

# Heart Transplants, Legislating Death, and Disruptive Anti-Apartheid Advocacy

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In Groote Schuur hospital on December 3, 1967, a white South African surgeon, Christiaan Barnard, transplanted the heart of a young white woman, Denise Darvall, into the body of Louis Washkansky, a diabetic Lithuanian Jew. Following his first transplant, Barnard became notorious across Europe and North America for his pioneering breakthrough, as heart surgeons around the world were in a competitive race to carry out a successful heart transplant.<sup>1</sup> Most knew each other, and many had studied or practiced together. Barnard had undertaken his residency in the 1950s at the University of Minnesota in the United States in the company of Dr. Norman Shumway and Dr. Christian Cabrol, who carried out the first successful heart transplants in the United States and France, respectively. Soon after Barnard's death in 2001, Shumway suggested that the

1. Margaret Lock, *Twice Dead: Organ Transplants and the Reinvention of Death* (Berkeley: University of California Press, 2002); and Edward C. Halperin, "Christiaan Neethling Barnard, M.D., M.Med., M.S., Ph.D.," *The American Surgeon* 74 (2008): 1078–82.

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first heart transplant was of greater social than medical importance because it pushed society to accept death as cerebral rather than an event signaled by cessation of heartbeat and respiration.<sup>2</sup> As legal, medical, and ethical debates emerged about how to define and certify death in such a way as to increase the viability of the transplanted heart, anti-apartheid advocates highlighted the racial and judicial asymmetries that, in their view, enabled Barnard to succeed before more experienced surgeons.<sup>3</sup>

Although anti-apartheid activists throughout the world were already aware that apartheid posed a threat to human rights, economic rights, and justice in South Africa, the notoriety of heart transplants offered an opportunity to sensitize new audiences to the structural injustices that the South African regime imposed upon non-white populations.<sup>4</sup> World attention to heart transplants enabled anti-apartheid activists to spotlight the racial and economic inequities that the South African government maintained through racially segregated legislation. Historian Saul Dubow has categorized anti-apartheid activists as heterogeneous in their perception of apartheid and the strategies that they leveraged against it. While some, particularly in capitalist countries, viewed it as an immoral attack on international standards of “justice, fairness and equality”—an aberration in a white-dominated world—others, especially those hailing from social democratic or socialist countries saw it as exemplifying, in an extreme way, “global capitalist economic exploitation and oppression.”<sup>5</sup> This article recounts the work of a committee composed of French Third Worldist Protestants experienced in supporting Algerian decolonization who tried to generate understanding of apartheid as *both* a morally unjust system *and* as a symptom of structural inequality on a global scale. To them, apartheid was part of the (neo)colonial white-dominated economic and racial order that outlasted empire. Confronting apartheid on both registers, the moral and the structural, required fostering human rights that would do more than seek to assuage moral wrongs by ensuring individual rights

2. Calixto Machado, Julius Korein, Yazmina Ferrer, Liana Portela, Maria de la C Garcia, and José M Manero, “The Concept of Brain Death Did Not to Evolve to Benefit Organ Transplants,” *Journal of Medical Ethics* 33 (2007): 197–200.

3. The questions involved in redefining death have been extensively studied. An especially nuanced medico-legal, ethical, and philosophical account is Stéphanie Hennette-Vauchez and Graciela Nowenstein, “Dire la mort et faire mourir: Tensions autour de la mort encéphalique et la fin de vie en France,” *Sociétés contemporaines* 75 (2009): 37–57.

4. Saul Dubow, “Closing Remarks: New Approaches to High Apartheid and Anti-Apartheid,” *South African Historical Journal* 69 (2017): 304–29, at 305.

5. *Ibid.*, 305.

protections. It required developing human rights that recognized and dismantled white economic privilege.

As the South African government leveraged the first cardiac transplants to present the image of a modern, technologically advanced South Africa,<sup>6</sup> Jean-Jacques de Félice, a French activist lawyer who chaired France's Anti-Apartheid Committee, and Elisabeth Mathiot, the committee's secretary, instrumentalized media coverage of the medical breakthrough to bring public awareness to the injustices of apartheid. They questioned Barnard's ethics and the legality of his transplants. They demonstrated how his medical advances converged with the South African state's arbitrary powers of detention and capital punishment to make a majority non-white population a potential involuntary organ bank for a white clientele. They called for an international law against using the organs of anyone deprived of liberty or condemned to death.<sup>7</sup>

Throughout 1968, surgeons in the United States, France, the United Kingdom, India, Argentina, and Brazil transplanted human hearts, with marginal long-term success.<sup>8</sup> As the year progressed, South Africa reacted to anti-apartheid campaigns as Barnard took a victory lap around the world. Increasingly aware of the implications that anti-apartheid activists made, with the support of colleagues and government officials, Barnard convened a symposium of heart surgeons in Cape Town in July 1968. One goal of the symposium was to discuss how organ donation legislation

6. Concurrently and in parallel fashion, the National Party of South Africa instrumentalized human rights discourse to defend apartheid's legitimacy: see Roland Burke, "'A World Made Safe for Diversity.' Apartheid and the Language of Human Rights, Progress, and Pluralism," in *The Rise of Global Human Rights Politics*, ed. A. Dirk Moses, Marco Duranti, and Roland Burke (Cambridge: Cambridge University Press, 2020), 316–39.

7. There is a growing scholarly literature on cause, activist, and advocate lawyers. See Austin Sarat and Stuart A. Scheingold, *The World's Cause Lawyers Make: Structure and Agency in Legal Practice* (Stanford: Stanford University Press, 2005). For cause lawyering in colonial contexts, legal advocacy on behalf of colonized subjects, and decolonizing or liberationist legal contestation see, among others: Vanessa Codaccioni, *Punir les opposants: PCF et procès politiques 1947–1962* (Paris: CNRS Editions, 2012); Meredith Terretta, "Anti-Colonial Lawyering, Postwar Human Rights, and Decolonization across Imperial Boundaries in Africa," *Canadian Journal of History* 52 (2017): 448–78; and Tembeka Ngcukaitobi, *This Land is Ours: South Africa's First Black Lawyers and the Birth of Constitutionalism* (Johannesburg: Penguin Random House South Africa, 2018). In the sphere of international law, see Umut Ozsu, "Determining New Selves: Mohammed Bedjaoui on Algeria, Western Sahara, and Post-Classical International Law," in *Battle for International Law—South-North Perspectives on the Decolonization Era*, ed. Jochen von Bernstorff and Phipp Dann (Oxford: Oxford University Press, 2019), 341–57.

8. By May 6, 1969, a total of 130 heart transplants had been performed (72 of them in the United States), and 95 of the recipients were dead. Only sixteen lived longer than 6 months. Symposium mondial sur la transplantation cardiaque, *Heart Transplantation: Second World Symposium* (Québec: Les Presses de l'Université Laval, 1970), 68–69.

could best increase donors and enable cardiac transplant success. The Anatomical Donations and Post-Mortem Examinations bill reached the South African Parliament on February 9, 1969 and bore the imprint of the International Symposium on Heart Transplantation. Especially innovative in its use of the phrase “living donor,” the bill aspired to make prisoner and posthumous organ harvesting possible: the eventualities that anti-apartheid activists cautioned against.

The history of heart transplants has been broadly written, studied, and memorialized. Medico-legal scholars have probed the relationship between cardiac transplant and the redefinition of death. The story of Christiaan Barnard, the gregarious Afrikaner heart surgeon who craved the limelight as much as surgical prowess, has been oft told as well. Histories of apartheid era South Africa and anti-apartheid activism proliferate. Here, my focus is the convergence of these histories. My aim is to show how apartheid, heart transplants, legal definitions of anatomical donation and death, and Barnard’s character and professional networks created a highly visible problem to which the French Anti-Apartheid Committee, chaired by an activist lawyer, applied a historically contingent human rights strategy. The apartheid geography of the first cardiac transplants nourished a particular kind of human rights advocacy that emphasized the risks that not being white incurred under apartheid, risks that ultimately included involuntary organ donation. In the campaign that anti-apartheid advocates launched to disrupt heart transplant success stories, racialized apartheid law as a cause of human rights violations figured prominently. South African physicians in Barnard’s circle countered by discussing procedures, donors, and recipients in medical and legal languages that made little explicit mention of race or apartheid law (although donor selection and capital punishment became proxies for race in their exchanges), using a universal professionalism to render the particularities of race and apartheid law irrelevant, and to dismiss those who raised these issues as “political.”<sup>9</sup>

Of late, Anglo-American revisionist history of human rights has shown how human rights parted ways with the structural in order to make its breakthrough in the 1970s—a turn that resulted in its becoming not enough.<sup>10</sup> Complementary to these accounts, this article aims to show

9. See, for example, Marais Malan, *Heart Transplant: ‘The Story of Barnard and the Ultimate in Cardiac Surgery’* (Johannesburg: Voortrekkerpers, 1968), 112–16.

10. See, for example, Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA: Harvard University Press, 2010); Sarah B. Snyder, *Human Rights Activism and the End of the Cold War: A Transnational History of the Helsinki Network* (Cambridge and New York: Cambridge University Press, 2011); and Jan Eckel and Samuel Moyn, eds., *The Breakthrough: Human Rights in the 1970s* (Philadelphia: University of Pennsylvania Press, 2014). On the Carter administration’s approach to

how in postcolonial France as elsewhere, *prior* to the emergence of a hegemonically Anglo-American “human rights movement” in the late 1970s, anti-apartheid was deeply entangled in the institutional and discursive development of human rights as part of the language and structure of international politics in the 1960s.<sup>11</sup> Study of the French Anti-Apartheid Committee’s activism on the heart transplants issue shows how legally minded activists deployed human rights in liberationist advocacy work before the 1970s, the decade that revisionist historians argue marked the debut of human rights as an international movement. I examine how the committee drew on transnational anticolonial and antiracist networks and applied a strategy of rupture to the celebrations of Barnard’s successful heart transplants by interrogating the circumstances in which he operated and by promoting an international law against prisoner organ donation. As a human rights campaign, anti-apartheid organ donation advocacy achieved a mixed outcome. The proposed international law reached the Special Committee Against Apartheid’s Sub-Committee on Petitions, who then forwarded it to the Human Rights Commission for discussion at its Twenty-Fourth Session, but, perhaps lacking a member state representative to carry it forward, it seems to have made it no further.<sup>12</sup> Yet anti-apartheid critics eventually pressured Barnard to stop transplanting hearts from non-white donors.<sup>13</sup>

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South African apartheid after the human rights “breakthrough” see Simon Stevens, “‘From the Viewpoint of a Southern Governor’: The Carter Administration and Apartheid, 1977–81,” *Diplomatic History* 36 (2012): 843–80. Stevens argues that the policy built on the experiences of Jimmy Carter and Andrew Young (United States ambassador to the United Nations) in the 1960s Civil Rights-era American South.

11. On this point, although from the perspective of diplomatic history, see Steven L. B. Jensen, *The Making of International Human Rights: The 1960s, Decolonization and the Reconstruction of Global Values* (Cambridge: Cambridge University Press, 2016). For a perspective from below, demonstrating how “a flexible discourse of human rights took shape during a period of instability” through mobilization against apartheid in West Yorkshire, Great Britain, see Robert Skinner, “The Dynamics of Anti-apartheid: International Solidarity, Human Rights and Decolonization,” in *Britain, France and the Decolonization of Africa: Future Imperfect?* ed. Andrew W. M. Smith and Chris Jeppesen (London: UCL Press), 111–30, at 111.

12. La contemporaine (LC), Fonds Jean-Jacques de Félice (hereafter FJJF), Comité français contre l’Apartheid (hereafter CFCA), *Bulletin* February–March 1968, 6. United Nations, E.4475 and E.CN.4.972, Commission on Human Rights, Report on the Twenty-Fourth Session, February 5 to March 12 1968. At the time I researched them, the FJJF files had not yet been sorted and catalogued. Here I have listed them by the file names given by the donor. For an overview of the collection, see Bassirou Barry, “Les archives de Jean-Jacques de Félice: témoignages d’un combat,” *Matériaux pour l’histoire de notre temps* 115–16 (2015): 6–11.

13. “Barnard Stops Using Organs from Blacks,” *The Globe and Mail*, February 3, 1975, 3.

The French Anti-Apartheid Committee's response to Barnard's surgical breakthrough drew on transnational advocacy networks and legal strategies that predated the Universal Declaration of Human Rights. Engaged lawyering—or cause lawyering in more contemporary parlance—surfaced in France in the interwar period, and quickly reached France's overseas territories.<sup>14</sup> During the Resistance, engaged lawyers and magistrates influenced charges and sentencing outcomes at trial under Vichy.<sup>15</sup> After the war, a number of activist lawyers took on the work of defending colonial politicians and agitators at trial in overseas courtrooms.<sup>16</sup> A few of them became *porteurs de valise*: couriers of currency, forged documents and political correspondence between Algerian revolutionaries and political prisoners.<sup>17</sup> An activist lawyer himself, de Félice fitted human rights into a political and historically inflected framework of internationalist resistance lawyering. In this historically rooted activist practice, human rights figured as companion to anticolonialism.<sup>18</sup> In the 1960s, Anglo-American human rights promoters narrowed their focus to negative rights of individuals, passed moral judgment on liberation violence, and portrayed their nongovernmental

14. Sharon Elbaz and Liora Israël, "L'invention du droit comme arme politique dans le communisme français. L'Association juridique internationale (1929–1939)," *Vingtième Siècle: Revue d'histoire* 85 (2005): 31–43; and Meredith Terretta, "'In the Colonies, Black Lives Don't Matter.' Legalism and Rights Claims across the Interwar French Empire," *Journal of Contemporary History* 53 (2018): 12–37.

15. Liora Israël, *Robes noires, années sombres: Avocats et magistrats en résistance pendant la Seconde Guerre mondiale* (Paris: Fayard, 2005).

16. Meredith Terretta, "Cause Lawyering et anticolonialisme: Activisme politique et état de droit dans l'Afrique française, 1946–1960," *Politique africaine* 138 (2015): 25–48.

17. Sharon Elbaz, "L'avocat et sa cause en milieu colonial: La défense politique dans le procès de l'Organisation spéciale du Mouvement pour le triomphe des libertés en Algérie (1950–1952)," *Politix* 16 (2003): 65–91. For an early history of *porteurs de valises* more broadly, see Hervé Hamon and Patrick Rotman, *Les porteurs de valises: la résistance française à la guerre d'Algérie* (Paris: A. Michel, 1979), and more recently, Jacques Charby, *Les porteurs d'espoir: les réseaux de soutien au FLN pendant la guerre d'Algérie: les acteurs parlent* (Paris: Découverte, 2004).

18. For the opposite contention, see Moyn, *Last Utopia*, 86. A comprehensive, collaborative rebuttal is: A. Dirk Moses, Marco Duranti, and Roland Burke, eds., *Decolonization, Self-Determination, and the Rise of Global Human Rights Politics* (Cambridge: Cambridge University Press, 2020). For earlier studies of the articulation between human rights and anticolonialism, see: Roland Burke, *Decolonization and the Evolution of Human Rights* (Philadelphia: Pennsylvania University Press, 2010); Meredith Terretta, "'We Had Been Fooled into Thinking that the UN Watches over the Entire World': Human Rights, UN Trust Territories, and Africa's Decolonization," *Human Rights Quarterly* 34 (2012): 329–60; Lydia Liu, "Shadows of Universalism: The Untold Story of Human Rights around 1948," *Critical Inquiry* 40 (2014): 385–417; and Bonny Ibhawoh, "Testing the Atlantic Charter: Linking Anticolonialism, Self-Determination and Universal Human Rights," *International Journal of Human Rights* 18 (2014): 842–60.

organizations (NGOs) as apolitically above Cold War fault lines, setting the stage for the 1970s breakthrough of revisionists' accounts.<sup>19</sup> Meanwhile, in France and elsewhere, human rights activists like de Félice emphasized collective over individual rights; and, through heterogeneous networks, pursued international solidarity with anticolonialists and liberationists.<sup>20</sup>

The article moves between South Africa, France, and the United States, key sites of heart transplant innovation. It begins by mapping the historical depth and ecumenical breadth of anti-apartheid activism in France, examining the biography of committee chair, human rights advocate, and anticolonial advocate lawyer Jean-Jacques de Félice. It next analyzes the ego and élan that Barnard exhibited on his post-transplant media appearances, demonstrating that this attitude derived from his position as a well-connected Afrikaner surgeon in a white-male dominated professional milieu. The third section elaborates the Anti-Apartheid Committee's development of a strategy of legal rupture to deploy, not in a court of law, but rather in the court of public opinion as doctors, jurists, and ethicists gathered to discuss Barnard's surgical exploits. Returning to South Africa, the last section takes up the mixed outcome of South African innovation in the related professional spheres of forensic medicine and legislation, drawing comparisons from the United States and France to analyze how various professional actors defined, documented, and otherwise oriented the ethical dimensions of harvesting a beating heart from a so-called brain-dead donor. The article concludes by considering how the French Anti-Apartheid Committee's activism around the South African heart transplants challenges current understandings and methods of legal human rights history.

### **The Origins and Networks of Anti-Apartheid Activism in France**

De Félice's anti-apartheid activism began several years before the heart transplants. A long time human rights champion and member of the central committee of the Ligue des Droits de l'Homme (LDH), de Félice's human

19. A critical overview history of human rights NGOs is: Jan Eckel, "NGOs and Human Rights Since the 1940s," in *The Cambridge World History of Rights, Volume 5: The Twentieth and Twenty-First Centuries*, ed. Samuel Moyn and Meredith Terretta (Cambridge: Cambridge University Press, forthcoming).

20. On a global anti-apartheid movement as a particular form of human rights struggle informed by solidarity see Rob Skinner, "Humanitarianism and Human Rights in Global Anti-Apartheid," in *A Global History of Anti-Apartheid: "Forward to Freedom" in South Africa*, ed. Anna Konieczna and Rob Skinner (Basingstoke: Palgrave Macmillan, 2019), 33–65. See also Hakan Thörn, *Anti-apartheid and the Emergence of a Global Civil Society* (Basingstoke: Palgrave Macmillan, 2006).

rights activism aimed for universal political participation and status equality.<sup>21</sup> In his early years of practice, he represented Algerians in France, categorizing them as political prisoners, even when French authorities charged them as common criminals.<sup>22</sup> He considered that decolonization had ushered in neocolonialism, enabling France and other imperial powers to dominate newly independent states economically. He viewed racism and the economic vestiges of colonialism as obstacles to equal rights, and law as the means to overcome them. At the same time, he did not view liberationists, even those who condoned or used violence, as less deserving of rights protections. He shared this view with those *confrères* who had come of age in the legal aftermath of the French resistance.<sup>23</sup> A Protestant social democrat from a wealthy bourgeois lineage, an active member of the ecumenical humanitarian network, *Christianisme social* (Social Christianity), and having practiced with communist and socialist lawyers, de Félice's address book was filled with contacts from an array of leftist organizations, political parties, church groups, and intellectual networks.<sup>24</sup>

The French Anti-Apartheid Committee first formed in 1962 although it was preceded by the Committee for Justice and Equality in South Africa (founded in 1960), and absorbed into the Liaison Committee against Apartheid (created in 1964).<sup>25</sup> Drawing on an early postwar form of activism in France, the committee coordinated existing anti-fascist and anticolonial networks<sup>26</sup> bringing together a diverse array of leftists ranging

21. On the LDH see W.D. Irvine, *Between Justice and Politics: The Ligue des Droits de l'Homme, 1898-1945* (Stanford: Stanford University Press, 2006); and Emmanuel Naquet, *Pour l'Humanité: La Ligue des droits de l'homme de l'affaire Dreyfus à la défaite de 1940* (Rennes: Presses universitaires de Rennes, 2014).

22. Sylvie Thénault, "Une défense politique sans rupture? Le collectif des avocats du FLN en pratique," *Matériaux pour l'histoire de notre temps* 115–16 (2015): 17–25.

23. Israël, *Robes noires*.

24. *Christianisme social* was a Third Worldist ecumenical group. At the time, its leaders sought to articulate liberation theology and revolutionary Marxism in order to enable leftist Christians and Marxists to join in a "common action" against world capitalism, of which apartheid and neocolonialism were virulent symptoms. See Arthur Rich, "La révolution, un problème théologique," *Christianisme social* 1–2 (1967): 5; Giulio Girardi, "Chrétiens et Marxistes face au problème de la paix," *Christianisme social* 3–4 (1967): 225–44.

25. Anna Konieczna describes the origins of anti-apartheid activism in France as slow and fragmented, taking shape through a series of circumstantial and more permanent committees. Intellectual Third Worldism and Pan-African solidarities, nourished through African student organizations active in France, also played a role. See her "La France, l'Afrique du Sud et les solidarités transnationales : l'activité du premier mouvement anti-apartheid français," in *Les nouvelles formes de contestation*, ed. Emma Bell and Jean-Marie Ruiz (Chambéry: Université Savoie Mont Blanc, 2017), 123–46. To enhance readability, I use the name "French Anti-Apartheid Committee" throughout the text.

26. Konieczna, "La France," 126.



from Christians to communists. It liaised among the political, religious, labor, humanitarian, antiracist, and student organizations acting to raise French awareness of the situation in southern Africa where the political economy, legal system, and social structure were founded upon white supremacy and upheld by Apartheid law: an ever expanding catalogue of racialized laws that designed a racial classification system to assign rights and privileges to white South Africans while curtailing those of black and colored South Africans, and South Africans of Asian descent. De Félice and Elisabeth Mathiot, member of *Christianisme social* and wife of Protestant pastor Etienne Mathiot—arrested in late 1957 during the Algerian war for having led an Algerian National Liberation Front (FLN) leader to the Swiss border—worked together in the committee's Secretariat.<sup>27</sup> As the committee's work grew, de Félice forged a partnership with the United Nations Special Committee Against Apartheid (then called the Special Committee on the Policies of Apartheid of the Government of the Republic of South Africa).<sup>28</sup> De Félice entered into contact with anti-apartheid activists elsewhere, including John Collins of the Defence and Aid Fund for Southern Africa, Raymond Kunene, the African National Congress (ANC)'s representative to London, and Ewald Katjivena, the South-West African Peoples' Organization's (SWAPO) representative in Algiers. The committee collaborated closely with *Christianisme social* as well as with the LDH. De Félice's supporters included a number of his fellow jurists, particularly activist lawyers like himself, many of whom had defended African and Algerian anticolonialists in courtrooms across Africa and France during the 1950s.<sup>29</sup> The committee mobilized former anti-Vichy resisters who, after the war, became anticolonialists or Third Worldists including the so-called "rebel priests" Robert Davezies and Alexandre Glasberg.<sup>30</sup>

The French Anti-Apartheid Committee called upon a number of associations—such as the Movement against Racism and for Friendship among Peoples (MRAP), the International League against Racism and

27. On the Mathiot trial see Pierre Croissant, "L'affaire Mathiot, épisode montbéliardais de la guerre d'Algérie," *Extrait du Bulletin de la Société d'Emulation de Montbéliard* 132 (2010): 1–28; and Paul Ricoeur, "Le cas Etienne Mathiot," *Foi-Education* 28 (1958): 45–47.

28. On the relationship between the United Nations and the French Anti-Apartheid Committee, see Anna Konieczna, "'We the People of the United Nations': The UN and the Global Campaigns Against Apartheid," in *Global History of Anti-Apartheid*, 67–103.

29. Terretta, "Anti-Colonial Lawyering."

30. On this point, see Sylvie Bernay, *L'Eglise de France face à la persécution des Juifs, 1940–1944* (Paris: CNRS Editions, 2012). On Third Worldist humanitarianism in France see Eleanor Davey, *Idealism beyond Borders: The French Revolutionary Left and the Rise of Humanitarianism, 1954–1988* (Cambridge: Cambridge University Press, 2015).

Antisemitism (LICA), and the Federation of the Students of Black Africa (FEANF)—to join them for specific events even if these groups were not regularly engaged in their activities.<sup>31</sup> It created a common action through meetings and voluminous correspondence with like-minded activists. It pressured United Nations and state authorities to intervene and take action against South Africa. It informed public opinion and organized activities to coincide with ongoing events, using these occasions to disseminate information about the realities of life in South Africa.<sup>32</sup> For example, throughout 1966, the committee fostered public awareness of the aid the French government gave to the South African government, particularly as a leader in the supply of arms. Appropriately, de Félice's anti-apartheid activism focused on legal issues and mobilized like-minded lawyers. In January 1966, as Abram Fischer, defense lawyer for Nelson Mandela, Walter Sisulu, and other leaders of the ANC during the Rivonia trials, appeared before the Supreme Court of South Africa for his anti-apartheid activism, de Félice organized a delegation of French lawyers to visit the South African embassy in Paris.

On November 9, 1966, the committee organized a press conference featuring France's leading Third Worldist, philosopher Jean-Paul Sartre. Third Worldism brought together a variety of leftist activists of the 1960s, including revolutionary Christians, intellectuals, secularists, political activists, anticolonialists, academics, students, Maoists, and non-conforming socialists and communists.<sup>33</sup> Third Worldist objectives were neither always aligned, nor coherent, but generally aimed to end economic exploitation and domination of the Third World by world superpowers. Already in 1956, Sartre used the term "neocolonialism" to predict that the colonial system would survive "decolonization." He saw neocolonialism at work

31. LC, FJJF, Jean-Jacques de Félice to Jean-Paul Sartre, October 26, 1966.

32. LC, FJJF, Dossier Afrique du Sud, CFCA, "Quelques précisions sur le Comité, sa nature, ses objectifs, ses moyens d'action..." n.d. [1968].

33. See Benetta Jules-Rosette, "Jean-Paul Sartre and the Philosophy of Négritude: Race, Self, and Society," *Theory and Society* 36 (2007): 265–85; and Paige Arthur, *Unfinished Projects: Decolonization and the Philosophy of Jean-Paul Sartre* (New York: Verso Books, 2010) for an account of Sartre's philosophical and intellectual progression toward Third Worldism. On Christian revolutionary humanitarianism, see Bastiaan Bouwman, "From Religious Freedom to Social Justice: The Human Rights Engagement of the Ecumenical Movement from the 1940s to the 1970s," *Journal of Global History* (2018): 252–73. For a focus on revolutionary Christianity emerging from Algerian decolonization in France, see Darcie Fontaine, *Decolonizing Christianity: Religion and the End of Empire in France and Algeria* (New York: Cambridge University Press, 2016). On the New Left's engagement with the "Third World" more generally, see Christoph Kalter, *The Discovery of the Third World: Decolonization and the Rise of the New Left in France, c. 1950–1976* (Cambridge: Cambridge University Press, 2016).

at the end of the 1960s, not only in territories formerly under French administration, but also in South Africa. Daniel Mayer, LDH president and Reverend John Collins, president of the International Defence and Aid Fund supporting South African political prisoners also spoke at the November press conference.<sup>34</sup> It was the occasion to publicly denounce apartheid, before more than forty journalists, and to shed light on France's role as supporter and accomplice of apartheid at the United Nations, where it voted against every resolution adopted on the question.<sup>35</sup> The committee also announced its intention to host an international conference of European anti-apartheid movements to develop and coordinate the struggle against apartheid in Europe in Paris in May 1967.<sup>36</sup>

On May 6 and 7, 1967, the European anti-apartheid movements convened in Paris for the International Conference hosted by the French Anti-Apartheid Committee. Sartre was attending the Russell Tribunal in Stockholm, but he sent a message denouncing South Africa as a country that "legally declares the inequality of its inhabitants according to the color of their skin and openly organises, in every sphere of life, the domination of the immense majority by a minority, the former's exploitation by the latter."<sup>37</sup>

Fleshing out Sartre's remarks, de Félice subjected apartheid law to a human rights inflected legal analysis. He had prepared a legal brief reviewing apartheid law titled "Recent Legal Aspects of Apartheid." In it, he traced the evolution of legalized racism since the National Party (NP) took control of government in 1948.<sup>38</sup> The brief analyzed the laws limiting African mobility, segregating educational systems and cities, prohibiting strikes, criminalizing inter-racial relationships, and authorizing the removal of Africans from any town or white-owned farm.<sup>39</sup> De Félice concluded that one could only note "the grievous and direct affront to being human." De Félice's speech at the International Conference on "the South Africa of today" was based upon this legal analysis. A long-time

34. See Supplément, *Cité nouvelle*, January 26, 1967, for Sartre's keynote speech as well as the words of Daniel Mayer, John Collins, and others.

35. LC, FJFF, Dossier Afrique du Sud, CFCA: Conférence de Presse et Réunion publique organisées à Paris le 9 novembre 1966, Supplément, *Cité nouvelle*, January 26, 1967.

36. Ibid.

37. LC, FJFF, Dossier Afrique du Sud, Message from Jean-Paul Sartre to the European Conference Against Apartheid, Paris, May 6–7, 1967.

38. See also de Félice's previous legal analysis: "La législation de l'Afrique du Sud," *Christianisme social* 7–8 (1964): 457–65.

39. The laws de Félice analyzed included: Natives (Abolition of Passes and Coordination of Documents) Act of 1952; the Bantu Education Act of 1953; the Natives Labour (Settlement for Disputes) Act of 1953; the Group Areas Act of 1950 and amended in 1957; the Immorality Act of 1957; and the Bantu Laws Amendment of 1964.

defender of political prisoners, de Félice highlighted a legal structure that by segregating and curtailing freedom of movement, thought, assembly, and social activity caused direct and painful injury to human beings.

The committee's activity was not extraordinary. It conformed to the French left's mode of activism of the time: a blend of heterodox Marxism, Third Worldism, and revolutionary humanitarianism. The cultivation of transnational ties, via colonial populations, pan-Black solidarity activists, and cause lawyers connecting across imperial boundaries, was not new either.<sup>40</sup> At the time of the medical breakthrough from South Africa, the French committee was uniquely prepared to apply de Félice's legal critique of the apartheid state to Barnard's world renowned success. The result was to disrupt the news of Barnard's medical exploits by introducing the question of whether he might have accomplished them anywhere except South Africa where the law afforded him—as it did to any white person—the power of life and death over non-whites.<sup>41</sup>

### Positioning a World-Famous Afrikaner Heart Surgeon

Christiaan Barnard was born to an Afrikaner family in Cape Province and grew up in the village of Karoo.<sup>42</sup> He was one of four sons of a Dutch Reformed Church pastor. In the late 1950s, he finished his medical training in the United States with a residency under the supervision of surgeon C. Walton Lillehei at the University of Minnesota.

The South African government was well aware of the attention that Barnard's medical first drew. Prime Minister Balthazar John Vorster, of the NP—the official party of the apartheid regime—referred to Barnard as “the best ambassador that South Africa has ever had.”<sup>43</sup> The government

40. Terretta, “Legalism and Rights Claims across the French Empire”; Terretta, “Anti-Colonial Lawyering”; and Michael Goebel, *Anti-Imperial Metropolis: Interwar Paris and the Seeds of Third World Nationalism* (Cambridge: Cambridge University Press, 2015).

41. Biopolitics in a Foucaultian sense are certainly at play in state actors' orchestration of the redefinition of death to accommodate heart transplants. My meaning in this instance is more direct and explicit, yet nonetheless follows what is implied in Achille Mbembe's Foucault-derived theory of necropolitics, which posits that modes of white supremacist governance have historically forged spaces and subjectivities that directly and indirectly expose increasing numbers of subjugated populations to death. Achille Mbembe, *Necropolitics* (Durham, NC: Duke University Press, 2019).

42. Edward C. Harperin, “Barnard”; Christiaan Barnard, *One Life* (London: Harrap, 1969); and David Cooper, *Christiaan Barnard: The Surgeon Who Dared* (Brimscombe, UK: Fronthill Media, 2018).

43. Christopher Hitchens, “Christiaan Barnard's Doctored Past,” *The Guardian*, September 5, 2001, <https://www.theguardian.com/education/2001/sep/05/highereducation.uk1> (accessed November 16, 2021).

subsidized their star surgeon's worldwide victory tour throughout 1968, and continued to finance his trips abroad until the end of the 1970s. Barnard, whom the *Globe and Mail* described as an "enlightened" sympathizer with the government in January 1968,<sup>44</sup> did not shy away from his ambassadorial role. On the contrary, he used the trips and fanfare to enhance his professional profile; after all, he was the winner of the race to transplant a heart.<sup>45</sup>

In the United States, Barnard appeared on the cover of *Time Magazine* on December 15, 1967, and was a guest on the television broadcast *Face of the Nation* on Christmas Eve. President Lyndon B. Johnson hosted the doctor at his Texas ranch on December 29.<sup>46</sup> Barnard's position on apartheid seeps through his interviews, at home and abroad. At first, in late 1967 and early 1968, Barnard seemed indifferent about apartheid, and journalists' insistent focus on it annoyed him. However, as the questions persisted, his position evolved.<sup>47</sup> On October 31, 1969, Barnard publicly declared his support for the United Party, an official opposition party at a time when the ANC, the Pan-African Congress (PAC) and the South African Communist Party had long been banned. The left wing of the United Party broke away to found the Progressive Party in 1959. In 1969, Barnard's claim to be a United Party oppositionist seems to have represented his attempt to carefully distance himself from the ruling NP. The United Party had disintegrated entirely by 1977.

Barnard's "opposition," then was not to apartheid per se, but rather to the extremes of the NP's implementation of it, and seems to have been motivated primarily by his desire to dodge critical questions at his press conference. Certainly, Barnard supported neither the participation of non-whites in South Africa's political processes, nor that they should have a role in South African governance. Rather, he denounced the politics of the "extreme right" as a threat to "white civilization," equivalent to communism. The only way to ensure a future "for you, for me, or for our children," he told a group of Afrikaner businessmen, is to adopt a progressive perspective.<sup>48</sup> He condemned racial segregation in those areas where he deemed it unjustified or unimportant; at the opera, for example, as well as in the operating room where he considered that the "heart is only

44. Stanley Uys, "Apartheid and the Surgeon's Knife," *Globe and Mail*, January 9, 1968, 7.

45. Donald McRae, *Every Second Counts: The Extraordinary Race to Transplant the First Human Heart* (London: Simon & Schuster, 2006).

46. Louis Dombrowski, "US at Heart of First Transplant Barnard," *Chicago Tribune*, December 30, 1967, 31.

47. Benjamin Pogrund, "Political Knives out for Barnard," *The Times*, November 9, 1969, 6.

48. "Extreme Right Politics Denounced by Barnard," *Globe and Mail*, November 10, 1969, 2.

a muscle.”<sup>49</sup> Yet he remained staunchly opposed to the idea of a black majority or multiracial government for South Africa.<sup>50</sup>

Abroad, in the international media spotlight where activist groups like the French Anti-Apartheid Committee worked to shatter his public image, Barnard declared ambiguously in 1969 that apartheid was not the answer to “the problem” for which South Africans sought an answer, leaving both problems and answers unspecified.<sup>51</sup> Ten years later, he proclaimed himself to be “strongly opposed” to apartheid but expressed his conviction that the international community’s attitude to South Africa was “unjust” because it ignored the progress that the country had made in racial relations. He put forward the idea of a two-state solution for South Africa, one “for blacks” and the other, “for whites.”<sup>52</sup> In 1997, soon after the fall of apartheid, Barnard stated that the greatest regret of his career was that “I worked under the cloud of apartheid. . . . It hampered me a tremendous amount, more than people think. . . . There’s no doubt that the white man also suffered as a result of apartheid.”<sup>53</sup> Barnard commented that had it not been for his race and nationality, he would have surely been awarded a Nobel Prize. What Barnard seemingly regretted most about apartheid was that his government’s policies of racial segregation tarnished the self-image he sought to cultivate abroad. Did he sign up for the United Party in 1969 in order to dupe foreign correspondents into thinking that he fought actively against apartheid? In France, de Félice drew on legal strategies to tarnish Barnard’s projected image.

### The French Anti-Apartheid Committee’s Disruptive Strategy

Harnessing the global reach of Barnard’s fame, the focused attention of the public, and the South African government’s awareness of an opportunity to polish its image in the eye of the “modern nations” to which it aspired to belong, the French Anti-Apartheid Committee sought to persuade the public that without apartheid, Barnard would not have won the heart transplant race. De Félice trained Barnard’s media spotlight on apartheid law,

49. “Professor Barnard in Protest over Colour Bar,” *The Times*, December 16, 1970, 5.

50. Lawrence K. Altman, “Christiaan Barnard, 78, Surgeon for First Heart Transplant, Dies. Obituary,” *New York Times*, September 3, 2001, A1.

51. “Apartheid Not the Answer,” *Washington Post*, August 4, 1969, A8.

52. “South Africa Puts a Crimp in Dr. Barnard’s Lifestyle,” *Globe and Mail*, September 6, 1979, 3.

53. “A Celebrity of World Medicine. Interview with Doctor Christiaan Barnard,” *Frontline: India’s National Magazine*, 14, No. 21, 18–31, October 1997, <https://frontline.thehindu.com/science-and-technology/a-celebrity-of-world-medicine/article6811267.ece> (May 22, 2019).

deploying a political strategy of legal rupture, a sort of legal defense that questioned the very legitimacy of a judicial procedure invoking the law.<sup>54</sup> De Félice condemned the Apartheid state for legislating that

12 million South Africans of colour had neither the right to assembly, nor the right to strike, nor freedom of expression. They cannot be considered free. The proliferation of laws governing their daily lives means that people are at every moment under arrest, condemned. Thousands of prisoners are there, available, a number of prisoners on death row are waiting. Wherever persons can be so easily arrested and detained, without judgment, for an indefinite period, and where capital punishment is frequent, we must fear the emergence of an immoral traffic in organs, under the cover of so-called voluntary donations or a mysterious organ bank.<sup>55</sup>

Although the question of prisoner organs fueled the campaign du jour, de Félice remained preoccupied with the racialized structural imbalance that apartheid maintained. He wrote, “We must remember that the real foundation of apartheid is the necessity, for partisans of white supremacy, of economic exploitation of Africans, to preserve and increase their privileges and to offer enticing profits to foreign investors.”<sup>56</sup> In the category of social rights, de Félice highlighted the United Nations and United Nations Educational, Scientific and Cultural Organization (UNESCO) reports on disparities in access to health care, where infant mortality in rural zones among Africans reached 400 per 1000 and tuberculosis, rickets, and malnutrition ravaged non-white communities.<sup>57</sup>

When Barnard transplanted the heart of a young white South African woman Denise Darvall into the chest of Louis Washkansky—a diabetic Cape Town grocer who had immigrated to South Africa from Lithuania in 1922—the French Anti-Apartheid Committee was poised for action. In the days that followed, Mathiot prepared and circulated a statement that emphasized the “new and serious problems” that organ transplantation posed to human rights. Mathiot sent the statement to Joë Nordmann, President of the International Association of Democratic Lawyers, to *Secours populaire*,<sup>58</sup> to *Secours catholique*, and to the Confederation of French Medical Unions. De Félice forwarded the statement to the press including leading French newspapers *Le Monde*, *Le Figaro*, the

54. Emiliios Christodoulidis, “Strategies of Rupture,” *Law and Critique* 20 (2009): 3–26.

55. Jean-Jacques de Félice, “Merci docteur d’avoir accepté ce coeur,” *Témoignage chrétien*, January 11, 1968, 14.

56. CFCA, *Bulletin*, February–March 1968, 4.

57. *Ibid.*, 3.

58. A. Brodiez, *Le Secours populaire français, 1945–2000: Du communisme à l’humanitaire* (Paris: Les Presses Sciences Po, 2006).

Communist *L'Humanité*, and the Christian left's *Combat*. Mathiot asked him to send it to other organizations that might find the issue concerning; namely, the LDH, MRAP, and LICA.

The statement's primary focus was the problem of organ harvesting in countries where "political prisoners number in the thousands, and people are arrested and detained arbitrarily and judged without their right to fair trial being guaranteed, capital executions are frequent" and where the law has been "many times denounced and condemned by the highest international authorities."<sup>59</sup> Washkansky died 18 days after the operation, but in a televised interview in Washington on December 24, Barnard announced his intent to make a second attempt, adding that more than fifteen non-South Africans had volunteered to undergo a heart transplant. The committee found alarming the doctor's declaration that he had "enough donors" and the only problem might be a lack of patients matching them.<sup>60</sup>

As the anti-apartheid movement painted the South African heart transplants as nefarious, South African medical professionals countered. Doctors, lawyers, and politicians professionalized the questions that anti-apartheid activists raised, excising their critical politics, and discussing instead new possible medico-legal definitions of death and innovative ways to standardize organ transplantation in ways most beneficial to transplant surgeons and the recipients they selected.

As Barnard talked up his surgical exploits abroad, in South Africa, forensic pathologists began to publish medical studies that both highlighted and obscured the circumstances in which he had performed them, and took care to argue that he did so legally. The first appeared in the December 30, 1967 *South African Medical Journal*, when Dr. L.S. Smith, the Senior Government Pathologist of the State Pathology Laboratory in Cape Town published the results of an official postmortem of Denise Darvall. The article, titled "The Acquisition of Human Tissue for Transplantation Purposes: Legal Requirements in South Africa," made clear, among other things, that the act distinguished "between the removal of tissue ('any human tissue flesh, organ, bone or body fluid') from bodies of deceased persons, and that of the removal from living persons."<sup>61</sup> Smith stipulated that the cause of Darvall's death was "multiple injuries."<sup>62</sup> When referencing the Post Mortem Examinations and Removal of

59. LC, FJF, Dossier Afrique du Sud—Greffé du Coeur, Communiqué, 27 décembre 1967.

60. *Le Figaro*, December 25, 1967, as quoted in FC, FJF.

61. L. S. Smith, "The Acquisition of Human Tissue for Transplantation Purposes: Legal Requirements in South Africa," *South African Medical Journal* 41.48 (1967): 1274–76, at 1275.

62. *Ibid.*, 1275.



Human Tissues Act (30 of 1952 as amended by Act 49 of 1961), Smith sidestepped the time of death, as well as the manner in which and by whom Darvall's death was discerned. He wrote "Only those sections of this Act which have bearing upon tissue-transplant manipulation will be considered in this communication. The contentious aspects of 'consent', and 'death' could be discussed profitably on another occasion."<sup>63</sup> Anti-apartheid activists like de Félice and Mathiot later amplified questions of consent and death, using them to cast a shadow over Barnard's triumphant narrative, and to frame his hubris as unbridled in a country where whites were bound by neither law nor ethics.

For his second transplant on January 2, 1968, Barnard transplanted a heart from colored donor Clive Haupt into a white South African dentist, Philip Blaiberg. Continuing to alert public opinion to the potential human rights violations involved in South African organ harvesting, the same day as the operation, Mathiot and de Félice circulated a statement calling for an international law to prohibit harvesting a heart from any person deprived of liberty, condemned to death, or facing the death penalty, even if the donor had "volunteered."<sup>64</sup> Mathiot, not a lawyer herself, was the one who proposed the law. It was likely the first time a law protecting prisoners from organ donation was conceived. When first introducing her idea to de Félice, she wrote, "It's hard to be ahead of the curve . . . often it can seem like going off the rails. But we must take this risk."<sup>65</sup> Motivating the public to act against apartheid was a primary objective of the committee, and Mathiot feared that proposing an international law that many might find far-fetched might undermine the committee's credibility, and hence, its ability to sensitize and persuade. However, rupture strategies, despite the risk of being polarizing then, as now, disrupt assumed norms by shocking or otherwise bringing people to come to new realizations. Both Mathiot and de Félice had gained experience with rupture strategies during the Algerian war. Their choice to use them here constituted a kind of revolutionary, anticolonial human rights campaign, questioning the legitimacy of an international law that did not prohibit organ harvesting from prisoners, and articulating it with the particularity of South African apartheid law.

In the week that followed, de Félice penned a one-page essay entitled, "Thank You, Doctor, For Accepting this Heart," for the ecumenical periodical

63. *Ibid.*, 1275.

64. LC, FJJF, Dossier Afrique du Sud, CFCA, Communiqué, 2 janvier 1968.

65. LC, FJJF, Dossier Afrique du Sud – Greffe du Coeur, E. Mathiot à de Félice, n.d., apparently December 1967.

*Témoignage chrétien*.<sup>66</sup> He wrote several drafts by hand, selecting words and phrases from press coverage of Barnard's transplants to create a powerful polemic amplifying the racialized legal, moral context in which they took place.<sup>67</sup> In the text, de Félice presented South Africa as "the land of apartheid, the land of racist law. . . where one can only react as racist or as a victim of racism." He cited the words of Haupt's mother: "At the hospital, everyone was very nice to us. They treated Dot (Clive Haupt's widow) and I as though we were White." As further evidence of fixed, internalized racism, de Félice offered the question asked of Dr. Blaiberg: "Do you find it inconvenient that the heart of a coloured man is replacing your own?" And then, to illustrate a tacit acceptance of racialized status quo, de Félice quoted the words of Haupt's family, as a sign of subjugation expressed as gratitude to white masters: "Thank you, doctor, for fighting against apartheid by having accepted this heart.' All of this is odious and unacceptable," showing how "racism permeates the air, leaving its mark everywhere," insisted the lawyer.

De Félice warned of the danger of becoming complicit in apartheid by lauding Dr. Barnard's exploits: "In reality we are in the midst of a vast political publicity stunt, orchestrated by a government seeking to appear humane and progressive in the eyes of the world that condemns it." He then turned his focus on Barnard himself, dismissing any notion that the surgeon was somehow an unwilling prisoner of the South African legal regime: "If he wants to save man, that is all mankind, he should go into exile, leaving . . . the land of Apartheid; or else continue his experiments with the blessing, the support, and the publicity granted him by a government too keen to appear great and generous in international public opinion. . ." The implication was that the South African government might well look the other way when it came to ethical questions related to Barnard's practice, and that this was perhaps the surgeon's reason for staying put.<sup>68</sup>

66. The review was launched a quarter century before as a clandestine newspaper promoting spiritual resistance during World War II. Sylvie Bernay, "Le Père Michel Riquet. Du philo-sémisme d'action lors des années sombres au dialogue interreligieux," *Archives Juives* 40 (2007): 100–116, at 106.

67. Of course, de Félice was not the only one to subject the South African heart transplants to racial analysis. A good overview comparing contemporary commentary on South African and United States heart transplants is Maya Overby Koretzky, "A Change of Heart': Racial Politics, Scientific Metaphor and Coverage of 1968 Interracial Heart Transplants in the African American Press," *Social History of Medicine* 30 (2016): 408–28. For a historical examination of the racial fault lines in organ transplantation and blood transfusion more broadly, see Susan E. Lederer, *Flesh and Blood: Organ Transplantation and Blood Transfusion in Twentieth-Century America* (Oxford and New York: Oxford University Press, 2008).

68. Eric Hobsbawm made a related observation regarding medical experiments on persons deemed socially inferior in the postwar United States. See Eric Hobsbawm, *On History* (New York: New Press, 1997), 260–261.

His prosecution finished, de Félice connected his analysis of apartheid law with the reality that “men of colour [in South Africa] have neither the right to assembly, nor the right to strike, nor the right to freedom of expression. They cannot be free men. By virtue of inequitable laws (laws on natives, Bantu organization, settlement zones, immorality, reservations and separate development, prohibition of mixed race marriages, etc), people are constantly arrested, condemned. Thousands of prisoners are there, available, weakened, a number of them on death row. . . . So we must sound the alarm. . . .” De Félice concluded his polemic by universalizing organ transplants as a human rights issue, announcing the international law that the committee supported: “We must ensure that no prisoners, even voluntarily, be allowed to give their hearts, their kidneys, or any other organ, because it is easy to imagine the pressures they could face to do so.”<sup>69</sup>

De Félice’s polemic offered a blueprint for raising public awareness of the moral perils and legal pitfalls of cardiac transplants in South Africa or anywhere that people could be indefinitely detained on a whim. When the committee learned of Barnard’s plan to deliver a keynote speech in Paris before the Society of Thoracic and Cardiovascular Surgery on February 3,<sup>70</sup> Mathiot met with Dr. Pierre Vernant, Cardiology Clinic Assistant at Broussais Hospital, to mobilize doctors to their cause.<sup>71</sup> In anticipation of Barnard’s address, de Félice and Mathiot suggested that Vernant ask disruptive questions that the lawyer had prepared, including:

1. If South Africa’s death row prisoners were to accept it, do you intend to harvest hearts from them and if so in what conditions?
2. If so, don’t you think that apartheid law and the reactions it sparks (demonstrations, terrorism, sabotage) makes you an executioner?

The questions invited Barnard to testify against his government, something that the surgeon took great care not to do, given that his publicity tours were funded by the South African state at the time.<sup>72</sup> When the opportunity for a question came, Vernant left aside the explicitly political questions that the committee had suggested. Instead, he asked about the criteria for the death of the

69. Jean-Jacques de Félice, “Merci docteur d’avoir accepté ce coeur,” *Témoignage chrétien*, January 11, 1968, 14.

70. LC, FJJF, Dossier Afrique du Sud—Greffé du Coeur, Mathiot à de Félice, s.d.

71. “Mort et résurrection d’un mandarin. Le cas du professeur Soulié,” *Esprit* 376 (1968): 772–81.

72. Barnard received funds from the South African Information Department to meet his expenses for international travel. The department was later disbanded, and its chief, Eschel Rhoodie, whom Barnard characterized as his close friend, was brought up on charges for fraud or theft. “South Africa puts a crimp in Dr. Barnard’s lifestyle,” *The Globe and Mail*, September 6, 1979, 3.

donor, turning the focus on legal and ethical ambiguities at the center of cardiac transplants and illustrating why strict international legislation of the matter was required. His questions probed the uncharted gray zone of “consent” and “death” that South African professionals, like Smith, occluded from discussion.

A week after Barnard’s keynote, Vernant submitted a report to the French Anti-Apartheid Committee alleging that when performing the operations, Barnard had violated the Removal of the Human Tissues Act of South Africa (Act 49, 1961)<sup>73</sup> by himself declaring the death of the donor, Denise Darvall, apparently after waiting for her heart to stop.<sup>74</sup> During the second transplant, Clive Haupt, suffering from a brain hemorrhage, was under the care of admitting physician Dr. Raymond Hoffenberg who therefore had the responsibility of declaring death.<sup>75</sup> Despite pressure from the transplant team, Hoffenberg refused to do so. When he returned to the unit the next morning, in his estimation, Haupt was no longer alive. But Hoffenberg did not sign the death certificate and, when Margaret Lock interviewed him years later, could not recall it being signed. Vernant questioned the criteria for determining Haupt’s death. Nowhere in the world at the time was cerebral death the norm. Nor did it appear in legal statutes. Vernant’s report concluded by underscoring the necessity for “international legislation that stipulates the criteria for definitively and absolutely determining cerebral death.”<sup>76</sup> The committee diffused the concerns and allegations raised in Vernant’s report, through activist networks, by sending it to *Le Monde*, and by preparing its submission to the World Health Organization and the

73. Smith, “Acquisition,” 1274–76.

74. Conflicting accounts and memories abound. Compare, for example, Marius Barnard with Simon Norval, *Defining Moments: An Autobiography* (Cape Town: Zebra Press, 2011), 149, 157; and McRae, *Every Second Counts*, 192.

75. “Obituary,” *The Lancet*, June 2, 2007, 1650–51. See also Lock, *Twice Dead*, 85. On January 2, 1968, the very day of Barnard’s second transplant, in accordance with the Suppression of Communism Act 44 of 1950, the South African government decreed an ordinance of official sanction against Dr. Hoffenberg, prohibiting him from teaching or accessing a university or school. Hoffenberg was not a communist but supported the Liberal Party and the Defence and Aid Fund that John Collins coordinated. The official order excluded Hoffenberg from the university campus where the hospital was located, thus preventing him from further involvement in the fate of his patient. Hoffenberg went into exile the same month and took up a position at the National Institute of Research in London. “Le Professeur Barnard arrive vendredi à Paris,” *Le Monde*, February 2, 1968, [https://www.lemonde.fr/archives/article/1968/02/02/le-professeur-barnard-arrive-vendredi-a-paris\\_2478123\\_1819218.html](https://www.lemonde.fr/archives/article/1968/02/02/le-professeur-barnard-arrive-vendredi-a-paris_2478123_1819218.html) (accessed November 16, 2021).

76. LC, FJF, Dossier Afrique du Sud-Greffé du Coeur, Rapport du Dr. Pierre Vernant remis au Comité contre l’Apartheid le 10 février 1968.

United Nations at the upcoming International Council of Organizations and Medical Sciences to be held in Geneva on May 13–14, 1968.<sup>77</sup>

Although working from afar and with limited information, the activism of the French Anti-Apartheid Committee's leaders depended upon their extensive understanding of apartheid society. De Félice and Mathiot seemed to anticipate how South African doctors, medical researchers, and legislators would appeal to the authority of medical and forensic science and lawmaking to legitimize Barnard's surgical accomplishments.

### **Racialized Innovation in Forensic Medicine and Legislation**

As though tuned in to the anti-apartheid critique that began to surface during Barnard's events abroad, a few white South African professional men sought to restructure South African law and medical practice to place Barnard above scrutiny. Skirting the issues of consent and death was clearly not enough to offset allegations of legal and ethical impropriety that tarnished the government's projected image of a modern South Africa. To counter anti-apartheid critiques, South Africans had to pioneer in two related professional spheres: forensic medicine and legislation. Hillel Abbe Shapiro, South Africa's leading forensic pathologist, renowned medical researcher, former lecturer in medical jurisprudence at Cape Town University, and editor of both the *South African Medical Journal* and the *Journal of Forensic Medicine*, guided South African law and medicine toward redefining death in such a way as to vindicate Barnard's specific actions. His focused publications and the medical conferences that he helped to organize over the next 2 years showed his commitment to making South Africa a model of how to legally manage the medical exigencies of organ transplantation.

Shapiro began by writing an editorial for the January–March 1968 issue of the *Journal of Forensic Medicine* entitled “Heart Grafting in Man.” In it he stated that although not all countries had “the statutory machinery to permit such surgical procedures ... the legal provisions which made organ removal and grafting operations possible in South Africa” were of worldwide importance.<sup>78</sup> Yet he questioned the “adequacy of our criteria of the moment of death,” emphasizing that “death is a legal and not a biological concept,” to be “determined by the decision of a registered medical practitioner who, in practice, relies on the persistent failure of the action of

77. LC, FJFF, Dossier Afrique du Sud-Grefte du Coeur, Bernard Lauzanne à de Félice, 28 février 1968.

78. H. A. Shapiro, “Heart Grafting in Man,” *Journal of Forensic Medicine* 15 (1968): 1–4, at 1.

the heart and the breathing of the patient.” He suggested that “a cerebral ‘death’ would justify a decision to switch off a respirator.”<sup>79</sup> Shapiro took care to explain that in the first heart transplant, Barnard had “insisted on electrocardiographic evidence of a ‘dead’ heart in a person who was cerebrally ‘dead’ as well.” Shapiro concluded that Barnard had “fulfilled all the ethical, legal and medical criteria that could reasonably have been demanded of him” and added that the same considerations had applied to the second heart transplant.<sup>80</sup>

Shapiro and Barnard actively cultivated South Africa’s role as innovator in medical law and practice, seeking, in effect, to increase the viability of transplant organs by pushing for acceptance of new norms defining death. In July 1968, financially supported by the Cape Provincial Administration and the University of Cape Town, they hosted an international symposium on human heart transplantation that took place in Cape Town.<sup>81</sup> The symposium drew sixteen surgeons, from South Africa, Argentina, Chile, Brazil, England, France, India, Canada, and the United States as the main participants. With the exception of Professor Praffula Kumar Sen of India, all were white men. All had attempted heart transplants, twenty-five of them altogether. Taking place on July 13, 15, and 16—a Saturday, followed by Monday and Tuesday—the symposium began with a day-long discussion of the selection and preparation of the recipient and the donor. On Monday, the surgeons collaboratively examined and debated surgical techniques, postoperative care, rejection, tissue typing, postoperative complications and how to mitigate them, rejection, psychological stability of recipients, and pathological findings in the deceased. The convening surgeons brought X-rays and electrocardiograms (ECGs), as well as records of postoperative doses of prednisone and antibiotics. The final day dealt with the future, and reiterated consensus reached and conclusions drawn during the 3-day discussion.

The parts of the discussion most revealing of the ways that race, privilege, and social status weighed heavily on the heart transplants, however, were those pertaining to the availability and selection of donors, the definition of death, who was qualified to determine when it occurred, and how to protect transplant surgeons from negative press, lawsuits, and public critique. In these areas, politics and race leaked through the professional

79. *Ibid.*, 3.

80. *Ibid.*, 4.

81. Unless otherwise indicated, information about the symposium is taken from H. A. Shapiro, *Experience with Human Heart Transplantation: Proceedings of the Cape Town Symposium, 13–16 July 1968* (Durban: Butterworths, 1969).

façade, as the surgeons gathered in Cape Town claimed authority over the ethical, legal, and medical issues that the discussion raised.

Barnard's views aligned with the leading American heart transplant surgeon, Denton Cooley, who practiced in Texas, a racially segregated state that, still in 1968, upheld white supremacy in statewide jurisprudence. Not surprisingly, the link between Groote Schuur and Baylor St. Luke's Medical Center was channeled through both advanced heart transplant programs and white affinity. Marius Barnard, Christiaan's lesser-known brother, in residency at Denton Cooley's heart program at St. Luke's, in Houston, Texas, recounted being stopped for speeding near New Orleans. The driver was arrested. Marius writes: "We were taken to the local prison, where he was placed in jail. But, being in the Deep South, when they discovered I was from South Africa I was treated like royalty and given food and Coca Cola."<sup>82</sup> Cooley and Barnard both benefited from exceptional financial resources as well as support of white leadership—medical and political. They were well positioned to harvest the privilege that enabled them to succeed, and to bestow it upon the cardiac patients who solicited their expertise, often from far away.

Viewed through a human rights framework of the "rights-less" as potentially unwilling donors, Cooley and Barnard's exchanges regarding donor selection reveal a casual assumption of white privilege over black prisoners on death row. Although donor race was not explicitly mentioned, it figured in the surgeons' banter about prisoners as donors and capital punishment. During the symposium, Cooley insisted that "there is another source of donors which could conceivably be tapped," adding, "perhaps we in our clinic would have preceded you by several years if we had the courage to ask for such hearts." He continued: "This is in the States where capital punishment is permitted. In Texas capital punishment is performed by electrocution. Why would it not be possible to utilise this source of normal young donors for cardiac transplantation? We use prisoners for other purposes on a voluntary basis, and if execution victims accepted this on a voluntary basis, why not use them for donors?"<sup>83</sup> Barnard blithely replied, "If I could use that sort of donor, we would catch up with you in one week." The chair of the session, Dr. Velva Schrire, who was one of Barnard's closest research collaborators and Director of the Cardiac Clinic in Cape Town, remarked ambiguously: "I think this is not objectionable and I think it would not

82. Barnard, *Defining Moments*, 119. For more on Cooley and the heart program he ran, see Thomas Thompson, *Hearts: Of Surgeons and Transplants, Miracles and Disasters along the Cardiac Frontier* (New York: McCall Publishing 1971). Cooley's memoir is Denton A. Cooley, *100,000 Hearts: A Surgeon's Memoir* (Austin, TX: Briscoe Center of American History, 2012).

83. *Heart Transplantation*, 59.

represent a great source of donors. Even Texas eventually will come to the point of view where you don't have to kill them. It doesn't represent a great number, and I doubt whether we execute five people in a year."<sup>84</sup>

Schrire's suggestion that rates of capital punishment in Texas were higher than in South Africa, where, he alleged, few were executed is curiously disingenuous, suggesting that he did not view non-white prisoners as potential heart donors, and in fact, did not count them at all. The actual numbers of South African executions were 97 in 1967, 95 of whom were "coloured" or "Bantu," and 119 in 1968, 116 of whom were "colored" or "Bantu."<sup>85</sup> The exchange in the formal setting of a symposium panel revealed the racialization that de Féllice had surmised "permeates the air leaving its mark everywhere, where one can only react as racist or as a victim of racism." In this conversation, capital punishment—a mechanism of state punishment that upheld white dominance<sup>86</sup>—was a proxy for race. In both Texas and South Africa, a disproportionately high execution rate of black prisoners had been historically normalized, although in 1968 the rate of black executions was reaching a high-water mark in South Africa, even as it had slowed to a near stop in Texas.

From 1924—when capital punishment became the purview of the state, rather than the counties—to 1968, Texas executed nearly twice as many blacks (269) as whites (146), but the state had held no executions since 1964.<sup>87</sup> In South Africa, capital punishment had steadily increased as the number of capital crimes rose after the NP came to power in 1948, making the death penalty "a tool of State repression."<sup>88</sup> Capital punishment was not politically or racially neutral. It was used as a component of the state policy of racial domination: apartheid.<sup>89</sup> In 1958, the South African government decreed robbery, attempted robbery, and breaking and entering as crimes punishable by death.<sup>90</sup> After the Sharpeville massacre and the

84. Ibid. On Velva Schrire, see Halperin, "Christiaan Neethling Barnard," 1078. At the time of the symposium, Barnard and Schrire had coauthored and published at least three articles and one book on cardiac surgery.

85. United Nations Centre against Apartheid, "Capital Punishment in South Africa," July 1970, 5.

86. James D. Unnever, Francis T. Cullen, and Cheryl Lero Jonson, "Race, Racism, and Support for Capital Punishment," *Crime and Justice* 37 (2008): 45–96.

87. Rupert C. Koeninger, "Capital Punishment in Texas, 1924–1968," *Crime & Delinquency* 15 (1969): 132–41, at 135.

88. Peter Norbert Bouckaert, "Shutting Down the Death Factory: The Abolition of Capital Punishment in South Africa," *Stanford Journal of International Law* 32 (1996): 287–326, at 291.

89. Nathan V. Holt, Jr., "Human Rights and Capital Punishment: The Case of South Africa," *Virginia Journal of International Law* 30 (1989): 273–318, at 307.

90. Holt, "Human Rights," 307.



banning of the ANC and the PAC, South Africa defined “both violent and non-violent political acts as capital crimes” by categorizing “sabotage” as such in 1962.<sup>91</sup> In 1963, it added “undergoing training or obtaining information that could further an object of communism” and “advocating abroad economic or social change in South Africa by violent means through the aid of a foreign government or institution”<sup>92</sup> to the list of crimes punishable by death. In 1967, the year of Barnard’s first heart transplant, the government decreed kidnapping as well as “terrorism,” broadly defined, capital crimes.<sup>93</sup>

From 1911 to 1968, 2,323 people were executed in South Africa, more than half of them since 1953. Only eighty-five of those put to death were white.<sup>94</sup> Blacks outnumbered whites by approximately five to one<sup>95</sup> at the start of that period, and whites comprised only about one in ten toward its end. The government further politicized capital punishment in the mid-1960s when executing some sixty members of the PAC.<sup>96</sup> Partial statistics (omitting 1969) indicate that more than 722 persons were executed in the 1960s.<sup>97</sup> From the 1960s until the end of apartheid, South Africa was among the leading executing countries in the world.<sup>98</sup>

South African whites viewed the death penalty favorably. In the 1960s, the state’s use of capital punishment was widely known and accepted, even among elite student populations, including those at the University of Cape Town. A study of the attitudes of South African elite toward capital punishment published in *The British Journal of Criminology* in 1967 found that a majority of Afrikaans-speaking university students viewed the death penalty as “indispensable to society, not only for premeditated murder, but also for treason, sexual assault, and even for murders committed by insane persons”<sup>99</sup> and that murderers’ confessions sufficed as a reason for a death sentence.<sup>100</sup>

91. General Law Amendment Act, No. 76 (1962) as quoted in Holt, “Human Rights,” 307.

92. *Ibid.*

93. Terrorism Act, No. 83 (1967), as quoted in Holt, “Human Rights,” 307.

94. United Nations Centre against Apartheid, “Capital Punishment in South Africa,” July 1970, 9.

95. Holt, “Human Rights,” 307.

96. *Ibid.*, 301.

97. United Nations Centre against Apartheid, “Capital Punishment in South Africa,” July 1970, 4–5.

98. From 1971 to 1980, 841 South Africans were put to death; and from 1981 to 1990, the number climbed to approximately 1,100. The number of executions peaked at 164 in 1987. Holt, “Human Rights,” 294.

99. Hemult Morsbach and Gisela Morsbach, “Attitudes towards Capital Punishment in South Africa: A Cross-Cultural Study,” *The British Journal of Criminology* 7 (1967): 394–403.

100. *Ibid.*

Against the prominence of capital punishment in South Africa, it is apparent that Schrire's dismissal of Cooley's suggestion that death row prisoners be tapped as a source of donors revealed his awareness of the moral and ethical questions being raised around Barnard's achievements. . . as well as his desire to keep them concealed from view—or greater discussion—during the symposium. In 1951, Schrire founded a cardiac clinic at Groote Schuur, to provide consultations and ECG service to heart patients. It was the first cardiology unit in South Africa and became the cornerstone of cardiology research in the country. Schrire was invested, like Barnard, in promoting the image of cardiac innovation in South Africa. Perhaps he was aware of the international campaign to draft an international law prohibiting organ harvesting from prisoners. He had certainly heard the implications that South African heart surgeons were not bound by the same ethics and legal norms as their Western counterparts.

In contrast, Cooley's comment, directing a rivalrous barb at Barnard, and Barnard's offhand rejoinder, delivered as the kind of joke that carries a truth, are more revealing of the racial subtext permeating heart transplant dynamics in both the United States and South Africa. Although professional competitors bound by mutual respect, they shared a white supremacist camaraderie encoded in what—at its surface—sounded like a professional discussion among ethically minded doctors. Revealing his own support for the death penalty during the brief discussion of the executed as donors, Cooley lamented a recent Supreme Court ruling that he claimed nearly abolished capital punishment in the United States by barring "certain individuals who have opinions regarding capital punishment to do jury duty in murder trials."<sup>101</sup> In light of his supposition that the Supreme Court decision would end executions in the United States, it is likely that Cooley did Barnard the favor of posing a question that was actually Barnard's own.

Beyond South Africa, the French Anti-Apartheid Committee curated the testimony of medical experts and gathered information to call into question the norms around heart transplants and cerebral death that Cape Town surgeons and experts were attempting to establish. In January, during his European tour, Barnard had broached the topic of harvesting hearts from death row prisoners in an interview given to *Paris-Match*. Cavalierly, he stated: "When it comes to the execution of those condemned to death,

101. *Heart Transplantation*, 59. In fact, the *Witherspoon v. Illinois* decision of June 3, 1968 did the opposite. In removing from the state unlimited challenge for cause of jurors who might object to the death penalty, it lifted the exclusion of abolitionist jurors from capital punishment cases, enabling a greater, not a lesser, diversity of opinions among jurors.

do us the honour of believing that we will never be executioners... But why not execute the condemned in sterile conditions? We will have to find hearts, after all..."<sup>102</sup> A few days later, de Félice had prepared the questions to guide Vernant's intervention at the Thoracic Conference, which included: "Don't you think apartheid law ... makes of you an executioner?" Without mentioning South Africa, Vernant's report asked readers to reckon with the potential afforded by the country's particular social, political, and legal terrain: "Imagine a country where racial segregation reaches such a degree that an 'inferior' race is sacrificed for the benefit of a 'superior' race. We can imagine how easily the donor could be determined to be dead, and that death sentences could be pronounced to produce donors." Everything must be done to prevent such eventualities, Vernant wrote: "It must be formally prohibited to use those condemned to death as donors... We must be vigilant that [heart transplantation] does not become, in certain countries and under certain regimes, a weapon of death."<sup>103</sup>

Vernant's report echoed concerns that Professor Werner Forssmann, German winner of the Nobel Prize for having developed cardiac catheterisation and former Nazi, published on January 4, 1968, 2 days after Barnard's second transplant, in *Frankfurter Allgemeine Zeitung*, a piece that the Anti-Apartheid Committee likely shared with the medical experts whom they approached (a French translation of the relevant portions appears in the committee's archives). Forssman knew firsthand the dangers of practicing medicine in situations where some human beings wielded the power of life and death over others.<sup>104</sup> It troubled him that transplanting the heart, a unique organ, required the donor's death. Forssmann recalled the death sentence meted out to Professor Karl Gebhardt at Nuremberg on August 20, 1947, "for using bones and joints of prisoners in concentration camps without their consent. His execution was justice." He opined that "political instability" made cardiac transplantation a somber affair because in such circumstances, "[C]alls will be made to restore the death penalty. Atonement will be distorted to link it to organ donation. Executions will no longer be carried out by the executioner, but in sterile clinics, by the surgeon and anaesthetist. Prisons will become the preparatory institutions for transplants... they will serve as organ banks... In this case, doctors will be definitively

102. *Paris-Match*, January 20, 1968, as quoted in CFCA, *Bulletin*, February–March, 1968, 5.

103. Rapport du Dr Pierre Vernant, Remis au Comité contre l'apartheid le 10 février, as quoted in CFCA, *Bulletin*, February–March, 1968, 5.

104. Lisa-Maria Packy, Matthias Krischel, and Dominik Gross, "Werner Forssmann—A Nobel Prize Winner and his Political Attitude before and after 1945," *The Journal of Urology* 193 (2015): 587.

reduced to executioners.”<sup>105</sup> For Forssmann, South African heart transplants were equivalent to Nazi medical practices. Did his questions anticipate Barnard’s vision for the future of heart transplants in South Africa?

The heart surgeons gathered at the closed symposium in Cape Town discussed and proposed solutions to every societal obstacle limiting their endeavor: to successfully transplant human hearts into chronically ill and dying cardiac patients. Collaborative discussion generated ideas about ways to meet challenges. Neither philosophers nor judges were qualified to determine the moment of death, which was, after all, an abstract concept, and moreover, a series of corporal failures rather than a singular biological event, as people had previously supposed.<sup>106</sup> In order to achieve viable heart transplants, cerebral death had to be declared when irreversible damage to the brain indicated that, without mechanical assistance, a patient’s organs would fail.<sup>107</sup> The heart could then be harvested while it was still contracting, thus increasing likelihood of success. These medical decisions—too complex to be widely understood, too controversial to be socially accepted—had to be protected by law.<sup>108</sup> Laws, too, must exist to prevent donors’ families from changing their minds, thus protecting surgeons and hospitals from lawsuits of the sort brought by the family of Bruce Tucker, a black American whose heart Dr. Richard R. Lower transplanted into the body of Joseph Klett at the Medical College of Virginia.<sup>109</sup> There must be a point of no return after which organs in unclaimed bodies might, under legal protection, be made available for transplant. Unpredictable press coverage, as damaging as it was laudatory, should be mitigated by insisting upon the anonymity of the donor.<sup>110</sup>

The Cape Town symposium for heart surgeons was not the first gathering to debate challenges and generate solutions, but it was the only such conference attended solely by cardiac specialists. It assigned heart surgeons a starring role in defining parameters that elsewhere were discussed across

105. Werner Forssmann, “Verlust an sittlicher Substanz. Zur Frage der Herztransplantation,” *Frankfurter Allgemeine Zeitung* 3.1, January 4, 1968, as quoted from translation in FC, FJFF.

106. *Heart Transplantation*, 39–40.

107. *Ibid.*, 41, 47.

108. *Ibid.*, 49–50.

109. *Heart Transplantation*, 255–57. The Tucker-Klett transplant, the sixteenth cardiac transplant in the world, was the first interracial transplant in the United States. The Medical Center of Virginia failed to notify Bruce Tucker’s next of kin, and his brother, William, brought suit against Dr. Richard R. Lower and the hospital for not obtaining consent and for premature declaration of death. See Koretzky, “Change of Heart,” 422–23.

110. *Heart Transplantation*, 257, 261. See also “Cape Town Plans Transplant Bills: Anonymity of Donors and Recipients to be Required,” *New York Times*, December 16, 1968, 10.

various professional disciplines, including medicine, law, ethics, and religion, often in public gatherings. In the United States, France, and Great Britain, doctors, jurists, and religious and political leaders gathered with the purpose of standardizing donorship, organ harvesting, and death certification procedures. In January 1968 in Boston, Henry Beecher, an anesthesiologist, convened ten physicians, a lawyer, a theologian, and a historian to form the Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Death, beginning in January 1968.<sup>111</sup> After meeting for 6 months, the committee published a report in the *Journal of the American Medical Association* that defined “irreversible coma as a new criterion for death.”<sup>112</sup> Concurrently, the Uniform Anatomical Gift Act (UAGA) was drafted by the Commissioners on Uniform State Laws to standardize state organ donorship and transplantation statutes and approved on July 30, 1968.<sup>113</sup> The UAGA omitted a definition of death, specifying only that “the time of death shall be determined by a physician who attends the donor at his death, or, if none, the physician who certifies the death” and who was not to participate “in the procedures for removing or transplanting a part.”<sup>114</sup> At the same time, Kansas led the way to a statutory definition of death, “which dealt with man as a human, not as a physiologic unit,” and thus establishing that, in legal terms, “when the brain is dead, the man is dead.”<sup>115</sup>

In France, similar formal, inter-professional discussions, bringing together clergy, intellectuals, politicians, jurists, and doctors, unfolded around the ethical legislation of death to allow for heart transplantation. In Paris on February 19, 1968, the Academy of Moral and Political Sciences—in the presence of Rabbi Kaplan, leader of the Jewish faith in France, and Pastor Boegner, a leading Protestant—heard Father Michel Riquet deliver a talk on Heart Transplants and the Human Person.<sup>116</sup> The Academy concluded

111. See Lock, *Twice Dead*, 89 and Mita Giacomini, “A Change of Heart and a Change of Mind? Technology and the Redefinition of Death in 1968,” *Social Science Medicine* 44 (1997): 1465–82.

112. “A Definition of Irreversible Coma: Report of the Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death,” *Journal of the American Medical Association* 205.6 (1968): 337–40, at 337.

113. Alfred M. Sadler, Jr, Blair L. Sadler, and E. Blythe Season, “The Uniform Anatomical Gift Act,” *Journal of the American Medical Association* 206.11 (1968): 2501.

114. “Uniform Anatomical Gift Act (UAGA), Copy of final draft as approved on 30 July 1968 by the National Conference of Commissioners on Uniform State Laws,” *Journal of the American Medical Association* 206.11 (1968): 2505–6, at 2506.

115. Loren F. Taylor, “A Statutory Definition of Death in Kansas,” *Journal of the American Medical Association* 215.2 (1971): 296.

116. Michel Riquet, S.J., took an active role in the Resistance and was deported for it, spending over a year in Dachau. See Edmond Michelet, *Rue de la liberté. Dachau*

that, although the responsibility for defining death fell on doctors, heart transplants could save the lives of patients who would otherwise die. The event laid the groundwork for an ethical and religious consensus supporting cardiac transplants. France's political leaders carried the intellectual and moral consensus forward. On April 17, 1968 Minister of Social Affairs, Jean-Marcel Jeanneney, presented to the Council of Ministers an exposé on "governmental intentions, moral and medical reflections, and ethical and regulatory specifications" relating to heart transplants. On April 24, 1968, France issued a ministerial circular allowing organs to be harvested in operating rooms, a de facto, although not legislated, acceptance of cerebral death.<sup>117</sup> Three days after the circular's issuance, French surgeon Christian Cabrol achieved the first cardiac transplant in Europe, at the *Hôpital de la Pitié* in Paris. The donor's identity was concealed, but was described in the papers as a "decedent with a beating heart." The circular preceded Law 76-1181 Relating to Organ Harvesting by 8 years.<sup>118</sup>

The South African path to legislation was narrower and bore the imprint of the resolutions reached at the Cape Town heart transplantation symposium through a closed-door discussion to which only physicians had access. They reinforced one another's expertise, agreeing that doctors alone were to wield the power of life and death. The new legal template came to fruition in the South African Anatomical Donations and Post-Mortem Examinations Bill to regulate organ transplantation first read in Parliament on February 6, 1969, barely 6 months after the symposium. In a piece titled "Organ Transplantation and the Law" appearing in the *Journal of Forensic Medicine*, South Africa's leading forensic pathologist, H. A. Shapiro wrote: "This draft legislation . . . will undoubtedly serve as a useful model and guide for other countries in which organ transplantation is carried out."<sup>119</sup>

Rather than seeking to legislate cerebral death, as the Kansas statute did, the South African bill specified the conditions in which organs could be harvested from a "living person."<sup>120</sup> UAGA specified the donee as "any

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1943-1945 (Paris: Seuil, 1955). Theologically and politically, Riquet sought common ground with Free Masons and Communists, and was committed to promoting interreligious dialogue between Christians and Jews. Bernay, "Le Père Michel Riquet."

117. Circulaire no. 67 du 24 avril 1968. See also Hennette-Vauchez and Nowenstein, "Dire la mort," 2009.

118. Graciela Nowenstein, *The Generosity of the Dead: A Sociology of Organ Procurement in France* (London and New York: Routledge, 2010), 34-42.

119. H. A. Shapiro, "Organ Transplantation and the Law," *Journal of Forensic Medicine* 16 (1969): 78.

120. The South African Anatomical Donations and Post-Mortem Examinations Bill, *Journal of Forensic Medicine* 16 (1969): 109-10.

hospital, surgeon, or physician;” . . . “any accredited medical or dental school, college or university;” any licensed, accredited “bank or storage facility” approved under state law “for storage of human bodies or parts thereof;” or “any specified individual for therapy or transplantation needed by him.”<sup>121</sup> Eschewing any such specificity, the South African bill specified the donee as “authorised institution,” without defining the institution’s purpose or requiring that it be licensed, stipulating only that: “No removal of any tissue from the body of a living person for use in the body of another living person shall take place UNLESS such removal is authorised in writing by the medical officer in charge of the hospital or authorised institution in which such removal takes place.” Unlike UAGA, which required that willingness to be an organ donor be made in writing, whether in a will, or on a card signed by the donor in the presence of two witnesses, in the South African bill, oral consent to donate was accepted, provided such consent was made in the presence of two persons over the age of 18. Significantly, the bill prohibited the publication of the identity of either the donor or the recipient. The bill reflected the heart surgeons’ discussion during the symposium. As drafted, it aspired to make legal South African surgeons’ use of prisoners’ organs in transplantation, while shielding them from public inquiry by imposing donor anonymity.

As the bill was being debated, Shapiro reviewed the published record of the Cape Town Symposium in his *Journal of Forensic Medicine*. He related the debate as having “centred on the propriety (moral and legal) of removing a heart from a donor while it was still beating. This unorthodox view found some support among the heart transplanters.”<sup>122</sup> Shapiro opined that “the public announcement by heart transplant surgeons that they would remove a beating heart in these circumstances, probably did much to undermine the public confidence. . .”<sup>123</sup>

South African legislators were not ready to accept the “living donor” portion of the bill supported by heart transplanters. Following lengthy discussions of the bill throughout much of 1969,<sup>124</sup> the Anatomical Donations and Post-mortem Examinations Act No. 24, finally passed in 1970, eliminated the possibility of organ harvesting from a living person. It specified that the death of any donor must be established “by at least two medical practitioners” before removal of tissue could be authorized. Like UAGA, the Anatomical Donations and Post-mortem Examinations Act did not

121. UAGA, Section 3, 2505.

122. H. A. Shapiro, “New Hearts for Old?” *Journal of Forensic Medicine* 16 (1969): 118.

123. *Ibid.*

124. *Report on the Select Committee on the Anatomical and Post-Mortem Examinations Bill* (Pretoria: Government Printer, 1969).

define death, instead leaving it up to physicians to determine that it had occurred. However, the act maintained oral consent to organ donation. Just as a death sentence could be applied on the basis of an oral confession, an organ donation could be orally consented to in the presence of two unspecified adults. The act also failed to specifically define to which “authorised institutions” donations could be made. Not until 1972 were specifications defining and identifying the purpose of donee institutions integrated into the act. Although it did not legislate liability coverage for physicians, it established their legal protection in another way: by requiring the authorization of a magistrate. In both the South African Act and UAGA, unclaimed bodies offered a legal way around consent should a body go unclaimed, recalling Forssmann’s concerns about postmortem use of body parts without consent. Unlike UAGA, the act upheld the anonymity of donors and recipients.

Although the phrase “living donor” was excised from the bill as it became the act, South Africa’s physicians had obtained nearly all other points discussed at the symposium Barnard convened in July 1968. The law that the South African Parliament passed made it legal for prisoners to donate organs, for authorized medical practitioners to harvest them without consent from unclaimed bodies in ill-defined institutions (not excluding prisons), for prison officers to coerce oral agreement to organ donation as they often coerced oral confession, and for the entire transaction to remain veiled in secrecy, under the cover of donor and recipient anonymity.

### **Conclusion**

In shedding light on the social and political injustices of South Africa, the French Anti-Apartheid Committee ruptured Barnard’s narrative of triumph. The committee suggested that his heart transplants were only possible in a state where whites wielded the power of life and death. It questioned the legitimacy of a rule of law that made a majority of South African inhabitants outlaws—it is clear from his files and the press clippings he saved that de Félice viewed apartheid South Africa as having legally transformed blacks into de facto political prisoners—organ donors in waiting for wealthy whites in need of transplants. Anti-apartheid campaigns portrayed Barnard as a doctor who had little regard for legal ethics that he viewed as hampering medical advances. Connecting Barnard’s tactics to the transplant-triggered debates of how to medically, ethically, and legally define death, anti-apartheid advocates spotlighted seeming irregularities in his surgeries. Moving from the legality of Barnard’s heart transplants to the broader South African context in which he performed them, legal activists like de Félice placed apartheid



law on trial in the court of public opinion, just as Nelson Mandela had in the courtroom at Rivonia.<sup>125</sup>

The donor in Barnard's third heart transplant was a 32-year-old unidentified black woman. She was 7 months pregnant. She was alone at Groote Schuur when declared dead of a brain hemorrhage. No consent was given to transplant her heart into a white male in his fifties with chronic heart failure. Scathingly criticizing Barnard for having taken a heart without the family's permission, *The Cape Times* reported that two out of three organ donors were black. *Die Vaderland* paper in Johannesburg printed a rebuttal: no authorization was requested for the heart in question, but according to the law, a government functionary could authorize an organ donation after death, even if the family did not consent.<sup>126</sup> Accusing the press of swaying public opinion against organ donation, Barnard angrily stated that it seemed preferable not to divulge the names of donors due to improper publicity diffused around the world about their families.<sup>127</sup> Ultimately, Barnard made the decision in 1975 to stop harvesting organs from non-whites, declaring: "Every time the organs of a black man or woman have been used, negative press has been the result."<sup>128</sup>

The French Anti-Apartheid Committee deployed a human rights strategy to elucidate apartheid era injustices. In the matter of forced organ harvesting, human rights activism achieved a mixed outcome.<sup>129</sup> On the one hand, Barnard stopped taking organs from black South Africans, and the South African legislation evolved to introduce greater controls and restrictions, especially by specifying what institutions could be authorized locations of donation. On the other, no international law against involuntary organ harvesting from prisoners was enacted. Perhaps at the time, the proposal of such a law seemed far-fetched. However, in China, in 1984, a law was passed authorizing the organs of executed prisoners to be used in transplants without their prior consent. Beginning in the 1990s, medical

125. Awol Allo, "Courtroom as a Space of Resistance: Reflections on the Legacy of the Rivonia Trial," in *The Courtroom as a Space of Resistance: Reflections on the Legacy of the Rivonia Trial*, ed. Awol Allo (London & New York: Routledge, 2017), 1–19.

126. "Controverse au Cap à propos de la dernière greffe cardiaque du docteur Barnard," *Le Monde*, September 13, 1968, [https://www.lemonde.fr/archives/article/1968/09/13/controverse-au-cap-a-propos-de-la-derniere-greffe-cardiaque-du-docteur-barnard\\_2483669\\_1819218.html](https://www.lemonde.fr/archives/article/1968/09/13/controverse-au-cap-a-propos-de-la-derniere-greffe-cardiaque-du-docteur-barnard_2483669_1819218.html) (accessed November 16, 2021).

127. "Le professeur Barnard attaque la presse," *Le Monde*, September 14, 1968, [https://www.lemonde.fr/archives/article/1968/09/14/le-professeur-barnard-attaque-la-presse\\_2483510\\_1819218.html](https://www.lemonde.fr/archives/article/1968/09/14/le-professeur-barnard-attaque-la-presse_2483510_1819218.html) (accessed November 16, 2021).

128. "Barnard Stops Using Organs from Blacks," *The Globe and Mail*, February 3, 1975, 3.

129. On mixed outcomes as "highly consequential outcomes of international human rights campaigns to be conceptualized in their own right" see Elizabeth Holzer, "What Happens to Law in a Refugee Camp?" *Law & Society Review* 47 (2013): 837–72.

associations and human rights groups began to denounce forced organ harvesting from prisoners in China, bringing evidence of their concerns before the United Nations Human Rights Council in September 2019.<sup>130</sup>

The strategies of rupture and contestation that anti-apartheid advocates leveraged in the wake of Barnard's heart transplants portray a conception of the law's potential for political change. In an era of liberation struggle, activist lawyers and the clients they represented made use of the law, not as normative, but as transformative.<sup>131</sup> In this endeavor, human rights offered a way to achieve structural change through the law even as it was historically constitutive of ongoing anti(neo)colonial goals in a broad sense. Research in the lawyers' archives offers a bird's eye view of the inter-professional, transnational, and ecumenical networks that these strategies of contestation mobilized both in and beyond the courtroom. At once anticolonial and generative of a human rights that would address structural inequities on a global scale, these strategies were undertaken by non-state actors to shape public opinion and, ultimately, to pressure state action. The building blocks of rights contestation and advocacy strategies included rights claimant(s), activist lawyers, public opinion campaigns, and a stage on which to contest, whether at trial, in an international forum, or in the media. The combination of these elements appears—and arguably has appeared, over the last century—wherever rights and politics are consciously articulated to rupture existing norms. Lawyers like de Félice meaningfully defined and practiced human rights by integrating it into this formula.

Revisionist histories of human rights are often rooted in intellectual or diplomatic methodologies, drawing on archives of the writings of jurists, states, and international institutions such as the United Nations. These sources emphasize the story of how human rights became institutionalized and operationalized as American foreign policy in the 1970s when they gained momentum as a movement. In this approach, human rights came to mean negative rights protections for individuals, privileging status equality and overlooking economic equality, redistributive rights, and other socioeconomic rights.<sup>132</sup> Any human rights parlance that defined

130. "UN urged to Investigate 'forced' organ harvesting in China," *Al Jazeera News*, September 25, 2019, <https://www.aljazeera.com/news/2019/09/urged-investigate-forced-organ-harvesting-china-190925081434736.html> (May 24, 2020).

131. On this point, see Brenna Bhandar, "Strategies of Legal Rupture: The Politics of Judgment," *Windsor Yearbook of Access to Justice* 30 (2012): 59–74, at 66–69.

132. Some revisionists argue that, having excised material rights, human rights now operate, albeit perhaps unwillingly, and most often unconsciously, in the service of neoliberalism. See Nils Gilman, "Human Rights and Neoliberalism," *Los Angeles Review of Books*, May 8, 2018, <https://lareviewofbooks.org/article/human-rights-and-neoliberalism/> (accessed

human rights otherwise prior to their 1970s emergence as a popular American movement, the revisionists contend, was not *really* about human rights, but about something else—citizenship, welfare, or diplomacy, for example.

The revisionist historiography of human rights occludes their alternative formulations and diverse historical trajectories: Too often the human rights that nourished a body of seemingly impartial legal norms comprising international human rights law seem to be the only human rights worthy of historical study.<sup>133</sup> This makes it difficult to historically examine alternative frameworks that do not easily fit into the genealogical projects that now sometimes pass for human rights history. Alternative and past concepts, practices, and discourses of human rights *do* belong in human rights history, although human rights lawyers arguing cases in the courts today may not perceive them to be of use. A less presentist human rights history that makes room for its past fullness and contradictions, that includes marginal practices, failed attempts, and definitions now fallen into disuse might unveil the ways that human rights could be articulated with a meaningful politics of transnational solidarity,<sup>134</sup> and asks that we risk imagining human rights transformatively.

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November 16, 2021); Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Cambridge, MA: Belknap Press, 2018).

133. For a critique of international human rights law as composed of impartial legal norms see Bronwyn Leebaw, “The Politics of Impartial Activism: Humanitarianism and Human Rights” *Perspectives on Politics* 5 (2007): 223–39.

134. For contemporary reflections on the politics of transnational solidarity see Ayça Çubukçu, “The Responsibility to Protect: Libya and the Problem of Transnational Solidarity,” *Journal of Human Rights* 12 (2013): 40–58.