at 722 and n.6: whether the classification bears a rational relationship to a legitimate public purpose which it is intended to achieve. See State of Fla. v. Matthews, 526 F.2d at 325.

"The threshold question, therefore," is always "whether the [particular] statute is invidiously discriminatory." Parham v. Hughes, 441 U.S. 347, 351-52, 99 S.Ct. 1742, 1746, 60 L.Ed.2d 269 (1979).

> If it is not, it is entitled to a presumption of validity and will be upheld 'unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.' Id. at 352, 99 S.Ct. at 1746.
>
> This is not a case involving a 'suspect classification' (e.g., race, sex and alienage), or a 'fundamental right' (e.g., voting, interstate travel and free speech); thus the classification will be sustained unless it is 'patently arbitrary and bears no rational relationship to a legitimate governmental interest.

> Under traditional equal protection principles, a State retains broad discretion to classify as long as its classification has a reasonable basis.....this is so in 'the area of economics and social welfare.'

Graham v. Richardson, 403 U.S. at 371, 91 S.Ct. at 1852.

Once the threshold issue is satisfied, that a statute does not create an invidiously discriminatory classification, the remaining issue is "whether the statutory classification is rationally related to a permissible state objective." Parham v. Hughes, 441 U.S. at 357, 99 S.Ct. at 1748. A twofold method of inquiry is used to determine whether a state's classification is rationally related to, and based on, a legitimate public purpose.

> First, does the challenged classification have a legitimate purpose?
>
> Second, was it reasonable to believe that the classification would promote that purpose?

Western & Southern Life Ins. Co. v. State Board of Equalization of Calif., 451 U.S. at 668, 101 S.Ct. at 2083.

Although the choice of particular legislative classifications may be debatable, "the courts are not empowered to second-guess the wisdom of state policies"; and judicial review of the objective behind a challenged classification "is confined to the legitimacy of the purpose." Id. at 670, 101 S.Ct. at 2084 (emphasis in original).

Parham v. Hughes, 441 U.S. 347, 99 S.Ct. 1742, 60 L.Ed.2d 269 (1979), involved an equal protection and due process attack

upon a Georgia statute. The question presented was whether the statute violated "the Equal Protection or Due Process Clause of the Fourteenth Amendment by denying the father of an illegitimate who has not legitimated the child the right to sue for the child's wrongful death." Id. at 349, 99 S.Ct. at 1744.

The Court explained and illustrated its two-step analysis of equal protection claims. "The threshold question, therefore, is whether the Georgia statute is invidiously discriminatory." Id. at 352, 99 S.Ct. at 1746.

> If it is not, it is entitled to a presumption of validity and will be upheld 'unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.'

Id. at 352, 99 S.Ct. at 1746. However, "when a State has enacted legislation whose purpose or effect is to create classes based upon racial criteria, since racial classifications, in a constitutional sense, are inherently 'suspect,'" id. at 351, 99 S.Ct. at 1745, the legislation will not be clothed with a presumption of validity. "And the presumption of statutory validity may also be undermined when a State has enacted legislation creating classes based upon certain other immutable human attributes." Id.

> In the absence of invidious discrimination, however, a court is not free under the aegis of the Equal Protection Clause to substitute its judgment for the will of the people of a State as expressed in the laws passed by their popularly elected legislatures.

Id. at 351, 99 S.Ct. at 1745-46.

The second question in the analysis, therefore, is "whether the statutory classification is rationally related to a permissible state objective." Id. at 357, 99 S.Ct. at 1748.

> State laws are generally entitled to a presumption of validity against attack under the Equal Protection Clause....Legislatures have wide discretion in passing laws that have the inevitable effect of treating some people differently from others, and legislative classifications are valid unless they bear no rational relationship to a permissible state objective.

Id. at 351, 99 S.Ct. at 1745.

The Court found that the statute's discriminating classification, affecting "only the fathers of deceased illegitimate children," id. at 353, 99 S.Ct. at 1747, (1) did not "impose differing burdens or award differing benefits to legitimate and illegitimate children"; (2) affected only the natural father by denying "the right to sue for his illegitimate child's wrongful death"; (3) did not exclude all members of the same sex from its classification; (4) promoted society's goal of condemning "irresponsible liaisons beyond the bonds of marriage"; and (5) promoted the interest "in avoiding fraudulent claims of paternity, that could lead to multiple wrongful death actions, and spurious claims against intestate estates." Id. at 353, 356-357, 99 S.Ct. at 1746-1747, 1748, 1749.

The Court noted that concerns about "the Constitutionality of differing legislative treatment of legitimate and illegitimate children are simply absent when a classification affects only

the fathers of deceased illegitimate children." Id. at 353, 99 S.Ct. at 1747.

Whether, in fact, a particular classification will accomplish its objectives is not a proper question for the courts. The Equal Protection Clause is satisfied by the conclusion that the legislative body could rationally have believed and decided that the particular classification chosen would promote the desired purpose. Id. at 671-72, 101 S.Ct. at 2085; Minnesota v. Cloverleaf Creamery Co., 449 U.S. at 466, 101 S.Ct. at 725.

> States are not required to convince the courts of the correctness of their legislative judgments. Rather, 'those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker.'....[T]hey cannot prevail so long as 'it is evident from all considerations presented...that the question is at least debatable.'

Minnesota v. Cloverleaf Creamery Co., 449 U.S. at 464, 101 S.Ct. at 724. The guarantee of equal protection does not afford judicial review and relief from legislation which is felt to be ill-advised or to "reflect unwise policy." Personnel Administrator of Mass. v. Feeney, 442 U.S. at 281, 99 S.Ct. at 2297.

> The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility.

Id. at 272, 99 S.Ct. at 2292.

The cornea removal statute creates a class of deceaseds, for which autopsies are required under the medical examiner statute

(§ 406.11); where there is no known objection by the next of kin to the removal of the corneae; where the corneae are suitable for human transplant; and the removal of corneae will not interfere with the necessary autopsies. Contrary to the notion imbedded in the trial court's ruling, there is nothing invidiously discriminatory about a classification that makes corneal tissue available from a decedent, without consent of the next of kin, where a death occurs under circumstances requiring an autopsy.

The classification created by the statute involves not living persons, but the deceased. To be sure, the living next of kin and family members are indirectly affected by that classification. But there are no fundamental rights affected by the classification, and there are no suspect criteria on which it is defined. The present case is far removed from any of the constitutional concerns over invidious discrimination against fundamental rights, or which is based on suspect criteria. The legislative classification created by Fla. Stat. § 732.9185 is not based upon any involuntary and immutable conditions of living persons (such as gender or illegitimacy); and the classification affects only the surviving family members of the deceased. Cf. Parham v. Hughes, 441 U.S. at 353, 99 S.Ct. at 1746-47. The statute's classification, therefore, must be upheld if it is reasonably related to achieving a legitimate public purpose.

This classification is a reasonable one to accomplish the overall public purpose of providing sight for blind people. The

classification furthers this goal by furnishing a greater amount of corneal tissue, and a more youthful, higher quality of corneal tissue, within the short time span necessary for successful transplants, in circumstances where consent is already not required for the comparatively greater intrusion of an autopsy procedure.

Therefore, it simply cannot be concluded that this statute does not bear any arguably rational relationship to the accomplishment of its goal. Hence, the statute must be sustained against an equal protection challenge. Disagreement or displeasure with it, whether because deemed imprudent, ineffective, or unacceptable, should be addressed to the legislature that enacted it. However, such dissatisfaction furnishes no basis for invalidating the statute under the Equal Protection Clause.

B. Substantive Due Process

"Due process has both a procedural and a substantive aspect." Wilson P. Abraham Construction Corp. v. Texas Industries, Inc., 604 F.2d 897, 904 (5th Cir. 1979).

> "[T]he Due Process Clause of the Fourteenth Amendment not only accords procedural safeguards to protected interests, but likewise protects substantive aspects of liberty against impermissible governmental restrictions.

Harrah Independent School District v. Martin, 440 U.S. 194, 197, 99 S. Ct. 1062, 1063, 59 L.Ed. 2d 248 (1979).

"Substantive due process requires that all legislation be rationally related to the furtherance of a legitimate governmental objective." Wilson P. Abraham Construction Corp. v. Texas Industries, Inc., 604 F.2d at 904.

> To satisfy due process, 'the challenged legislation must have a legitimate public purpose based on promotion of the public welfare, health or safety,'...and 'be rationally related to the accomplishment of [that] legitimate state purpose.'

Dirt, Inc. v. Mobile County Commission, 739 F.2d 1562, 1565 (11th Cir. 1984).

Decisions from the United States Supreme Court "have emphasized that the general welfare is not to be narrowly understood; it embraces a broad range of governmental purposes." Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 498 n.6, 97 S. Ct. 1932, 1935 n.6, 52 L.Ed.2d 531 (1977).

> The basic test of substantive due process is whether the state can justify the infringement of its legislative activity upon personal rights and liberties. So long as the legislative activity does not encroach upon constitutional guarantees, or run afoul of federal statutory law, a state has a broad scope of discretion in which to regulate the conduct of its citizens....It need only be shown that the challenged legislative activity is not arbitrary or unreasonable. ...Courts will not be concerned with whether the particular legislation in question is the most prudent choice, or is a perfect panacea, to cure the ill or achieve the interest intended. ....If there is a legitimate state interest which the legislation aims to effect, and if the legislation is a reasonably related means to achieve the intended end, it will be upheld....Nevertheless, despite a state's wide discretion, and the cautious restraint of the courts, there remain basic restrictions and limits on a state's legislative power to intrude upon individual rights, liberties, and conduct. To exceed those bounds without rational justification is to collide with the Due Process Clause.

Patch Enterprises, Inc. v. McCall, 447 F.Supp. 1075, 1080-81

(M.D. Fla. 1978).[10]

Substantive due process is a constitutional bulwark against unreasonable governmental intrusion into fundamentally personal choices and relationships essential to the orderly pursuit of happiness by free persons. Cf. Meyer v. State of Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626 (1923).

> "The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State....Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty."

Roberts v. United States Jaycees, 104 S.Ct. 3244, 3250 (1984).

The only rights which the Court has found to be so fundamental as to be implicit in the personal liberty protected by the Due Process Clause have involved ongoing, highly personal relationships among living persons. "[A]mong the decisions that an individual may make without unjustified government interference are personal

---

[10]The substantive due process analysis of Patch Enterprises, Inc. v. McCall, both in its content and method of reasoning, have repeatedly been approved by Florida decisions. See Fillingin v. State, 446 So.2d 1099, 1103 (Fla. 1st D.C.A 1984); State v. Walker, 444 So.2d 1137, 1138-39 (Fla. 2nd D.C.A. 1984); Florida Canners Ass'n. v. State Dep't of Citrus, 371 So.2d 503, 513 (Fla. 2nd D.C.A. 1979, aff'd 406 So.2d 1079 (Fla. 1981) appeal dismissed for want of substantial fed. question sub nom. Kraft, Inc. v. Florida Dep't of Citrus, 456 U.S. 1002, 102 S. Ct. 2288, 73 L.Ed.2d 1297 (1982). Like equal protection, the standards and methods of review under the due process clauses of the Fourteenth Amendment and the Florida Constitution are identical. Florida Canners Ass'n v. State Dep't of Citrus, 371 So.2d at 513.

decisions 'relating to marriage,...procreation,...contraception, ...family relationships,...and child rearing and education.'" Carey v. Population Services Inter'l, 431 U.S. at 684, 97 S.Ct. at 2016.

> "The personal affiliations that exemplify these considerations, and that therefore suggest some relevant limitations on the relationships that might be entitled to this sort of constitutional protection, are those that attend the creation and sustenance of a family--marriage,...child birth,...the raising and education of children,...and cohabitation with one's relatives..."

Roberts v. United States Jaycees, 104 S.Ct. at 3250.

The Court has clearly indicated that these fundamental rights are not absolutely exempt from governmental regulation:

> "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,'...and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake."

Roe v. Wade, 420 U.S. 113, 155, 93 S.Ct. 705, 728, 35 L.Ed.2d 147 (1973).

> "When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate those interests."

Zablocki v. Redhail, 434 U.S. 374, 388, 98 S.Ct. 673, 682, 54 L.Ed.2d 1618 (1978).

The Court has noted that the realm of substantive, fundamental rights, which it has recognized as protected by the Due Process Clause, is not exhaustive. Carey v. Population Services Inter'l,

431 U.S. 678, 684-85, 97 S.Ct. 2010, 2016, 52 L.Ed.2d 675 (1977). At the same time, the Court has also cautioned that much of what is encountered in the range of human experience does not warrant expanding the concept of ordered personal liberty, to create additional fundamental rights.

> "Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. Among other things, therefore, they are distinguished by such attributes as relative smallness, a high degree of selectivity and decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty. Conversely, an association lacking these qualities -- such as a large business enterprise -- seems remote from the concerns giving rise to this constitutional protection."

Roberts v. United States Jaycees, 104 S.Ct. at 1350-51.

Further, in refusing to broaden the scope of fundamental rights in cases which do not involve highly personal choices or presently existing and ongoing relationships amongst living people, the Court has illustrated that deep personal sentiment and emotion alone will not warrant the protection of the Due Process Clause.

> "[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays

in 'promot[ing] a way of life'...

Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 844, 97 S.Ct. 2994, 2109, 53 L.Ed.2d 14 (1977).

In Roe v. Wade, supra, notwithstanding deep personal sentiment involved, the potential life and relationship of a future (but yet unborn) child with its mother was not deemed a fundamental right under the Due Process Clause, in the face of the competing rights and liberty of the existing, pregnant woman.

In Quilloin v. Wolcott, 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978), the potential of a legitimated relationship between an illegitimate child and his unwed, natural father did not qualify as a fundamental right protected by the liberty of the Due Process Clause, against the existing relationship of the child with his natural mother and the stepfather wishing to adopt him. See Lehr v. Robertson, 103 S.Ct. at 2993.

Even in Smith v. Organization of Foster Families for Equality & Reform, supra, despite the emotions involved in a current, state-created relationship between a foster family and a foster child, it could not enjoy the protected liberty of a fundamental right under the Due Process Clause, in conflict with the "intrinsic human rights" of the natural family. 431 U.S. at 845, 97 S.Ct. at 2110.

Nor could the emotional repercussions from being publicized as an arrested, but not convicted, shoplifter, qualify as a fundamental liberty protected under the Due Process Clause, in Paul v. Davis, 424 U.S. 693, 713, 96 S.Ct. 1155, 1166, 47 L.Ed.2d

405 (1976).

Death, of course, is beyond the other extreme of living relationships -- not a potential for, but a termination of, such relationships. The relationship of the surviving family with the deceased has ended.

> "Generally, the term 'person' as used in the legal context, defines a living human being and excludes a corpse as a living being who has died."

Guyton v. Phillips, 606 F.2d 248, 250 (9th Cir. 1979), cert. denied sub nom. Guyton v. Jensen, 445 U.S. 916, 100 S.Ct. 1276, 63 L.Ed.2d 600 (1980).

Expanding the scope of liberty under the Due Process Clause to include the lingering emotion of memories by survivors, concerning a past relationship with the deceased, is far less compelling than those potential relationships to which the Court has not extended the substantive protection of a fundamental right. To extend the scope of substantive due process to the sentiments and recollections of survivors, concerning their past relationship with a deceased, is inconsistent with the nature of the ongoing personal closeness in those relationships which the Court has regarded as fundamental.

Finally, to broaden substantive due process to include a past relationship with a deceased is to embark upon a course over uncharted terrain, the destination of which is unknown, leaving behind the compass of reason by which the Court has drawn the boundaries in the past. What the Court cautioned, in Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 502-04, 97

S.Ct. 1932, 1937-38, 52 L.Ed.2d 531 (1977), in recognizing the right of an extended family to live together, bears careful heed in a situation as in the present case:

> "Substantive due process has at times been a treacherous field for this Court. There are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights....[T]here is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint. But it does not counsel abandonment...
>
> "Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect for the teachings of history [and], solid recognition of the basic values that underlie our society.'...Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.

It is only through an ongoing relationship with living persons, such as an existing family, that "cherished values, moral and cultural, [are] inculcate[d]." Id. at 504, 97 S.Ct. at 1938.

The cornea removal statute, Fla. Stat. § 732.9185, is reasonably related to promoting the legitimate governmental objective of providing the gift of sight to persons who otherwise would be blind, and limited in their ability to engage in the activities involved in employment, recreation, and the necessary functions of everyday life. By making available a supply of corneal tissue for needed transplants, usually of high quality,

the statute achieves its goal.

That there are circumstances where the goal of this statute is not met, and that there are persons opposed to it, does not invalidate the statute under the Due Process Clause.

> The constitution does not make it a condition of preventive legislation that it should work a perfect cure. It is enough if the questioned act has a manifest tendency to cure or at least to make the evil less.

North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 167, 94 S.Ct. 407, 38 L.Ed.2d 379, 387 (1973). Because of the increasing need of corneal tissue for transplant, authorizing the supply of corneae, under the conditions when an autopsy is required by the medical examiner statute, Fla. Stat. § 406.11, and when the other circumstances set forth in the statute are met, is a legislative determination rationally related to achieving the public benefit intended.

Under the circumstances surrounding the deaths of James White and Anthony Powell, full autopsies were necessary. Making their corneae available for transplant was consistent with both the conditions and the authority under the cornea removal statute. There is no suggestion or evidence to the contrary.

In each case, as Plaintiffs, the parents of the deceased boys simply attack the statute because they disagree with the results that it was enacted to achieve. This disagreement, while real, fails to recognize that opposition to the legislature's statutory means does not invalidate it as lacking reasonable relationship to the accomplishment of legitimate public goals and

purposes. Hence, the cornea removal statute satisfies the requirement of due process under the United States and Florida Constitutions.

C. Right of Privacy

The right of privacy under federal constitutional law is rooted in the Due Process Clause--the substantive safeguards of due process against unwarranted encroachments into fundamental rights and ordered liberties.

> "Although '[t]he Constitution does not explicitly mention any right of privacy,' the Court has recognized that one aspect of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment is a 'right of personal privacy, or a guarantee of certain areas or zones of privacy.'

Carey v. Population Services In'tl, 431 U.S. at 684, 97 S.Ct. at 2016.

The right of privacy under Florida law is found in article I, section 23 of the Florida Constitution.

(1) No Constitutional Right of Privacy to Decedents.

Under federal law, constitutional rights (including right to privacy) of Plaintiffs' deceased children terminated at their deaths.

> After death, one is no longer a person within our constitutional and statutory framework, and has no rights of which he may be deprived.

Whitehurst v. Wright, 592 F.2d 834, 840 (5th Cir. 1979). The Court also noted that, based on the Supreme Court's ruling "that a fetus is not a person under the Fourteenth Amendment and has no

right thereunder," it could be forcefully argued that

> [I]f a being capable of sustaining life in the future is not a person, a fortiori, a corpse, having no potential for life is not a person within the protection of our constitution.

Id. at n.9. Other federal courts have ruled similarly.

> [B]ecause the F.B.I. allegedly became involved in the conspiracy only after the death of Karen Silkwood..., [it] therefore, could not have violated her rights.

Silkwood v. Kerr-McGee Corp., 637 F.2d 743, 749 (10th Cir. 1980), cert. denied 454 U.S. 833, 102 S.Ct. 132, 70 L.Ed.2d 111 (1981). "We agree....that the civil rights of a person cannot be violated once that person has died." Id.

> A "deceased" is not a "person" for the purposes of 42 U.S.C. §§ 1983 and 1985, nor for the constitutional rights which the Civil Rights Act serves to protect.
>
> Generally, the term "person", as used in the legal context, defines a living human being and excludes a corpse or a human being who has died.
>
> [R]elevant cases suggest the definition of a "person" for purposes of protection of constitutional rights is limited only to a living human being. In Roe v. Wade, the Supreme Court held that a fetus is not a "person" within the meaning of the Fourteenth Amendment.

Guyton v. Phillips, 606 F.2d at 250 (emphasis added).

> In the present case, all of the alleged actions of the appellees occurred after [the deceased's] death and thus were not violations of a 'person's' civil rights.

Id. at 251. In accord with these decisions under federal constitutional law, the trial court had earlier ruled in this case

that "Plaintiffs' deceased minor son (like the unborn) has no recognized legal rights. Cf. Roe v. Wade, 410 U.S. 113, 158, 98 S.Ct. 705, 729, 35 L.Ed.2d 147 (1973)." (R.382-86)

On this question, Florida law is similar. "The right of privacy is a right that is purely personal to the individual asserting such right." Jones v. Smith 278 So.2d 339, 342 (Fla. 4th D.C.A. 1973) (emphasis supplied by court). Also, the Florida Constitution, article I, section 23, expressly limits the right of privacy to "natural persons" and to intrusions into "private life."

(2) No Constitutional Right of Privacy to Plaintiffs.

Only fundamental rights of personal liberty are protected by the Due Process Clause of the Fourteenth Amendment, against unreasonable and arbitrary state action. Those rights include highly personal actions and relationships among living persons, such as marriage, procreation, contraception, childbirth, raising and educating children. City of Akron v. Akron Center for Reproductive Health, Inc., 103 S.Ct. 2481, 2490-92 (1983); Harrah Independent School District v. Martin, 440 U.S. 194, 198, 99 S.Ct. 1062, 1064, 59 L.Ed.2d 248 (1979); Zablocki v. Redhail, 434 U.S. 374, 383-85, 98 S.Ct. 673, 679-80, 54 L.Ed.2d 618 (1978); Carey v. Population Services Int'l, 431 U.S. 678, 684-85, 97 S.Ct. 2010, 2016, 52 L.Ed.2d 675 (1977); Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 499-501, 97 S.Ct. 1932, 1935-36, 52 L.Ed.2d 531 (1977); Paul v. Davis, 424 U.S. 693, 712-13, 96 S.Ct. 1155, 1166, 47 L.Ed.2d 405 (1976); Roe v. Wade, 410 U.S. 113,

152, 93 S.Ct. 705, 726, 35 L.Ed.2d 147 (1973). See Griswold v. Connecticut, 381 U.S. 479, 484-85, 85 S.Ct. 1678, 1681-82, 14 L.Ed.2d 510 (1965); Prince v. Commonwealth of Massachusetts, 21 U.S. 158, 165-67, 64 S.Ct. 438, 442 (1944).

In ruling that the cornea removal statute violates Plaintiffs' right of privacy under the Due Process Clause and article I, section 23 of the Florida Constitution, the trial court failed to discern the nature of those interests that have been accorded the constitutional safeguards of privacy. Every instance in which the Due Process Clause has been recognized as a source of such privacy rights has been limited solely to intimate relationships among living persons.

In Tillman v. Detroit Receiving Hospital, 360 N.W. 2d 275 (Mich. App. 1984), the Court of Appeal rejected the plaintiff's challenge to an almost identical cornea removal statute[11], as an unconstitutional invasion of her right of privacy.

> The threshold question is whether plaintiff has privacy rights which are implicated here. Only rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" are included in the guaranty of the right of personal privacy...Plaintiff claims that as next of kin she has an inherent, fundamental right to bury her decedent's body without mutilation. While there is no property right in the next of kin to a dead body, ...Michigan jurisprudence recognizes a common law cause of action on behalf of the person or persons entitled to the possession, control or burial of a dead body for the tort of interference

---

[11]See footnote 4 above.

> with the right of burial of a deceased person without mutilation.
>
> We do not find this common law right to be of constitutional dimension. The privacy right encompasses the right to make decisions concerning the integrity of one's body...This right is, however, a personal one. It ends with the death of the person to whom it is of value. It may not be claimed by his estate or his next of kin...Accordingly, we reject plaintiff's constitutional challenge predicated on the right to privacy.

Id. at 277.

Florida law and Michigan law are in accord. In Florida, as in Michigan, while there is no property right of the next of kin in a dead body, there is a common law cause of action for the tort of maliciously interfering with the right of the next of kin to bury their decedents in the lawful manner they so choose. See Kirksey v. Jernigan, 45 So.2d at 189-90; cf. Rupp v. Jackson, 238 So.2d at 89. In Florida, as in Michigan, the privacy right is a personal one. "The right of privacy is a right that is purely personal to the individual asserting such right." Jones v. Smith, 278 So.2d at 342 (emphasis supplied by court).

The Florida Constitution's guarantee, in article I, section 23, provides a greater scope of privacy against informational disclosure than the federal Constitution. Winfield v. Division of Pari-Mutual Wagering, Dep't of Business Regulation, 10 F.L.W. 548, 550 (Fla. 1985). However, the scope of privacy for personal autonomy appears to encompass the same highly personal relationships among living persons as in the Fourteenth Amendment.

See Florida Board of Bar Examiners re Applicant, 443 So.2d 71, 74-76 (Fla. 1983); Shevin v. Byron, Harless, Schaffer, Reid & Associates, 379 So.2d 633, 636-39 (Fla. 1980); Laird v. State, 342 So.2d 962 (Fla. 1977).

Only if fundamental rights, involving intimate relationships among living persons, are at stake, must a compelling state interest be shown to justify governmental activity that impinges upon those rights. The trial court's ruling that Plaintiffs have a right of privacy, in the bodies of their deceased sons, fundamental and implicit in the concept of ordered liberty, conflicts with the long line of cases which has acknowledged constitutionally protected rights of privacy only for ongoing personal relationships among living persons.

CONCLUSION

Unquestionably, the deaths of Plaintiffs' sons, through drowning and a motor vehicle accident, were tragic losses to them. Requiring autopsies, regardless of next-of-kin's consent, however, is constitutional and proper, as the trial court ruled (R.760). In such circumstances, beyond the natural changes that death brings to the condition of bodies, the autopsy procedure alters them substantially more.

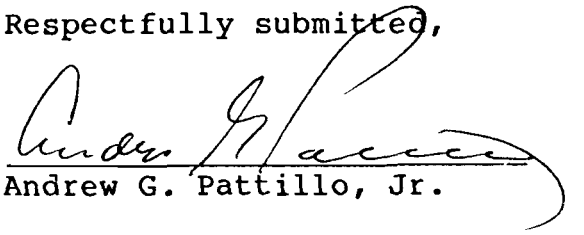
In exactly those same circumstances, the legislature has authorized, by the cornea removal statute, the slight further change of removing, without consent, small, thin, clear corneal tissue for transplant. The statute cannot dispel the grief and sense of loss from those deaths, but it may perhaps temper them in a small way by enabling them to redound to some good.

That good is the worthy public goal of bestowing sight upon blind persons through the availability of corneal tissue for transplant. In seeking to accomplish that goal, the cornea removal statute affects no genuine property interest of Plaintiffs. It creates no suspect classifications; and it impinges on no fundamental constitutional right of Plaintiffs. It is a reasonable legislative choice to achieve the intended objective.

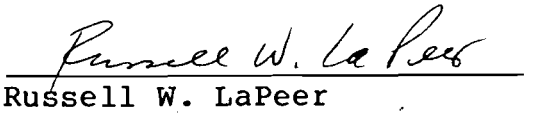
The trial court's ruling that this statute is unconstitutional is not only contrary to constitutional law, both state and federal, it is an improper substitution of judicial judgment for a distinctively legislative determination concerning public

health and welfare. Accordingly, the trial court's ruling should be reversed and the constitutionality of the cornea removal statute upheld.

Respectfully submitted,



Andrew G. Pattillo, Jr.



Russell W. LaPeer

Of PATTILLO & McKEEVER, P.A.
Post Office Box 1450
Ocala, Florida 32678
(904) 732-2255

Attorneys for Defendants-Appellants, William H. Shutze, M.D., Thomas M. Techman, M.D., and Keith Gauger

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that the original and seven copies of the foregoing Corrected Initial Brief have been served this 5th day of November, 1985 for delivery to the Clerk of the Supreme Court of the State of Florida on November 6, 1985; and a copy served by U.S. Mail this 5th day of November, 1985, upon the following:

James T. Reich, Esquire, 606 Southwest Third Avenue, Ocala, Florida 32670;

Jack Singbush, P.A., P.O. Box 906, Ocala, Florida 32678;

Jerome J. Bornstein, Esquire, Staff Counsel, American Civil Liberties Union, 125 South Court Avenue, Orlando, Florida 32801;

Craig A. Dennis, Esquire, Post Office Drawer 5286, Tallahassee, Florida 32314;

George N. Meros, Jr., Esquire, P.O. Drawer 190, Tallahassee, Florida 32302;

Robert L. Blake, Esquire, Assistant County Attorney, Jackson Memorial Hospital, Public Health Trust Division, 1611 Northwest 12th Avenue, Executive Suite C, Room 108, W.W., Miami, Florida 33136;

Louis F. Hubener, Esquire, Assistant Attorney General, Department of Legal Affairs, The Capitol - Suite 1501, Tallahassee, Florida 32301;

Janet W. Adams, Esquire, Adams, Hill & Fulford, 333 North Ferncreek Avenue, Orlando, Florida 32803; and

Donald W. Weidner, Esquire, Associate General Counsel, Florida Medical Association, 760 Riverside Avenue, Jacksonville, Florida 32204.

Russell W. LaPeer

Russell W. LaPeer