

ARTICLES

Dead Bodies as Quasi-Persons

*Ela A. Leshem**

This Article argues that American law treats dead bodies as quasi-persons: entities with a moral status between things and persons. The concept of quasi-personhood builds on dead bodies' familiar classification as quasi-property. Just as quasi-property implicates only a subset of the rights usually associated with property, quasi-personhood implicates only a subset of the moral interests often associated with moral personhood. Drawing on a broad historical analysis of state, territory, and federal law, I show that U.S. law conceives of dead bodies as holders of dignity interests, which it protects in a variety of ways. The law, for example, protects dead bodies against denigration to the status of property, waste, or nonhuman animals and ensures that dead bodies be treated as individuals with names. The law also protects dead bodies

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against visual, physical, and sexual abuse. I analyze how these dignity protections operate across disparate areas of law, including criminal statutes, tort law, licensing regimes, and zoning ordinances. Using unclaimed bodies as a case study, I then argue that my account of dead bodies as quasi-persons casts a critical light on the mistreatment that some dead bodies—especially those of Black Americans, Native Americans, and the poor—regularly suffer. The account also illuminates the law’s implicit views of personhood, property, human nature, and mortality. And it points the way for future research on the law’s treatment of other arguably liminal entities, such as animals, fetuses, plants, and AI models.

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INTRODUCTION

*Is not life more than meat,
and the body more than raiment?*¹

When Jock K. Adams died of a fentanyl overdose on October 21, 2018, it took Washington, D.C., weeks to locate relatives.² Adams, a Black man, had spent the previous two decades in homeless shelters, jails, and prisons, serving terms for drug offenses. He had lost contact with most of his family. And his older brother, whom officials eventually found, could not afford to pay for the burial. This made Adams's body an "unclaimed" body—one that D.C. needed to dispose of at public expense. The city paid \$485 to cremate Adams's corpse and then interred his crematory remains in a newly purchased vault at the renowned Congressional Cemetery, along with dozens of other unclaimed bodies. The following spring, the city held a memorial service for Adams and its other unclaimed residents—the first such service in its history.

Had Adams died just a few years earlier, D.C. would have sent his unclaimed body to Chesapeake Pet Crematory, which advertised its services as "help[ing] you plan an event that celebrates the life of your pet."³ D.C. would have then interred his crematory remains together with those of other unclaimed bodies in an overgrown and unmarked cemetery plot in Baltimore, "next to heaps of trash."⁴

Had Adams lived and died a century and a half earlier, his unclaimed body may have traveled farther still. It would have stood a good chance of first being buried in the city's potter's field and then being dug up by grave robbers and sold to a distant medical school.⁵ At the time, D.C. was a central hub of illicit cadaver trade.⁶ As letters and

1. W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 94 (2d ed. 1903) (quoting *Matthew* 6:25).

2. For facts in this paragraph, see Clarence Williams, *A Dignified Resting Place Awaits the Poor and Unfamous in a Famous Graveyard*, WASH. POST (Apr. 26, 2019, 1:36 PM), https://www.washingtonpost.com/local/public-safety/a-final-place-of-dignity-awaits-the-poor-and-unfamous-in-a-famous-cemetery/2019/04/26/48e20a88-670e-11e9-8985-4cf30147bdca_story.html [https://perma.cc/6AFY-C6QF].

3. Terrence McCoy, *Washington's Unclaimed Remains in Unmarked Graves Next to Trash Cans*, WASH. POST (July 19, 2015, 6:45 PM), https://www.washingtonpost.com/local/social-issues/washingtons-unclaimed-remains-in-unmarked-graves-next-to-trash-cans/2015/07/19/a8c03ce2-24df-11e5-aae2-6c4f59b050aa_story.html [https://perma.cc/8VFS-FXDA] (internal quotation marks omitted).

4. Simon Davis, *This Is What Happens to Unclaimed Bodies in Washington, DC*, VICE (Apr. 6, 2015, 3:55 PM), <https://www.vice.com/en/article/9bze43/this-is-what-happens-to-unclaimed-bodies-in-washington-dc-406> [https://perma.cc/4ELU-2KLF].

5. See SUZANNE M. SHULTZ, *BODY SNATCHING: THE ROBBING OF GRAVES FOR THE EDUCATION OF PHYSICIANS IN EARLY NINETEENTH CENTURY AMERICA* 60–62 (1992).

6. See *id.* at 60.

diaries from the period attest, grave robbers often targeted local pauper and Black cemeteries and then shipped the stolen bodies in whiskey barrels to medical schools across the country.⁷ Medical faculty bought those bodies—or “goods,” as they called them—for about \$25 each and used them for anatomical dissections in their courses.⁸

Finally, had Adams died on the same October morning in 2018, but just five miles farther north in Maryland, his unclaimed body would likely have landed on the dissection table of a medical school as well—except this time by fully legal means. Pursuant to Maryland’s Anatomy Act, passed in 1882 and in effect to this day, the state’s anatomy board distributes unclaimed bodies to medical schools and scientific research institutions across the state.⁹ It charges about \$140 per corpse and \$84 per torso or head to recoup its costs.¹⁰ Institutions can then use those bodies for medical instruction and research, including the testing of military weapons and protective gear,¹¹ before returning whatever is left of those bodies for cremation and subsequent interment at a collective gravesite.¹²

If a dead body were a mere thing, it would be unclear why any of these scenarios should trouble us. Imagine, for instance, that Adams had left behind an old coat. When nobody came to claim the coat, why shouldn’t the state have escheated it and then disposed of it in the most useful way? If that meant tossing it away into an unmarked field or dump yard, fine. And if the coat could be repurposed or sold and give another human warmth and joy, all the better. Likewise, the counterfactual processing of Adams’s body near trash bins and animal remains, its collective and anonymous burial, its medical dissection, and even its disinterment and sale by body snatchers should concern us little. If anything, the actual disposition of Adams’s body should give us pause. From a “thing” perspective, it may seem like a wasted opportunity to put his body to good use. And not just any good use, but one that might help save future lives. Plus, Adams, like many unclaimed others, was socially quite isolated. So, the scientific use of

7. *Id.* at 38, 61–62.

8. SHULTZ, *supra* note 5, at 38. At that time, twenty-five dollars amounted to approximately a week’s wages for a skilled worker. See MICHAEL SAPPOL, A TRAFFIC OF DEAD BODIES: ANATOMY AND EMBODIED SOCIAL IDENTITY IN NINETEENTH-CENTURY AMERICA 113 (2002).

9. See MD. CODE. ANN., HEALTH-GEN. §§ 5-401 to -409 (West 2023); Act of Mar. 30, 1882, ch. 163, 1882 Md. Laws Spec. Sess. 222, 222–23.

10. See Eliana Block, *Maryland’s Unclaimed Dead Become Body Donors*, CAP. NEWS SERV. (May 25, 2016), <https://marylandreporter.com/2016/05/25/marylands-unclaimed-dead-become-body-donors/> [https://perma.cc/ZPW6-LUL9].

11. See KENNETH V. ISERSON, DEATH TO DUST: WHAT HAPPENS TO DEAD BODIES? 123 (2d ed. 2001).

12. See Block, *supra* note 10.

his body carried comparatively little risk of offending the feelings of family and friends. And, in any event, such feelings toward a mere “thing” would be irrational. These were in fact the arguments that utilitarian lawmakers successfully mounted in the nineteenth and early twentieth centuries, leading to the passage of anatomy acts not only in Maryland but in nearly all U.S. states.¹³

But is a dead body a mere thing? The question may seem too metaphysical to admit of a legal answer. It implicates beliefs about what makes us human, what gives us moral status, what grounds our dignity, what happens to us after we die, and more. But however fraught, the law cannot abstain from answering the question, at least implicitly. At the very least because, as the example of unclaimed bodies shows, the state itself sometimes assumes the delicate role of disposing of dead bodies. In fact, in more indirect ways, too, the state, as a lawmaker, regulator, and adjudicator, frequently assesses the moral status of dead bodies. As a result, many areas of law speak to what a dead body is: criminal and civil, statutory and common law, liability and licensing regimes, cemetery regulations and zoning ordinances, appropriations and taxes, wills, trusts, and estates.¹⁴ And they do so across multiple layers of jurisdiction: federal, state, and local.

The trouble then is not that the law has little to say about the nature and status of dead bodies. It is rather that it seems to be speaking with too many voices for there to be a coherent body of American law to address the question of whether dead bodies are mere things. That indeed appears to have been the conclusion reached by the few scholars who have explored the law’s answers to this question and shown concern about our treatment of unclaimed bodies. Historian Ellen Stroud, for instance, posed the question in a short review piece and concluded that there is “no coherent corpus of dead body law to critique, much less reform.”¹⁵ But we need not give up so quickly.

This Article shows that American laws regarding dead bodies—despite spanning many legal arenas, multiple layers of jurisdiction, fifty states, and five major territories—share a common concern with protecting the dignity of dead bodies. For instance, they seek to ensure

13. See *infra* Section IV.A.

14. See generally TANYA MARSH, *THE LAW OF HUMAN REMAINS* (2016); HEATHER CONWAY, *THE LAW AND THE DEAD* (2016) (focusing on English and Welsh law); PERCIVAL E. JACKSON, *THE LAW OF CADAVERS AND OF BURIAL AND BURIAL PLACES* (1937); George H. Weinmann, *A Survey of the Law Concerning Dead Human Bodies*, 73 BULL. NAT’L RSCH. COUNCIL 1 (1929).

15. Ellen Stroud, *Law and the Dead Body: Is a Corpse a Person or a Thing?*, 14 ANN. REV. L. & SOC. SCI. 115, 122 (2018). Similarly, Tanya Marsh observes in the introduction to her comprehensive treatise that dead bodies “challenge our neat bifurcation of people and property.” MARSH, *supra* note 14, at ix. But she then presents disparate human remains laws without elaborating on that initial observation.

that dead bodies be treated as distinct from and better than property, waste, and animal carcasses, and with respect for their individuality and names. And they guard dead bodies against various forms of mistreatment, including visual, physical, and sexual abuse. I will demonstrate how pervasive these legal protections are, and show that they point to a rich and provocative account of dead bodies' status.¹⁶

Based on this analysis, I argue that the law rejects the view that dead bodies are mere things.¹⁷ The moral status that it instead attributes to dead bodies falls between thing and person.¹⁸ In particular, the law situates dead bodies on a moral spectrum above venerated objects and below living human beings, somewhere in the vicinity of living animals. What is more, the law treats dead bodies as holders of certain moral interests—specifically, dignity interests. My analysis reveals that the law's default protections are in large part concerned with dignity (a term I will define below) and that the law treats dead bodies as beneficiaries of those dignity protections and as victims of their violation.¹⁹

16. Some of these legal protections have, as far as I can tell, never been the focus of scholarly attention before—among them the law's efforts to keep human corpses apart from waste and animal carcasses, as well as its requirements to treat them as individuals with names and to guard them against visual exposure. Other legal protections of dead bodies have been the subject of valuable scholarly work—among them the law's treatment of dead bodies as quasi-property and its prohibitions against corpse mutilation, disturbance, and necrophilia. See, e.g., Shyamkrishna Balganes, *Quasi-Property: Like, but Not Quite Property*, 160 U. PA. L. REV. 1889 (2012); Fred O. Smith, Jr., *The Constitution After Death*, 120 COLUM. L. REV. 1471 (2020); John Troyer, *Abuse of a Corpse: A Brief History and Re-theorization of Necrophilia Laws in the USA*, 13 MORTALITY 132 (2008). But for those protections, too, important aspects have gone unexplored, such as the law's attribution of dignity interests to dead bodies themselves, its comparisons between dead bodies and sleeping or incapacitated humans, its structuring of quasi-property around a duty of care that next of kin are thought to owe dead bodies, and the distinction between realist and fictionalist understandings of quasi-property. The Article thus breaks new ground in its description and analysis of each of the legal protections it detects.

17. Here and elsewhere, I use "the law" as a shortcut to refer to the wide-ranging body of laws outlined above. The shortcut makes it possible to describe the relevant legal materials and actors without having to spell out each time the full multiplicity of subject areas, jurisdictions, states, and territories at play, nor the even greater multiplicity of actors shaping those laws across more than two centuries, including legislators, judges, advocates, and the public. Although there are differences in the legal treatment of dead bodies across space and time, there are sufficient similarities for "the law" to be a coherent shortcut. Throughout, I will justify my broader claims by reference to specific subject areas, jurisdictions, legal actors, and historical periods, highlighting both similarities and differences among them.

18. In highlighting this in-between status, my argument differs from previous accounts that implicitly embrace an all-or-nothing conception of personhood and then suggest that dead bodies are either persons, see, e.g., Smith, *supra* note 16, at 1493–1503 (focusing on decedents as rightsholders), or things, see, e.g., Philippe Ducor, *The Legal Status of Human Materials*, 44 DRAKE L. REV. 195, 198, 212 (1996) (understanding dead bodies as "objects rather than subjects of rights" and thus as "thing[s]").

19. I speak of moral interests and responsibilities throughout this Article. But none of my arguments depend on accepting an interest theory of rights. Readers should feel free to replace my terminology in their minds with their preferred alternatives, such as moral rights and duties, or

The Article proposes that we capture this liminal moral status between thing and person with the concept of “quasi-personhood.”²⁰ The term invokes the established classification of dead bodies as quasi-property, which refers to the limited possessory and exclusionary rights that next of kin have in their relative’s dead body to ensure its dignified disposition.²¹ The concept of quasi-personhood, as we will see, builds on this concept of quasi-property in multiple ways that illuminate dead bodies’ liminal moral status: First, dead bodies’ quasi-personhood forms the flipside of their quasi-property status. If dead bodies were mere things, they could be full property. If dead bodies were full persons, they could not be any kind of property. But because dead bodies are neither things nor full persons but in-between, they can be quasi-property. Second, just as there is a realist and a fictionalist way of understanding dead bodies’ quasi-property status, there is a realist and a fictionalist way of understanding their quasi-personhood. On a realist

reasons for action. Nor do I mean to invoke a welfarist conception of interests with my use of the terms “beneficiaries” and “victims.” The terms are meant to be capacious, indicating that dead bodies in the eyes of the law are loci of moral concern and vulnerable to mistreatment. Readers should also feel free to replace my use of the term “moral person” with, for instance, a “being holding moral interests or bearing responsibilities,” a “being holding moral rights or bearing moral duties,” a “being with whom one can stand in a moral relationship,” or a “locus of moral concern.” My thanks to Quinn White for discussing these alternatives.

20. The term quasi-personhood is largely new. Historically, case law sometimes referred to partnerships as quasi-persons and rarely also to corporations and ships. *See, e.g., In re Morrison’s Estate*, 22 A.2d 729, 732 (Pa. 1941) (referring to a partnership as “a quasi person”); *Mayor of Savannah v. Cullens*, 38 Ga. 334, 346 (1868) (referring to a corporation as “a quasi person”); *T.B. Young & Co. v. Steamboat Virginia (The Virginia)*, 12 Ohio Dec. Reprint 77, 79 (Ohio Super. Ct. 1854) (referring to a steamboat as “a quasi person”). Angela Fernandez recently proposed that we use quasi-personhood to capture the legal status of animals. *See* Angela Fernandez, *Not Quite Property, Not Quite Persons: A ‘Quasi’ Approach for Nonhuman Animals*, 5 CANADIAN J. COMPAR. & CONTEMP. L. 155, 157 (2019) [hereinafter Fernandez, *A Quasi Approach*]; Angela Fernandez, *Animals as Property, Quasi-Property or Quasi-Person* 3 (Brooks Inst., Working Paper, 2021), https://thebrooksinstitute.org/sites/default/files/presentations/Animal%20Law%20Fundamentals%20-%20Angela%20Fernandez_1.pdf [<https://perma.cc/8K2T-WFKU>] [hereinafter Fernandez, *Animals*]. James Martel and Norman Cantor also apply the term to dead bodies, but only in passing. *See* James R. Martel, *Interrupted by Death: The Legal Personhood and Non-personhood of Corpses*, in 87A INTERRUPTING THE LEGAL PERSON 103, 104 (Austin Sarat ed., 2022); NORMAN L. CANTOR, *AFTER WE DIE: THE LIFE AND TIMES OF THE HUMAN CADAVER* 4 (2010). Martel’s parenthetical reference to “quasi personhood” aligns with my use. Martel observes the law’s struggle to situate dead bodies between its categories of legal personhood and property, and highlights the law’s lingering and diminishing attributions of personhood to dead bodies. Martel, *supra*, at 104, 111–13. What Cantor seems to pick out with the term “quasi-personhood” is the distinct, albeit related, observation that our customs and laws tend to anthropomorphize dead bodies by “attributing human feelings and reactions to” them. CANTOR, *supra*, at 32. For that reason, he refers to dead bodies often as “quasi-human.” *Id.* at 4, 29, 30, 34, 39, 43–44, 48, 290, 295, 297. Another related term in the sociological literature on dead bodies is “quasi-subject.” *E.g.*, Troyer, *supra* note 16, at 145. I take quasi-personhood to correspond to the spectrum of personhood intuitions on which ordinary people, in Nina Strohminger and Matthew Jordan’s studies, locate “edge cases,” such as corporations and animals. Nina Strohminger & Matthew R. Jordan, *Corporate Insecthood*, COGNITION, July 2022, at 1, 6, 23.

21. *See infra* notes 58–63 and accompanying text.

understanding, dead bodies really are moral persons in the eyes of the law and the qualification “quasi” only denotes a difference in degree. On a fictionalist understanding, by contrast, dead bodies are “like, but not quite” moral persons: decedents (meaning, the individuals who died) are the real interest holders, and the qualification “quasi” denotes a difference in kind. Finally, the relationship between quasi-personhood and moral personhood mirrors the relationship between quasi-property and property. Just as quasi-property implicates only a subset of the rights usually associated with property, quasi-personhood implicates only a subset of the moral interests and responsibilities often associated with moral personhood.

As mentioned, the subset of moral interests that the law ascribes to dead bodies comprises primarily dignity interests. The law nowhere defines “dignity.” But courts and legislatures seem to use the term—and I will in this Article follow them—to capture dead bodies’ elevated moral status.²² They also seem to use “dignity” as similar in meaning to singularity, uniqueness, irreplaceability, and non-fungibility.²³ Moreover, as I will show, dead bodies’ dignity interests give rise to a range of more specific interests, such as individual respect, privacy, bodily integrity, and sexual inviolability.²⁴ I also argue that the law limits the authority of decedents (before their deaths) and next of kin (after the decedents’ deaths) to waive dead bodies’ dignity protections to a subset of cases.²⁵ In most cases in which the law authorizes waivers, it seems to do so because the outlines of dead bodies’ dignity interests are blurry and the consensual choices of decedents and next of kin help to disambiguate them. That can happen, for instance, because the human remains in question are no longer full dead bodies but partial or disintegrated remains—such as body parts, skeletal remains, and crematory remains. Or it can happen because of shifting moral and

22. In Leslie Meltzer Henry’s illuminating typology of dignity, this conception matches the “collective virtue as dignity” conception. See Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 220–29 (2011).

23. Their use of “dignity” is largely consistent with Adeno Addis’s observation that laws not only in the United States but also abroad often invoke dignity to defend the integrity of persons. See Adeno Addis, *Dignity, Integrity, and the Concept of a Person*, 13 VIENNA J. ON INT’L CONST. L. 323, 327–28 (2019).

24. When appealing to dead bodies’ dignity as demanding certain forms of respect and recognition from the state and from others, U.S. lawmakers and courts use dignity as a relational status. See JEREMY WALDRON, *DIGNITY, RANK, AND RIGHTS* 17–18 (Meir Dan-Cohen ed., 2012) (emphasizing a conception of dignity as elevated rank that is both the ground of rights and the content of rights); Emma Kaufman, *Reflection: Death and Dignity in American Law*, in *DIGNITY: A HISTORY* 361–67 (Remy Debes ed., 2017) (analyzing courts’ relational use of “dignity” in death penalty jurisprudence).

25. This argument runs contrary to the widespread emphasis that medical and legal scholars place on decedents’ consent.

cultural understandings of which disposition practices are dignified. In fact, as we will see, American law is currently in the midst of responding to several such shifts. In the last two decades, an increasing number of states have legalized new disposition methods, permitted the joint burial of human and pet remains, and enacted new protections for fetal remains. The Article will help us understand these shifts by integrating them into its broader account of dead bodies' quasi-personhood.

This account has several implications. To start, it allows us to show why, and in what ways, we mistreat some dead bodies—especially those of Black Americans, Native Americans, and the poor.²⁶ These dead bodies, unlike others, do not enjoy the law's full range of default protections. Using unclaimed bodies as a case study, I show that the account of dead bodies' quasi-personhood gives us new conceptual tools to articulate what their mistreatment consists of and how we ought to remedy it. The resulting criticisms and reform proposals illustrate the practical legal implications that my account of dead bodies' quasi-personhood carries. These upshots are compatible with diverging underpinning beliefs. They are consistent, for instance, with beliefs that embrace the existence of an afterlife, and beliefs that reject it. In fact, as I will argue, the law's treatment of dead bodies as quasi-persons generates criticisms and reform proposals even if it is metaphysically mistaken.²⁷ Put differently, the descriptive fact that the law treats dead bodies as quasi-persons has normative upshots whether or not one endorses such treatment.

My account of dead bodies' quasi-personhood also helps illuminate the law's implicit views of human nature and mortality. As we will see, the law's insistence that a dead body is more than a mere thing amounts to an assertion about the moral status not only of dead bodies, but also of living human beings.²⁸ The law's conception of dead bodies as quasi-persons speaks to its conception of human beings as moral persons. The law's efforts to ensure, for instance, that dead bodies be treated differently from property or waste express its commitment to the belief that in life, too, human beings were more than mere matter. Similarly, its efforts to ensure that human corpses be treated better than animal carcasses express its commitment to the belief that in life, too, humans were more than mere animals. At the same time, the law's concerted efforts to protect dead bodies suggest latent anxieties about those beliefs. Are we sure that humans transcend matter and surpass animals? Human mortality and the unsightly fate of human corpses

26. See *infra* Section IV.B.

27. See *infra* notes 397, 526–529, 553–562, 566, and accompanying text.

28. See *infra* notes 136–139, 157–159, and accompanying text.

may seem to suggest otherwise. Against the backdrop of such anxieties, the law's efforts to keep property, waste, and animals at a distance offer assurance of human transcendence and superiority. And its efforts to keep decomposing bodies out of sight and prevent their abuse spare us from confronting the full fragility of our lives and bodies. On the one hand, then, the law's protections of dead bodies are expressions of our self-conception as beings transcending matter and surpassing other creatures in moral status. On the other hand, they are safeguards of that very self-conception against doubts raised by our mortality and the disintegration of our bodies.

Finally, the account sheds new light on the law's conception of personhood and property. And by doing so, it also points the way for future research on the law's treatment of other arguably liminal entities, such as animals, fetuses, plants, and AI models. In the animal law context, Angela Fernandez has recently argued that an all-or-nothing approach to animals' legal status, according to which they are either property or persons, inaccurately describes animals' legal treatment and undermines attempts to bolster their protection.²⁹ She has proposed that we conceive of animals instead as quasi-property and quasi-persons.³⁰ With respect to dead bodies, which Fernandez does not discuss, I will show that the law has long carved out such an in-between legal status based on a nuanced understanding of dead bodies' moral status, which it situates on a spectrum rather than across a binary divide between things and moral persons. Because judges have long referred to dead bodies as "quasi-property," the example of dead bodies can provide a firm legal foundation for the concept of quasi-personhood. And it also provides a new conception of quasi-property—one in which property rights are tailored to enable living humans to fulfill their duty of care toward quasi-persons.³¹ My account reveals that the law has, at times, adopted a capacious view of quasi-persons, extending certain dignity protections even to inanimate entities such as corpses. Because

29. Fernandez, *A Quasi Approach*, *supra* note 20, at 157.

30. *Id.*

31. This conception differs, for example, from Shyamkrishna Balganesh's account of quasi-property. Balganesh views the law's allocation of quasi-property in dead bodies as protecting relatives against emotional anguish. And he assumes that the law treats dead bodies as *res* (things). Balganesh, *supra* note 16, at 1904. I, too, acknowledge quasi-property's function of protecting relatives' feelings, but view that as an additional (rather than exclusive) function of quasi-property—additional, that is, to its function of enabling relatives to fulfill their duty of care toward dead bodies. What is more, relatives' anguish often presupposes that they view dead bodies as quasi-persons, and the law embraces that view at least indirectly. See *infra* notes 291–293 and accompanying text. My conception of quasi-property also differs from Fernandez's, who uses the term quasi-property to capture the fact that animals are in some ways property and in others not, and that those ways are in flux. See Fernandez, *A Quasi Approach*, *supra* note 20, at 212–13. She does not conceive of quasi-property as structured around a duty of care.

dead bodies are human, biological, and inanimate, their legal treatment may carry important implications for the treatment of fetuses, plants, and AI models. The Article thus extends the concept of quasi-personhood to new realms and explores its deep roots in American law.

The Article proceeds as follows. Part I explores legal protections that seek to ensure that dead bodies be treated in accordance with their liminal moral status: namely as distinct from and better than property, waste, and animal carcasses, and with respect for their individuality and names. Part II analyzes legal protections that try to guard dead bodies against various forms of abuse, including visual, physical, and sexual abuse. Part III proposes that we capture the preceding account of dead bodies' liminal moral status with the concept of quasi-personhood, and it suggests new ways of understanding the role of consent in that account. Part IV puts the account to work by returning to the example of unclaimed bodies. The Article concludes with reflections on the account's implications for other liminal entities.

I. STATUS ANXIETY

*A corpse is meat gone bad.*³²

The law, as we will see in this Part, makes a concerted effort to distinguish dead human bodies from property, waste, and dead animal bodies, and to secure their treatment as individuals with names. These legal protections speak to anxieties about the moral status of dead bodies. And they suggest that the law situates that status on a spectrum between things and persons.

A. Property

*[B]eware of making merchandize of the dead.*³³

One foil against which American law has sought to define dead bodies is the legal category of property. American courts have consistently maintained that dead bodies—unlike all other nonliving and physically moveable entities—cannot be fully owned.³⁴

32. JAMES JOYCE, *ULYSSES* 145 (Penguin Grp. 1992) (1922).

33. ROBERT CROWELL, *INTERMENT OF THE DEAD, A DICTATE OF NATURAL AFFECTION, SANCTIONED BY THE WORD OF GOD, AND THE EXAMPLES OF THE GOOD IN EVERY AGE* 40 (Andover, Flagg & Gould 1818).

34. Alix Rogers, *Unearthing the Origins of Quasi-Property Status*, 72 *HASTINGS L.J.* 291, 294 (2020). The statement arguably covers parts taken from dead and living bodies, such as human tissues and organs. I will discuss the law's treatment of parts taken from dead bodies more below,

For the first century of the republic, American courts maintained this position by echoing the English common law's rule that a dead body is *nullius in bonis*—nobody's property.³⁵ The legal origins of this no-property rule are disputed.³⁶ But it came to dominate English and early American courts' legal treatment of dead bodies thanks to Edward Coke's and William Blackstone's influential common law treatises.³⁷

Today, this categorical stance against treating dead bodies as property still features prominently in two areas of American law. The first concerns the sale of dead bodies. State courts confronted with corpse sales have consistently maintained that the common law criminalizes the selling, buying, and trafficking of dead bodies as *malum in se*.³⁸ Many states have also passed statutes to codify this criminal prohibition.³⁹

The second area concerns the use of dead bodies as debt collateral.⁴⁰ Judges have balked at creditors' seizure of dead bodies as collateral to pressure their debtors to pay.⁴¹ And many states have passed criminal statutes that penalize the attachment of dead bodies upon a debt.⁴²

In prohibiting the property treatment of dead bodies in these ways, courts and legislatures are not blind to the potential commercial

see infra Section III.B, and save the law's treatment of parts taken from living bodies (as well as its treatment of living bodies themselves) for another time, *see infra* note 54.

35. *Id.* at 312.

36. *See, e.g.*, MARSH, *supra* note 14, at 5, 14 (pointing to two possible origins: ecclesiastical doctrine and Roman law).

37. *See* Rogers, *supra* note 34, at 312–13; EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 203 (London, W. Clarke & Sons 1809) (1644); 4 WILLIAM BLACKSTONE, COMMENTARIES *235–36.

38. *See, e.g.*, Thompson v. State, 58 S.W. 213, 214 (Tenn. 1900) (“[T]he authorities are harmonious on the proposition that the . . . sale of the dead body of a human being for gain and profit, is a common-law misdemeanor of high grade, and *malum in se* . . .”).

39. *E.g.*, S.C. CODE ANN. § 44-43-580(A) (2023); TEX. PENAL CODE ANN. § 42.08(a)(3) (West 2023); VA. CODE ANN. § 32.1-303 (West 2023).

40. This prohibition was not initially entailed by the no-property rule, but emerged in both England and America in the early nineteenth century. *See* Walter F. Kuzenski, *Property in Dead Bodies*, 9 MARQ. L. REV. 17, 18 (1924).

41. *E.g.*, Griffith v. Charlotte, Columbia & Augusta R.R., 23 S.C. 25, 40 (S.C. 1885) (stating that Americans “would revolt” if creditors were to seize the dead bodies of their debtors); Morgan v. Richmond, 336 So. 2d 342, 343 (La. Ct. App. 1976) (holding that a funeral home does not have “a right to maintain possession of [a] deceased’s body to secure payment”); Gadbury v. Bleitz, 233 P. 299, 300–01 (Wash. 1925) (similar).

42. *E.g.*, ALASKA STAT. ANN. § 11.61.130(a)(3) (West 2023); MINN. STAT. ANN. § 149A.80(9) (West 2023); NEV. REV. STAT. ANN. § 451.040(1) (West 2023); N.Y. PUB. HEALTH LAW § 4219 (McKinney 2024); N.D. CENT. CODE ANN. § 23-06-28 (West 2023); OKLA. STAT. ANN. tit. 21, § 1165 (West 2024); OR. REV. STAT. ANN. § 97.110 (West 2023); WASH. REV. CODE ANN. § 68.50.120 (West 2023); W. VA. CODE R. 6-1-25.9 (2023).

value that dead bodies have.⁴³ Recent centuries and especially recent decades have seen an explosion in valuable scientific uses of dead bodies.⁴⁴ But legislatures have sought to facilitate those scientific uses without turning dead bodies into objects over which others have the full suite of property rights—for instance, by allowing body brokers and research institutions to charge the recipients of body parts “reasonable” reimbursement fees for storage and transportation.⁴⁵ Whether or not they are successful in these attempts,⁴⁶ continued legislative and judicial prohibitions on treating dead bodies as property in a “commercial” sense express opposition to commodifying dead bodies.⁴⁷ That is to say, these prohibitions signal reservations against treating dead bodies as goods to which the market may attach a price tag in commercial transactions.⁴⁸ These reservations, as courts have made clear, are “premised on moral and ethical, rather than economic, considerations.”⁴⁹

Similar reservations against treating dead bodies as property are also apparent in states’ refusal to equate crimes against dead bodies with property crimes. The vast majority of states, for instance, have passed statutes criminalizing grave robbery and unauthorized disinterments as separate offenses rather than including dead bodies in property theft statutes.⁵⁰ Courts have likewise resisted defendants’ attempts to collapse crimes against corpses with crimes against property. In one case, for example, a Defendant appealed his convictions for larceny and unauthorized disturbance of human remains, arguing that those two counts amounted to double punishment for the same

43. See, e.g., *Onyeanusi v. Pan Am. World Airways, Inc.*, 952 F.2d 788, 792 (3d Cir. 1992) (insisting on dead bodies’ significant “potential commercial value”); *Brotherton v. Cleveland*, 923 F.2d 477, 481 (6th Cir. 1991) (“As biotechnology continues to develop, so will the capacity to cultivate the resources in a dead body.”).

44. See *infra* notes 423–430.

45. E.g., OHIO REV. CODE ANN. § 2108.18(B) (West 2023); VA. CODE ANN. § 32.1-291.16(B) (West 2023); W. VA. CODE ANN. § 16-19-16(c) (West 2023); WIS. STAT. ANN. § 146.345(c) (West 2023); WYO. STAT. ANN. § 35-5-215(b) (West 2023).

46. Critics charge, among other things, that this allowance has created an insufficiently regulated, de facto market in dead bodies and body parts. See, e.g., Julia D. Mahoney, *The Market for Human Tissue*, 86 VA. L. REV. 163, 209 (2000).

47. E.g., *Culpepper v. Pearl St. Bldg., Inc.*, 877 P.2d 877, 880 (Colo. 1994); *Dougherty v. Mercantile-Safe Deposit & Trust Co.*, 387 A.2d 244, 246 n.2 (Md. App. Ct. 1978); *Finley v. Atl. Transp. Co.*, 115 N.E. 715, 717 (N.Y. 1917); *Larson v. Chase*, 50 N.W. 238, 239 (Minn. 1891).

48. See Balganes, *supra* note 16, at 1914–15; MARGARET J. RADIN, *CONTESTED COMMODITIES* 1–2 (1996); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2036–38, 2045–48 (1996).

49. *Onyeanusi v. Pan Am. World Airways, Inc.*, 952 F.2d 788, 792 (3d Cir. 1992) (footnote omitted).

50. See *infra* Section II.B (analyzing legal protections against dead bodies’ physical abuse). *But see, e.g.*, MINN. STAT. ANN. § 609.52(1)(1) (West 2023) (including corpses in the theft statute’s definition of property).

conduct in violation of California law.⁵¹ The court rejected the argument, insisting that the two counts punished different conduct: one the stealing of urns, which were property; the other the disturbance of the human remains in those urns, which was not reducible to a property crime.⁵² The court explained this irreducibility in moral terms, pointing to the dignity of the dead: “[T]he removal of human remains from their places of interment [is not] morally akin to property crimes such as receiving stolen automobile radios or stealing welfare benefits,” for “[c]ourts have long recognized the dignity and respect society affords the dead and their survivors.”⁵³

There is, however, one important context in which courts have qualified the English no-property rule. Starting in the 1870s, courts came to recognize that next of kin had a particular proprietary interest in a relative’s dead body.⁵⁴ Historically, such recognition was necessary for enabling next of kin to seek equitable remedies against anyone who interfered with their “right of sepulcher”—the right to secure a dead body’s disposition and subsequent repose.⁵⁵ Today, most states recognize such a proprietary interest under the label of “quasi-property.”⁵⁶ And many treat a relative’s suit for wrongful interference

51. *People v. Reid*, 201 Cal. Rptr. 3d 295, 299–300 (Ct. App. 2016); *see also* Smith, *supra* note 16, at 1500 (discussing the case).

52. *Reid*, 201 Cal. Rptr. 3d at 299–300.

53. *Id.*

54. *See* Rogers, *supra* note 34, at 306–09. I am bracketing here the question of what, if any, property rights people have in their living bodies and in tissues taken from their living bodies. *See* Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 445–59 (2000) (arguing for a privacy rather than property approach to bodies that are living, whole, or involved in intimate relationships); Meredith M. Render, *The Law of the Body*, 62 EMORY L.J. 549 (2013) (presenting a conceptual framework for understanding the living body as property); *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 488–90 (Cal. 1990) (holding that a patient whose extracted cells were used to manufacture a patented cell line did not have a cause of action for conversion because the patient did not retain ownership interest in his cells following their removal); *cf.* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 19(c) (AM. L. INST. 1998) (excluding human blood and tissue from products liability rules); Lawrence Zelenak, *The Body in Question: The Income Tax and Human Body Materials*, 80 LAW & CONTEMP. PROBS. 37 (2017) (analyzing the uncertain treatment of donations and sales of human body materials under federal income tax law).

55. *See* Balganes, *supra* note 16, at 1912; RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS § 48.D–E (AM. L. INST. Tentative Draft No. 2, approved 2023) (discussing the right of sepulcher). My thanks to Nora Freeman Engstrom and Susan Frelich Appleton for bringing these provisions to my attention.

56. *E.g.*, *Travelers Ins. Co. v. Smith*, 991 S.W.2d 591, 595 (Ark. 1999); *Culpepper v. Pearl St. Bldg., Inc.*, 877 P.2d 877, 880 (Colo. 1994); *Strachan v. Kennedy Memorial Hosp.*, 538 A.2d 346, 350 (N.J. 1988) (recognizing a “quasi property right in the body of a dead person”); *Evanston Ins. Co. v. Legacy of Life, Inc.*, 370 S.W.3d 377, 383 (Tex. 2012); *Coleman v. Sopher*, 499 S.E.2d 592, 604 (W. Va. 1997); *Litteral v. Litteral*, 111 S.W. 872, 874 (Mo. Ct. App. 1908) (recognizing a “quasi property right”); *Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227, 238, 242 (1872) (recognizing “a sort of quasi property” in dead bodies).

with their quasi-property right and right of sepulcher as a tort claim for negligent infliction of emotional distress.⁵⁷

Quasi-property in a dead body encompasses several property rights (or, strictly speaking, ownership interests): the rights of possession, exclusion, and disposition.⁵⁸ But it does not encompass other property rights, such as the rights of use, transfer, profit, and destruction.⁵⁹ And importantly, the property rights encompassed by quasi-property are only present “for the limited purpose of seeing that the body is decently interred or disposed of”⁶⁰ and that it remains “protect[ed] . . . from insult.”⁶¹ As courts have explained, the quasi-property right of a next of kin in their relative’s dead body stems from their duty to care for the dead body and to dispose of it decently, which is “imposed by the universal feelings of mankind.”⁶² A duty of care, in other words, is primary. The quasi-property right, along with the right of sepulcher, is secondary: it exists in service of the duty and “corresponds in extent to the duty from which it arises.”⁶³

There are two ways to make sense of courts’ quasi-property language, and both find expression in judicial opinions and legal commentary. One way is to view quasi-property as in fact a type of property. Several courts, for instance, have suggested that the presence

57. *E.g.*, *Galvin v. McGilley Mem’l Chapels*, 746 S.W.2d 588, 591 (Mo. Ct. App. 1987); RESTATEMENT (SECOND) OF TORTS § 868 cmt. a (AM. L. INST. 1979) (“In practice the [quasi-property] right has served as a mere peg upon which to hang damages for the mental distress inflicted upon the survivor; and in reality the cause of action has been exclusively one for the mental distress.”). Alix Rogers argues that liability under quasi-property and under the tort of emotional distress should not be conflated because liability under quasi-property (1) arises primarily from a defendant’s injury of the corpse, not of next of kin; (2) is not subject to the same limitations on recovery, such as proximity; and (3) can give rise to additional remedies, such as the return of human remains. Rogers, *supra* note 34, at 303.

58. *See, e.g.*, *Whitehair v. Highland Memory Gardens, Inc.*, 327 S.E.2d 438, 440–41 (W. Va. 1985) (discussing rights of possession and disposition); RESTATEMENT (THIRD) ON TORTS: MISCELLANEOUS PROVISIONS § 48.F (AM. L. INST. Tentative Draft No. 2, approved 2023); Rao, *supra* note 54, at 382–83.

59. The various sticks in the property bundle can be enumerated in different ways. *See, e.g.*, ROGER A. CUNNINGHAM, WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* § 1.2 (1984); Ducor, *supra* note 18, at 225.

60. *Culpepper*, 877 P.2d at 880.

61. *Guthrie v. Weaver*, 1 Mo. App. 136, 143 (Mo. Ct. App. 1876).

62. *Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227, 237–38 (1872); *O’Donnell v. Slack*, 55 P. 906, 907 (Cal. 1899); *McGathey v. Davis*, 281 S.W.3d 312, 317 (Mo. Ct. App. 2009) (quoting *Moloney v. Boatmen’s Bank*, 232 S.W. 133, 139 (Mo. 1921)).

63. *Travelers Ins. Co. v. Smith*, 991 S.W.2d 591, 595–96 (Ark. 1999); *see also* *St. Louis Sw. Ry. Co. v. White*, 91 S.W.2d 277, 278 (Ark. 1936) (noting that the “dead body” of the decedent “had the right of sepulture” and that “[s]ociety generally, and his next of kin specially, were under the duty of giving his body burial, and these latter had the right to perform that duty decently”); *Pettigrew v. Pettigrew*, 56 A. 878, 879 (Pa. 1904) (“[T]he law recognizes property in a corpse . . . subject to a trust, and limited in its rights to such exercise as shall be in conformity with the duty out of which the rights arise.”).

of important ownership interests, such as the right to exclude, means that there is indeed property in a dead body.⁶⁴ On this first, “realist” understanding of quasi-property, the qualifier “quasi” picks out that we are dealing with a thin, or in any case, less than full property right,⁶⁵ but one that is nonetheless real.

Another way to make sense of courts’ quasi-property language is to view quasi-property as a fiction or analogy. This second, “fictionalist” understanding is, for instance, espoused by Shyamkrishna Balganesh.⁶⁶ Balganesh takes the “quasi” in quasi-property to mean “like, but not quite property.”⁶⁷ Quasi-property, as he further explains, “*simulate[s]* the functioning of property’s exclusionary apparatus through a relational liability regime.”⁶⁸

Realists and fictionalists appear to divide over the status of quasi-property because realists, unlike fictionalists, view entitlements as decisive for determining whether something really is property. Fictionalists, by contrast, also look to remedies. They treat as decisive that quasi-property is not enforceable through traditional property causes of action, such as conversion,⁶⁹ replevin,⁷⁰ and larceny,⁷¹ nor subject to what Guido Calabresi and Doug Melamed termed property rules: transfers through voluntary purchase and protection against

64. *E.g.*, *Larson v. Chase*, 50 N.W. 238, 239 (Minn. 1891) (emphasizing exclusive control); *Pettigrew*, 56 A. at 879 (emphasizing custody, control, and disposition). On this basis, some courts have even concluded that family members’ quasi-property right in their relatives’ dead bodies amounts to a constitutionally protected property right. *E.g.*, *Newman v. Sathyavaglswaran*, 287 F.3d 786, 796–97 (9th Cir. 2002) (applying California law); *Whaley v. County of Tuscola*, 58 F.3d 1111, 1116–17 (6th Cir. 1995) (applying Michigan law); *Brotherton v. Cleveland*, 923 F.2d 477, 482 (6th Cir. 1991) (applying Ohio law).

65. As Balganesh stresses, it is not just the case that quasi-property rights in dead bodies encompass limited ownership interests. More importantly, it is also the case that those limited ownership interests apply in only limited situations—namely, in the context of ensuring dead bodies’ decent burial and undisturbed repose. Balganesh, *supra* note 16, at 1904. I account for this situational limitation by conceiving of quasi-property rights in dead bodies as tailored toward facilitating next of kin’s duty of care toward dead bodies as quasi-persons and will return to this point in Section III.A, *infra*.

66. *See also, e.g.*, W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen, PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 63 (5th ed. 1984) (“It seems reasonably obvious that such ‘property’ is something evolved out of thin air to meet the occasion, and that in reality the personal feelings of the survivors are being protected, under a fiction likely to deceive no one but a lawyer.”); *Johnson v. State*, 334 N.E.2d 590, 592 (N.Y. 1975) (“Recovery in these cases has ostensibly been grounded on a violation of the relative’s quasi-property right in the body. It has been noted . . . that . . . such a ‘property right’ is little more than a fiction; in reality, the personal feelings of the survivors are being protected.” (citations omitted)).

67. Balganesh, *supra* note 16, at 1894 (internal quotation marks omitted).

68. *Id.* at 1891 (emphasis omitted); *see also* Rogers, *supra* note 34, at 295 (noting that quasi-property “mimic[s] some of the functions of property, but does not formally qualify as property”).

69. Rogers, *supra* note 34, at 295, 302.

70. *E.g.*, *Keyes v. Konkel*, 78 N.W. 649, 649 (Mich. 1899).

71. *E.g.*, *Toppin v. Moriarty*, 44 A. 469, 469 (N.J. Ch. 1899).

interference based on market value.⁷² Instead, as Balganesh stresses, quasi-property is only subject to liability rules;⁷³ and thus, compensation is determined by the state and at least partially separate from market values.⁷⁴

I will later come back to the distinction between realist and fictionalist conceptions of quasi-property. For now, we can put these distinctions aside. Whichever view is correct, quasi-property's exclusive reliance on liability rules, as opposed to property rules, is significant because it avoids the commodification of dead bodies, even as it recognizes relatives' proprietary interests. And either way, we land on a limited set of ownership interests in dead bodies: possession, exclusion, and disposition for the purpose of ensuring decent burial and undisturbed repose.⁷⁵

* * *

Stepping back, we can see that the law refuses to treat dead bodies as property in a commercial sense by restricting their trade, imposing distinct criminal penalties, and limiting the enforcement of quasi-property rights to liability rules. What is more, the law's recognition of dead bodies' quasi-property status and its rejection of their property status both assume the same premise: dead bodies are not mere things. For the duty of dignified disposition that gives rise to dead bodies' quasi-property status is a duty to care for dead bodies as distinctly valuable. Similarly, the law's prohibitions against selling dead bodies and using them as debt collateral, as well as its resistance to reducing crimes against dead bodies to property crimes, imply that dead bodies are distinctly valuable. Dead bodies, the law seems to insist, have value but should not have market value. In fact, their value

72. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972); Jesse Wall, *The Legal Status of Body Parts: A Framework*, 31 OXFORD J. LEGAL STUD. 783, 797–98, 800 (2011) (discussing Calabresi & Melamed, *supra*).

73. Balganesh, *supra* note 16, at 1891.

74. Wall, *supra* note 72, at 798–800.

75. In recent decades, states have arguably added some sticks to this quasi-property bundle. Many states give a decedent the right to direct the disposition of their body after death. *E.g.*, *O'Donnell v. Slack*, 55 P. 906, 907 (Cal. 1899) (“[T]he individual has a sufficient proprietary interest in his own body after his death to be able to make valid and binding testamentary disposition of it.”). Moreover, all states have codified a version of the Uniform Anatomical Gift Act (“UAGA”), giving the decedents and their relatives the further control right to dispose of dead bodies for purposes other than burial: by donating dead bodies to medical and scientific institutions for education and research. UNIF. ANATOMICAL GIFT ACT § 3, 8A U.L.A. 29, 40 (1987).

is precisely what seems to make inappropriate any assignment of commercial value.⁷⁶

In such insistence we can detect the echoes of what Achille Mbembe calls “a deep anxiety concerning the proper relation between people/humans, on the one hand, and things/objects, on the other.”⁷⁷ The law seems invested in treating dead bodies as other than mere things, as closer to the people/humans category. Or so I will argue.

B. Waste

*[C]orpses are more worth throwing out than dung.*⁷⁸

A second foil against which American law has sought to define dead bodies is the category of waste.⁷⁹ Legislatures, courts, and legal advocates have sought to keep dead bodies apart from waste and ensure that the disposition of dead bodies is meaningfully distinct from the disposal of waste.

That distance and distinction are not self-evident. Practically, the disposition of dead bodies has a lot in common with the disposal of waste.⁸⁰ Corpses, like waste, rot and smell. Both need to be removed and deposited elsewhere. Both are primarily processed by professionals in industrial facilities. We also dispose of waste and corpses using parallel methods: cemeteries and landfills use ground burial, crematories and waste incinerators employ fire. Indeed, even when it comes to terminology, the line between managing dead bodies and waste is precariously thin: *disposition* versus *disposal*.⁸¹ But the law has sought to strengthen this thin line in a variety of ways.

First, many U.S. states and territories prohibit the mingling of dead bodies and waste at multiple stages of the disposition process.

76. See Cora Diamond, *Moral Liveliness and Other Forms of Moral Interestingness* 80 (June 24, 2022) (manuscript on file with author).

77. ACHILLE MBEMBE, *NECROPOLITICS* 94 (Steven Corcoran trans., 2019).

78. Heraclitus 22b96, in HERMANN DIELS & WALTHER KRANZ, *DIE FRAGMENTE DER VORSOKRATIKER* 172 (2005); THOMAS W. LAQUEUR, *THE WORK OF THE DEAD: A CULTURAL HISTORY OF MORTAL REMAINS* 3 (2015) (translating the quoted verse).

79. I use the term “waste” here and throughout in the ordinary rather than doctrinal sense of the word—that is, as similar in meaning to “trash” or “garbage.” My thanks to Danielle D’Onfro for suggesting this clarification.

80. These similarities are among the reasons that Philip Olson refers to dead bodies as “necro-waste.” Philip R. Olson, *Knowing “Necro-Waste,”* 30 *SOC. EPISTEMOLOGY* 326 (2016).

81. Compare *Glossary of Funeral Terms*, NYS FUNERAL DIRS. ASS’N, <https://www.nysfda.org/industry-resources/glossary-funeral-terms> (last visited May 19, 2024) [<https://perma.cc/AF9U-L5SK>] (defining disposition as “[t]he means of laying human remains to rest”), with *Disposal*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/disposal> (last visited May 19, 2024) [<https://perma.cc/2QCH-8Q6N>] (defining disposal, among other things, as “destruction or transformation of garbage”).

Several jurisdictions bar the accumulation of trash in funeral establishments and cemeteries.⁸² The mingling of dead bodies and waste has also been the subject of civil complaints. In 1996, for instance, a class action suit against the University of California, Los Angeles (“UCLA”), alleged that the university’s body donation program cremated thousands of donor bodies together with medical waste and laboratory animals and then sent the mingled crematory remains (“cremains” for short) to a landfill.⁸³ The Plaintiffs eventually lost,⁸⁴ but UCLA promised the public that it would change its disposition practices and that henceforth “people will be treated with compassion.”⁸⁵ Another civil suit accused the City of Newark, New Jersey, of turning its city cemetery, where thousands of indigent residents had been buried between 1869 and 1954, into an industrial storage yard and later into a public dump.⁸⁶ The court ordered the city to restore the cemetery.⁸⁷

The federal government, too, has sought to keep human remains and waste distinct. The Environmental Protection Agency (“EPA”), for instance, determined in 2005 that human crematories were exempt from its regulations of “other solid waste incineration units” under the Clean Air Act.⁸⁸ It justified its decision by stating in conclusory terms that “the human body should not be labeled or considered ‘solid waste.’”⁸⁹ The Agency did not engage meaningfully with commenters who had argued that human crematories should be regulated as “solid

82. *E.g.*, N.C. GEN. STAT. ANN. § 14-148(a)(1) (West 2023); 140 N. MAR. I. ADMIN. CODE § 140-20.2-420(c)(3)(vii), (d)(1) (2019).

83. Dorothy Nelkin & Lori Andrews, *Do the Dead Have Interests? Policy Issues for Research After Life*, 24 AM. J.L. & MED. 261, 276 (1998) (describing the case).

84. *Bennett v. Regents of the Univ. of Cal.*, 34 Cal. Rptr. 3d 579, 581, 585 (Ct. App. 2005) (affirming the trial court’s denial of class certification because, pursuant to CAL. HEALTH & SAFETY CODE § 7054.4 (West 2024), the simultaneous cremation of donated bodies used for scientific research does not constitute an actionable wrong, and because the plaintiffs failed to present admissible evidence in support of their other allegations); *Bennett v. Regents of the Univ. of Cal.*, No. B194991, 2007 WL 2966130, at *2–4 (Cal. Ct. App. Oct. 12, 2007) (affirming the trial court’s summary judgment in favor of UCLA on similar grounds when adjudicating the lead plaintiff’s individual claims).

85. ISERSON, *supra* note 11, at 101 (internal quotation marks omitted).

86. *Id.* at 619.

87. *Id.*; David M. Herszenhorn, *Restoration Plan Ordered for Potter’s Field in Newark*, N.Y. TIMES (Oct. 9, 1998), <https://www.nytimes.com/1998/10/09/nyregion/restoration-plan-ordered-for-potter-s-field-in-newark.html> [<https://perma.cc/AN4D-9QEU>]. This suit took place in the Chancery Division of New Jersey’s courts and ended in 2001 with a consent order that required the city to restore the cemetery and establish a memorial park. *Lascrain v. City of Newark*, 793 A.2d 731, 753–54 (2002). Plaintiff’s companion suit in the Law Division, by contrast, was unsuccessful. *Id.* at 736.

88. Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Other Solid Waste Incineration Units, 70 Fed. Reg. 74870, 74881 (Dec. 16, 2005) (to be codified at 40 C.F.R. pt. 60).

89. *Id.*

waste incinerators” because they emit mercury and other hazardous air pollutants.⁹⁰

Advocates have shown similar sensitivities when opposing the legalization of new disposition methods that they view as inappropriately mingling dead bodies and waste. In legalization debates over alkaline hydrolysis (a method that places dead bodies in lye), opponents’ principal objection has been that it flushes the dissolved human tissue into the sewage system, leaving only bones behind.⁹¹ Missouri’s Catholic bishops, for instance, objected that “subjecting the dissolved human remains to being flushed into the sewer system” “fails to show due reverence and respect for the human remains of the deceased.”⁹² In Indiana, Representative Dick Hamm (an owner of two casket manufacturing companies) persuaded his colleagues to vote against legalizing alkaline hydrolysis by charging that the bill would let human remains “run down the drain out into the sewers and

90. *Id.* (not engaging meaningfully with Earthjustice’s Comment on the Proposed Rule). The EPA’s conclusory treatment of human remains stands in contrast to its more reasoned treatment of animal remains. *See id.*; *see also infra* note 112. The EPA’s regulation of burials at sea evinces a similarly unquestioning reluctance to classifying human remains as waste. In 1988, Congress amended the Marine Protection, Research, and Sanctuaries Act of 1972 by adding “medical waste” to the list of items that were categorically barred from ocean dumping and for which the EPA could therefore not issue any permit. Ocean Dumping Ban Act of 1988, Pub. L. No. 100-688, sec. 3201(a)(2), (b)(2), 102 Stat. 4139, 4153 (codified as amended at 33 U.S.C. § 402) (including “body parts” in the definition of medical waste). In the wake of this amendment, the EPA did not revisit its general permit for burials at sea. *See* General Permits for the Transportation for Dumping, and the Dumping of Material into Ocean Waters, 40 Fed. Reg. 30114 (July 9, 1975) (codified at 40 C.F.R. § 229.1). Nor is there any indication in the legislative history of the amendment that Congress anticipated a conflict between the established disposition of dead bodies at sea and the new prohibition on the dumping of medical waste and body parts. Both Congress and the EPA evidently assumed that human remains did not constitute medical waste and that this was sufficiently straightforward as to obviate the need for clarification. All the EPA did see a need to clarify in guidance was that human remains to be buried at sea ought not to be mixed with medical waste, though they were allowed to contain “[m]edical wastes that otherwise exist within the body of the deceased.” *Burial at Sea*, U.S. ENV’T PROT. AGENCY, https://www.epa.gov/ocean-dumping/burial-sea#Can_cremains_be_mixed_with_medwaste (last visited May 19, 2024) [<https://perma.cc/QD4K-DR9Y>].

91. *See, e.g.*, Victoria J. Haneman, *Alkaline Hydrolysis*, 47 ACTEC L.J. 55, 56–59 (2021) (describing the process and outlining objections).

92. *Missouri Catholic Bishops Oppose Use of Alkaline Hydrolysis*, CATH. MISSOURIAN (Aug. 29, 2018, 10:44 AM), <https://catholicmissourianonline.com/stories/missouri-catholic-bishops-oppose-use-of-alkaline-hydrolysis,1095> [<https://perma.cc/D8Q8-CA5M>] [hereinafter *Missouri Catholic Bishops*]. For more background on the theological underpinnings of Catholic dignity concerns for dead bodies, *see, for example*, Renée Mirkes, *The Mortuary Science of Alkaline Hydrolysis: Is It Ethical?*, 8 NAT’L CATH. BIOETHICS Q. 683, 683–85 (2008). While Catholic and other Christian beliefs no doubt underpin many U.S. laws protecting dead bodies as a historical matter, such beliefs do not provide the only possible grounding for such laws. As we will see, the law’s dignity protections of dead bodies are compatible with a range of different beliefs about human mortality and the nature of moral personhood. They do not necessarily presuppose beliefs in, say, an afterlife, immortal soul, mind/body dualism, or resurrection of the body at the end of time. *See infra* Section III.A.

whatever” and complaining that this method is “just not very humane.”⁹³ Opponents of human composting (a method that places dead bodies in alfalfa) have leveled related objections.⁹⁴ The thought of throwing dead bodies, like banana peels, on a compost pile struck them as unduly conflating dead bodies with waste. The New York State Catholic Conference, for instance, protested that “human corpses are not just like other inanimate objects, they’re not just trash.”⁹⁵

As these examples suggest, the law insists on a certain minimal esteem for dead bodies when it resists the mingling of dead bodies and waste. In keeping dead bodies and waste distinct, it asserts that dead bodies have higher moral status than trash. But there is still more at stake in the law’s separation of dead bodies and waste. To see that, it helps to look at an adjacent area of law in which the same assertion of superior moral status has played out prominently: the disposition of fetal remains.

In recent years, anti-abortion activists have lobbied for state laws that would put more distance between the disposition of fetal remains and the disposal of waste.⁹⁶ Most states have long treated the remains of fetuses older than twenty weeks as equivalent—for disposition purposes—to (other) human remains.⁹⁷ But the targets of recent legislative campaigns are the remains of fetuses younger than

93. Tony Cook, *Casket-Making Lawmaker Helps Kill Bill Allowing Alternative to Burial*, INDYSTAR (Mar. 20, 2015, 6:11 PM), <https://www.indystar.com/story/news/politics/2015/03/20/casket-making-lawmaker-helps-kill-bill-allowing-alternative-burial/25109443/> [<https://perma.cc/2ZEH-G44F>] (internal quotation marks omitted); see also Tanya D. Marsh, *Modernizing the Law of Human Remains: Challenges and Opportunities*, in *THE FUTURE OF THE CORPSE: CHANGING ECOLOGIES OF DEATH AND DISPOSITION* 100 (Karla Rothstein & Christina Staudt eds., 2021) (describing the Indiana vote); Emily Atkin, *The Fight for the Right to Be Cremated by Water*, NEW REPUBLIC (June 14, 2018), <https://newrepublic.com/article/148997/fight-right-cremated-water-rise-alkaline-hydrolysis-america> [<https://perma.cc/AE28-62KL>] (same). Similarly, New Hampshire representative John Cebrowski objected to alkaline hydrolysis, “I don’t want to send a loved one . . . down the drain to a sewer treatment plant.” *Id.*

94. See, e.g., Katie M. Alfus, Note, *Better Homes and Scattered Gardens: Why Iowa Should Legalize “Human Composting” as a Method of Final Disposition*, 106 IOWA L. REV. 325, 342–43, 360 (2020) (describing the process and noting objections).

95. The Takeaway, *Is Composting the Future of Death?*, WYNC STUDIOS, at 9:18 (Jan. 5, 2022), <https://www.wyncstudios.org/podcasts/takeaway/segments/composting-future-death> [<https://perma.cc/LCU2-CGKU>]. For a discussion of how to understand the legalization of alkaline hydrolysis and human composting by several states notwithstanding concerns about the mingling of dead bodies and waste, see *infra* Section III.B.

96. See, e.g., Rebecca Grant, *The Latest Anti-Abortion Trend? Mandatory Funerals for Fetuses*, NATION (Oct. 11, 2016), <https://www.thenation.com/article/archive/the-latest-anti-abortion-trend-mandatory-funerals-for-fetuses/> [<https://perma.cc/YG5R-EDRX>].

97. See, e.g., Weinmann, *supra* note 14, at 11–18; PAMELA PRICKETT & STEFAN TIMMERMANS, *THE UNCLAIMED: ABANDONMENT AND HOPE IN THE CITY OF ANGELS* 187 (2024).

twenty weeks. Activists lobby that such fetuses should, at the very least, no longer be “flushed down sewers” or thrown into landfills.⁹⁸

In several states, the campaigns succeeded at eliminating certain medical waste disposal methods for fetal remains. Texas, for instance, amended its regulations in 2016 to prohibit healthcare facilities from discharging fetal remains into a sanitary sewer system or removing them to a sanitary landfill.⁹⁹ A year later, the legislature exempted fetal remains from the category of medical waste and required healthcare facilities to dispose of fetal remains by interment or scattering other than in a landfill.¹⁰⁰ But it left intact the option of incinerating fetuses collectively in a facility that is not licensed as a crematory for human remains.¹⁰¹ Other states have passed laws with similar effects.¹⁰²

Politicians, activists, and states championing these laws defend these changes in dignitary terms. Thus, a spokeswoman for Texas Governor Greg Abbott explained in support of Texas’s initial regulatory amendments that separating fetal remains from medical waste “affirms the value and dignity of all life.”¹⁰³ Indiana’s then-Governor Mike Pence lauded a similar Indiana law for “ensur[ing] the dignified final treatment of the unborn.”¹⁰⁴ A journalist celebrated that same Indiana law for “prevent[ing] the . . . inhumane disposal” of fetal remains and thereby “restor[ing] some humanity to our most helpless.”¹⁰⁵ And Indiana took the position in subsequent litigation that its interests

98. Cortney O’Brien, *Indiana Pro-Life Bill Exposes How Aborted Babies Are Flushed Down Sewers*, TOWNHALL (Feb. 19, 2015, 10:30 AM), <https://townhall.com/tipsheet/cortneyobrien/2015/02/19/indiana-prolife-bill-exposes-how-aborted-babies-are-flushed-down-sewers-n1959429> [<https://perma.cc/ZYM3-JGTF>]; KRISTI BURTON BROWN, CHARLOTTE LOZIER INST., FETAL DISPOSITION: THE ABUSES AND THE LAW 9–12 (2016), https://lozierinstitute.org/wp-content/uploads/2016/12/ARS_FetalDisposition_final.pdf [<https://perma.cc/X9DQ-A5BV>].

99. 25 TEX. ADMIN. CODE §§ 1.132 to 1.137 (2016); see also Elizabeth Kimball Key, Note, *The Forced Choice of Dignified Disposal: Government Mandate of Interment or Cremation of Fetal Remains*, 51 U.C. DAVIS L. REV. 305, 315 (2017) (discussing the amended regulations).

100. TEX. HEALTH & SAFETY CODE ANN. §§ 697.003 to .004 (West 2023).

101. *Id.*

102. *E.g.*, IND. CODE ANN. §§ 16-21-11-6, 16-34-3-4 (West 2023); MO. ANN. STAT. § 194.381 (West 2023); S.D. CODIFIED LAWS § 34-25-32.4 (2024).

103. Jon Herskovitz, *Texas Proposes Strict New Rules for Disposal of Aborted Fetal Tissue*, REUTERS (July 7, 2016, 5:52 PM), <https://www.reuters.com/article/idUSKCN0ZN2K8/> [<https://perma.cc/74S8-283M>] (internal quotation marks omitted); see also TEX. HEALTH & SAFETY CODE ANN. § 697.001 (West 2023) (“The purpose of this chapter is to express the state’s profound respect for the life of the unborn by providing for a dignified disposition of embryonic and fetal tissue remains.”).

104. Mitch Smith, *Indiana Governor Signs Abortion Bill with Added Restrictions*, N.Y. TIMES (Mar. 24, 2016), <https://www.nytimes.com/2016/03/25/us/indiana-governor-mike-pence-signs-abortion-bill.html> [<https://perma.cc/UF34-RTYH>] (internal quotation marks omitted).

105. O’Brien, *supra* note 98.

include “ensuring ‘that fetal remains be treated with humane dignity.’”¹⁰⁶

* * *

These statements of support and purpose maintain that the dead bodies of fetuses ought to be treated in more dignified ways than waste. But they do more than just insist on the superior moral status of fetal remains. They also suggest that recognizing the superior moral status of fetal remains is intimately tied to recognizing the “humanity” of fetuses. Presumably that is so because advocates for separating such remains from waste believe, as a more general matter, that recognizing the elevated moral status of human remains goes hand in hand with recognizing the humanity of the decedent (the individual who died and who either ceased to exist at death or continues to exist in the afterlife). This general belief, I would argue, is implicit in the law’s varied attempts to put distance between the disposition of dead bodies and the disposal of waste. Those attempts assert not only the superior moral status of dead bodies as compared to trash, but also the superior moral status of the decedents.

The same legal protections against mingling dead bodies and waste largely do not hold for animal cadavers, as we will see in the next Section. Instead, animals operate as yet another foil against which the law asserts the elevated moral status of dead bodies.

C. Animals

*No where’s the difference?—to th’impartial eye
A leg of mutton and a human thigh
Are just the same—for surely all must own
Flesh is but flesh, and bone is only bone.*¹⁰⁷

The law tends to keep dead human bodies apart from dead animal bodies. As with waste disposal, the law’s insistence that the disposition of human remains be distinct from the disposal of animal remains is an uphill battle. Human and animal remains require the law to take similar public health precautions against groundwater

106. *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r*, 194 F. Supp. 3d 818, 832 (S.D. Ind. 2016).

107. FRANCIS HOPKINSON, AN ORATION WHICH MIGHT HAVE BEEN DELIVERED TO THE STUDENTS IN ANATOMY ON THE LATE RUPTURE BETWEEN THE TWO SCHOOLS IN THIS CITY 16 (Philadelphia, T. Dobson & T. Lang 1789); SAPPOL, *supra* note 8, at 47 (discussing Hopkinson’s poem).

contamination,¹⁰⁸ air pollution,¹⁰⁹ and the spread of disease.¹¹⁰ They share their disposal methods: from burial and burning to alkaline hydrolysis and composting. And terminology, too, largely overlaps: dead bodies can refer to both human and animal remains, as can cadavers. Only the terms “corpse” and “carcass” maintain some separation.¹¹¹

The law resists these similarities by withholding most of the default protections that it bestows on human remains from animal remains.¹¹² And it employs a variety of tools to put additional distance between the disposal of human and animal remains.

For example, several states explicitly prohibit the joint transportation and storage of human and animal remains.¹¹³ Some states also prohibit crematory or alkaline hydrolysis facilities for human remains from processing animal remains.¹¹⁴ Still others prohibit crematories more narrowly from using the same cremation chamber for human and animal remains.¹¹⁵

Many jurisdictions also try to keep humans and animals separate after burial. Local ordinances, cemetery charters, and the common law put restrictions on the joint burial of human and animal remains. The Kentucky Supreme Court, for instance, in a 1907 case, sided with the owner of a cemetery plot who sued the purchaser of an adjacent lot for interfering with his property rights by burying the remains of a dog in that adjacent lot.¹¹⁶ It reasoned:

108. *E.g.*, GA. CODE ANN. § 4-5-5 (West 2023); KAN. STAT. ANN. § 47-1219 (West 2023); MO. ANN. STAT. § 269.020 (West 2023); 3 PA. STAT. AND CONS. STAT. ANN. § 2352 (West 2023); WIS. STAT. ANN. § 95.50(2)(b) (West 2023).

109. *E.g.*, 3 PA. STAT. AND CONS. STAT. ANN. § 2352 (West 2023).

110. *E.g.*, ALA. CODE § 3-1-28 (2023); MO. ANN. STAT. § 269.020 (West 2023); 3 PA. STAT. AND CONS. STAT. ANN. § 2352(a)(1) (West 2023); WIS. STAT. ANN. § 95.50(2)(a) (West 2023).

111. *E.g.*, KAN. STAT. ANN. § 47-1219 (West 2023); MO. ANN. STAT. § 269.020 (West 2023); 3 PA. STAT. AND CONS. STAT. ANN. § 2352 (West 2023); WIS. STAT. ANN. § 95.50 (West 2023); WYO. STAT. ANN. § 35-10-104 (West 2023).

112. For instance, in contrast to its separation of human remains from the market of commercial goods, the law makes animal remains available for commercial gain. Indeed, the law even permits killing animals to create these commercial goods. The law is also significantly more comfortable classifying animal remains as waste than human remains. *See, e.g.*, 40 C.F.R. § 60.51c (2022); RTI INT’L, U.S. ENV’T PROT. AGENCY, FREQUENTLY ASKED QUESTIONS REGARDING THE NEW SOURCE PERFORMANCE STANDARDS, EMISSIONS GUIDELINES, AND STATE PLAN PROCESS FOR HOSPITAL/MEDICAL/INFECTIOUS WASTE INCINERATORS 6-1 to 6-2 (July 18, 2011), https://19january2021snapshot.epa.gov/sites/static/files/2016-01/documents/hmiwifaq_7-18-11_faq.pdf [<https://perma.cc/ZY4V-TLGJ>] (specifying that “medical/infectious waste” pursuant to 42 U.S.C. § 7429(a) includes contaminated animal carcasses, but not contaminated human corpses).

113. *E.g.*, MD. CODE ANN., HEALTH-GEN. § 5-513(f) (West 2023); VA. CODE ANN. § 54.1-2811.1(D) (West 2023).

114. *E.g.*, 035-6 WYO. CODE R. § 6-11(f) (LexisNexis 2019).

115. *E.g.*, MINN. STAT. ANN. § 149A.95(9) (West 2023); OHIO REV. CODE ANN. § 4717.26(K) (West 2023).

116. *Hertle v. Riddell*, 106 S.W. 282, 286 (Ky. 1907).

If the body of a dog may find sepulture on the lot of its owner . . . , why might not the owner of a horse or bull, or donkey, also bury his favorite on his lot therein, if his fancy should take this freakish direction? Where would, or could, the line be drawn, if not at the body of a dog? We believe that the average man would consider it an outrage on his rights as a lot owner in a cemetery if the owner of the adjoining lot should inter the carcass of a dog beside the lot which holds the graves of his family.¹¹⁷

Zoning laws, too, sometimes separate animals and their remains from human corpses. Pennsylvania, for instance, prohibits the establishment of slaughterhouses, manure factories, bone dust factories, soap factories, distilleries, and tanneries within two hundred yards of an incorporated cemetery in certain counties.¹¹⁸ And Texas prohibits “[t]he maintenance or location of a feed pen for hogs, cattle, or horses, a slaughter pen, or a slaughterhouse 500 feet or nearer to an established cemetery in [some] count[ies].”¹¹⁹

Even the fact that a given disposition method has historically been used to dispose of animal remains can be a strike against its legalization for human remains. Opponents of legalizing alkaline hydrolysis for human disposition, for instance, have cited its initial use for animal remains.¹²⁰ And pioneers of new methods who successfully campaigned for their legalization have made a concerted effort to design and use their facilities exclusively for human remains.¹²¹

Finally, the law has put additional distance between the disposal of human and animal remains by trying to keep *living* animals away from human remains.¹²² One example of the law’s attempt at

117. *Id.*; see also *St. Peter’s Evangelical Lutheran Church v. Bean*, 15 Pa. D. 636, 639 (Ct. C.P. 1906) (holding that a cemetery owner had the right to restrain a lot owner from erecting a memorial stone for his dog in part because “[t]he grave of a domestic animal or the stone tablet that commemorates its death and burial seems to us so out of place, when it stands in a cemetery, side by side with the memorials to our departed loved ones, that it must be revolting to our better feelings”).

118. 9 PA. STAT. AND CONS. STAT. ANN. § 9 (West 2023).

119. TEX. HEALTH & SAFETY CODE ANN. § 714.002(a) (West 2023).

120. See Mirkes, *supra* note 92, at 693.

121. See, e.g., MARY ROACH, *STIFF: THE CURIOUS LIVES OF HUMAN CADAVERS* 274 (2003) (describing the adamance of a pioneer of freeze-drying corpses not to market the technique for dead animals).

122. In this effort, the law can draw on a long history of viewing birds’ and beasts’ devouring of human corpses as disgraceful. Sophocles’s *Antigone* lends an early and radical voice to this view when she prefers to die rather than “leave unwept, unburied” her brother’s dead body “for the birds that see him, for their feast’s delight.” SOPHOCLES, *ANTIGONE* 162, vv. 27–30 (David Grene trans., Univ. of Chicago Press 2d ed. 1991) (441 B.C.E.). Counter voices, such as that of Diogenes the Cynic, who asked his students to leave his body unburied for the birds and beasts to devour, have remained a minority position. See LAQUEUR, *supra* note 78, at 1, 5, 35. Just as old and persistent as *Antigone*’s sentiment is the act that provoked it: the intentional exposure of human corpses to birds and beasts as a form of posthumous punishment. U.S. history has witnessed such punishment in some of its darkest moments. See, e.g., DAINA RAMEY BERRY, *THE PRICE FOR THEIR POUND OF FLESH: THE VALUE OF THE ENSLAVED, FROM WOMB TO GRAVE, IN THE BUILDING OF A NATION* 125 (2017) (recounting the many abuses to which the dead body of Dangerfield Newby—one of the first abolitionists to die in the Harpers Ferry Raid in 1859—was subjected and noting

separating human remains from living animals is statutes that try to keep living animals out of human cemeteries. Puerto Rico, for instance, requires that “[e]very cemetery . . . be completely enclosed by well-built, structurally strong concrete walls or metallic fence not less than five (5) feet high that prevents animals from entering the cemetery.”¹²³ Another example is the law’s unfavorable treatment of sky burials, also called “excarnatory funerals”—a disposition method in which dead human bodies are placed on an elevated surface to be defleshed by vultures or other carrion birds. Although historically practiced by some Native American tribes,¹²⁴ and currently still common among Zoroastrians,¹²⁵ sky burial is not among the disposition methods that U.S. states permit.¹²⁶ Moreover, the only U.S. court to have addressed sky burials, to my knowledge, called them (alongside the Defendant’s other proposed disposition methods) “morally and legally reprehensible” and violative of Georgia’s criminal prohibition against corpse abuse.¹²⁷ Free exercise claims may well lead future courts to a different assessment. But in the meantime, research institutes that study human decomposition for forensics remain the only places where the law officially tolerates the devouring of human corpses by animals.¹²⁸

* * *

Part of what the law seems to be after in trying to prevent animals from devouring human corpses relates to anti-commodification instincts we saw in the law’s attempt to separate dead bodies and property.¹²⁹ Here, as there, the law tries to prevent a dead human body from becoming a thing of use—except that the use in question here is

that “perhaps nothing was more disrespectful than allowing the hogs to have their way with his remains”).

123. P.R. LAWS ANN. tit. 24, § 3843 (2012).

124. Khushbu Solanki, Note, *Buried, Cremated, Defleshed by Buzzards? Religiously Motivated Excarnatory Funeral Practices Are Not Abuse of Corpse*, 18 RUTGERS J.L. & RELIGION 350, 357 (2017).

125. *Id.* at 352–56.

126. *E.g.*, ME. REV. STAT. ANN. tit. 13, § 1032 (West 2024); MASS. GEN. LAWS ANN. ch. 114, § 43M (West 2023).

127. *Newby v. Serpentfoot*, No. 13-CV-01200-JFL002, slip. op. at 1–2 (Ga. Super. Ct. June 17, 2013).

128. *See, e.g.*, A.W. Ohlheiser, *What Happens When You Donate Your Body to Science*, MIT TECH. REV. (Oct. 12, 2022), <https://www.technologyreview.com/2022/10/12/1060924/donating-your-body-science-body-farm/> [https://perma.cc/6CAJ-YJLH].

129. There are also possible evolutionary reasons for these legal sensibilities. Evolutionary musicologist Joseph Jordania argues that one of the antipredator strategies of early humans was to keep human meat, whenever possible, away from predators. The covering instincts, *infra* Section II.A, could be manifestations of that same strategy. *See* JOSEPH JORDANIA, WHY DO PEOPLE SING? MUSIC IN HUMAN EVOLUTION 118 (2011).

animal consumption rather than human commerce. Moreover, reflecting more generally on the legal efforts to distinguish human from animal remains, we can conclude that those efforts reflect and assert a belief in the superior moral status of human corpses as compared to animal carcasses.

But as with the law's separation of human remains from waste, the law's efforts here also speak to beliefs about the decedents' superior moral status. And here, as with fetal remains in the case of waste, it is easiest to see this additional assertion once we turn to an adjacent legal battle over the superior moral status of certain animal remains—in this case, the elevation of pet remains.

In recent years, pets have increasingly blurred the dividing line between human dispositions and animal disposals.¹³⁰ More and more pets are cremated individually in licensed crematories rather than incinerated collectively alongside medical waste.¹³¹ Pet cremation is currently one of the fastest-growing parts of the funeral industry.¹³² A thriving market for pet grave goods surrounds it, ranging from designer mini coffins and urns to jewelry.¹³³ There is now even an international cryonics company that preserves the dead bodies of pets in addition to humans for their scientific resurrection at the end of days—including a dead chinchilla called “Button.”¹³⁴ And some states are getting in on the

130. These recent changes in the disposal of pet remains have deep historical roots. Archaeologists have found domestic animals buried alongside humans—such as dogs buried next to their owners in Archaic gravesites in North America. See Darcy F. Morey, *Burying Key Evidence: The Social Bond Between Dogs and People*, 33 J. ARCHAEOLOGICAL SCI. 158, 159–160 (2006). More recently, Ulysses Grant, for instance, was buried with his horse in accordance with his wishes. CANTOR, *supra* note 20, at 36. And even prior to New York's legalization of joint human and pet burials, the Hartsdale Pet Cemetery in Westchester estimated that it housed the cremains of seven hundred humans, who had been buried there since the 1920s while the state turned a blind eye. See Glenn Blain & Nathan Place, *Pet Cemeteries Will Now Accept Human Remains for Burial Alongside Beloved Family Pets*, N.Y. DAILY NEWS (Sept. 14, 2013, 12:07 AM), <https://www.nydailynews.com/2013/09/14/pet-cemeteries-will-now-accept-human-remains-for-burial-alongside-beloved-family-pets/> [<https://perma.cc/37JG-43WV>]. No doubt, there are many other less well-publicized instances of humans being buried together with their companion animals. Anthropologist Shannon Lee Dawdy, for instance, recounts a funeral director's confession that he once buried a seeing-eye dog with his owner and then kept it a secret because he didn't “want this to become a trend.” SHANNON LEE DAWDY, *AMERICAN AFTERLIVES: REINVENTING DEATH IN THE TWENTY-FIRST CENTURY* 85 (2021). But the trend is now upon us. What used to be a fringe practice in the United States has gained both social and legal momentum.

131. *Pet Cremation*, CREMATION ASS'N OF N. AM., <https://www.cremationassociation.org/page/PetCremation> (last visited May 19, 2024) [<https://perma.cc/U2EL-8ENX>].

132. *Id.*

133. DAWDY, *supra* note 130, at 223 n.15.

134. Tom Hartsfield, *Horror Stories of Cryonics: The Gruesome Fates of Futurists Hoping for Immortality*, BIG THINK (Aug. 3, 2022), <https://bigthink.com/the-future/cryonics-horror-stories/> [<https://perma.cc/K8HL-KRG9>].

act by passing laws that permit cemeteries to offer joint burials for pets and their owners.¹³⁵

Advocates for these changes tend to articulate their motivations by emphasizing the moral status of dead pets—ranging from “[s]he wasn’t garbage,”¹³⁶ to “[h]e’s my son,” and “[d]ogs are like people They’re better than people, actually.”¹³⁷ These advocates appeal to the human-like moral status of pets in life, just as advocates for a more dignified disposal of fetal remains in the previous Section appealed to the human-like moral status of fetuses in life. Implicit in these appeals is once again a more general assumption: setting the disposition of human remains apart from the disposal of animal remains reflects and asserts not only the superior moral status of human remains, as compared to animal remains, but also the superior moral status of humans over animals in life.

In setting human remains apart from animal remains, the law thus seems to assure us that we are not mere animals, just as the legal separations we previously analyzed assured us that we are not mere things or waste. The law’s assurance comes at a moment of particular vulnerability. Death—or more precisely, a decomposing body that must be disposed of—threatens our self-understanding as transcending our animal body and thus risks reducing us to our animal nature. John Troyer calls this the “postmortem human-animal slippage.”¹³⁸ The law, in ensuring that the disposition of human remains differs meaningfully from the disposal of animal remains, provides resistance against a feared descent in death from human to animal. In that, it is part of what some theorists have described as a larger societal project and craving. Martha Nussbaum, for instance, speaks of our desire to transcend our own “decay-prone animality” and our tendency to seek out buffers “between the fully human and the merely animal.”¹³⁹

But regardless of whether the law indeed responds to these anxieties and desires, we can at the very least conclude at this point

135. *E.g.*, S. 2582, Assemb. 2647, Reg. Sess. (N.Y. 2015–2016) (codified at N.Y. NOT-FOR-PROFIT-CORP. LAW § 1510(n) (McKinney 2024)); H.R. 588, 2014 Sess. (Va.) (codified at VA. CODE ANN. § 54.1-2312.01 (West 2024)); *see* Blain & Place, *supra* note 130.

136. Rachel Weiner, *Virginia Bill Would Allow Pets, Owners to Be Buried Together*, WASH. POST (Jan. 30, 2014, 7:30 PM), https://www.washingtonpost.com/local/virginia-politics/virginia-bill-would-allow-pets-owners-to-be-buried-together/2014/01/30/24c7e188-8477-11e3-9dd4-e7278db80d86_story.html [https://perma.cc/54KT-H8T5].

137. Blain & Place, *supra* note 130 (internal quotation marks omitted).

138. JOHN TROYER, TECHNOLOGIES OF THE HUMAN CORPSE 80 (2020); *see also* JULIA KRISTEVA, POWERS OF HORROR: AN ESSAY ON ABJECTION 3–4 (Leon S. Roudiez trans., 1982) (calling corpses “the utmost of abjection,” as they confront us with what we “permanently thrust aside in order to live”).

139. MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 97, 110 (2004).

that it insists on a superior moral status for human remains, as compared to animal remains, mere things, and waste. And we can further conclude that this insistence is intimately tied to an insistence on the superior moral status of humans.

D. Individuals

*I should not like . . . to be . . . dispersed,
a part of me here, and a part of me there, but
should wish to collect myself like a genteel person.*¹⁴⁰

One more way in which American law recognizes the special moral status of dead human bodies is by trying to ensure that they be treated as individuals throughout the disposition process. It pursues this end with a variety of statutes as well as common law causes of action, all of which disincentivize or outright prohibit the commingling of remains from different people.

Many states, for instance, have passed laws prohibiting that more than one dead body be placed in a coffin, casket, or other container at any given time absent special authorization or consent by the decedent or next of kin.¹⁴¹ Many states also prohibit reusing a casket for a second dead body—as could happen, for instance, if the prior dead body rested in the casket during a viewing, but was subsequently cremated and buried in an urn.¹⁴²

When it comes to the ground burial of dead bodies, states usually prohibit the burial of more than one body in any given grave, unless everyone authorized to direct the bodies' disposition consents to joint burial.¹⁴³ Similarly, the United States Law of War Manual instructs the

140. CHARLES DICKENS, *OUR MUTUAL FRIEND* 127 (Penguin Grp. 15th ed. 1984) (1865).

141. *E.g.*, N.J. STAT. ANN. § 45:7-65.4 (West 2023).

142. *E.g.*, OR. REV. STAT. ANN. § 692.180(1)(f) (West 2023); P.R. LAWS ANN. tit. 24, § 3822 (2012); WIS. STAT. ANN. § 440.80(4)(b) (West 2023). Jurisdictions that do permit the reselling and reusing of caskets, moreover, do so usually under tight conditions—such as ordering manufacturers to build and advertise the casket specifically for multiple uses, and requiring funeral directors to disclose the prior use to customers, or to receive customers' written authorization under penalty of fines or loss of license. *E.g.*, MICH. COMP. LAWS ANN. § 339.1810(1)(g) (West 2023); 140 N. MAR. I. ADMIN. CODE § 140-20.2-410(b)(2) (2019); WASH. REV. CODE ANN. § 18.39.410(4) (West 2023). For a discussion of the role that such laws play in protecting the profits of licensed funeral directors, see *infra* notes 273, 291.

143. *E.g.*, N.J. STAT. ANN. § 45:27-22(c) (West 2023); TEX. HEALTH & SAFETY CODE ANN. § 711.0395 (West 2023). Exceptions to the default of individualized burial sometimes apply during wartime, natural disasters, and other emergencies. These exceptions, however, only emphasize how entrenched the legal sensibilities of individualized burial are. Mass graves provoke horror and become symbols of the degradation and dehumanization that those moments in history mark. *See, e.g.*, Roger Cohen, *The Singular Offense of the Mass Grave*, N.Y. TIMES (Sept. 18, 2022),

military to provide individualized burial and avoid collective graves wherever possible.¹⁴⁴ Some jurisdictions even restrict the consensual alteration of that default to the joint burial of family members alone.¹⁴⁵ Importantly, moreover, the one-body-per-grave default tends to extend indefinitely in time. Nevada gives expression to the default's permanence when it provides that “the lot or plat, from the time of the interment, is forever thereafter inalienable, and, upon the death of the holder or proprietor thereof, descends to the heirs at law of the holder or proprietor, and to their heirs at law forever.”¹⁴⁶ Unless individual lot owners eventually abandon their title,¹⁴⁷ cemeteries can never resell or reuse a grave.¹⁴⁸ All that is not to say, of course, that American cemeteries may not reuse a grave after the disinterment of a dead body. But the disinterment and reinterment procedures of most states maintain the one-body-per-casket-and-grave default by mandating that each disinterred dead body be transported and reinterred “in separate caskets and graves.”¹⁴⁹

When it comes to cremation as opposed to whole-body burial of corpses, states try to prevent the commingling of dead bodies by prohibiting their joint cremation.¹⁵⁰ Several jurisdictions do so by prohibiting the simultaneous cremation of more than one dead body

<https://www.nytimes.com/2022/09/18/world/europe/izium-mass-grave-ukraine.html> [https://perma.cc/6LFC-JDUT].

144. *E.g.*, U.S. Dep’t of Def., Law of War Manual §§ 7.7.4, 9.34, 10.34 (2023).

145. *E.g.*, 10 GUAM CODE ANN. § 30106 (2022); 140 N. MAR. I. ADMIN. CODE § 140-20.2-515(a)(4)(i) (2019).

146. NEV. REV. STAT. ANN. § 452.285(1) (West 2023).

147. *E.g.*, N.D. CENT. CODE ANN. § 23-06-21.1 (West 2023) (providing for the reversion of unused burial plots after sixty years); 9 PA. STAT. AND CONS. STAT. ANN. § 201 (West 2023) (same after fifty years).

148. That is different from the laws of many other countries, where title to a lot automatically reverts back to the cemetery after a certain period and is then reused. Louise Harmon, *Honoring Our Silent Neighbors to the South: The Problem of Abandoned or Forgotten Asylum Cemeteries*, 34 TOURO L. REV. 901, 940 (2018); *see also In re Widening of Beekman St.*, 4 Brad. 503 (N.Y. 1856) (adopting Samuel B. Ruggles’s report); SAMUEL B. RUGGLES, LAW OF BURIAL: REPORT TO THE SUPREME COURT OF THE STATE OF NEW-YORK, IN 1856, at 39 (Albany, Weed, Parsons & Co. 1858):

The doctrine of the legal right to open a grave in a cemetery, after a certain lapse of time, to receive another tenant, however it may be sanctioned by custom in the English church-yards, or by continental usage at Père La Chaise, and elsewhere, will hardly become acceptable to the American mind . . . The right to the individuality of a grave, if it exists at all, evidently must continue, so long as the remains of the occupant can be identified—and the means of identifying can only be secured and preserved by separate burial.

149. 9 PA. STAT. AND CONS. STAT. ANN. §§ 44, 52 (West 2023).

150. The same is true of alkaline hydrolysis and human composting. *E.g.*, MINN. STAT. ANN. § 149A.941(20), (25) (West 2023); WASH. REV. CODE ANN. § 68.50.185 (West 2023); 035-6 WYO. CODE R. § 6-11(c) (LexisNexis 2019).

outright.¹⁵¹ Others prohibit simultaneous cremations only absent express (usually written) consent by all the decedents or next of kin.¹⁵² Unauthorized joint cremations, moreover, are also a recurring point of complaint in relatives' civil suits against crematories.¹⁵³ Washington provides a rare example of spelling out the legislative intent behind its prohibition against simultaneous cremation. The Washington legislature explained that unauthorized simultaneous cremation was among the practices it found to “violate common notions of decency and generally held expectations,” and that it aimed with its bill to “reaffirm[] that [such] practices . . . violate principles of human dignity.”¹⁵⁴

* * *

Implicit in this explanation may be a thought that applies more generally to the law's individualization requirements: what seems undignified about commingling dead bodies is the failure to treat them as individuals.¹⁵⁵ Or put positively, the dignity of individualized processing and disposition consists of respecting dead bodies as singular, unique, irreplaceable, and non-fungible.¹⁵⁶

Moreover, the law's individualization requirements, like the status protections that differentiate dead bodies from waste and animals, reflect and assert the elevated moral status not only of dead bodies but also of decedents. Laws ensuring that fetal remains be treated better than waste usually permit the joint cremation and disposition of fetal remains.¹⁵⁷ This omission of individualization

151. *E.g.*, KY. REV. STAT. ANN. § 367.97514(1) (West 2023); N.C. GEN. STAT. ANN. § 90-210.129(h) (West 2023); 140 N. MAR. I. ADMIN. CODE § 140-20.2-425(b)(7) (2019); 5 R.I. GEN. LAWS ANN. § 5-33.2-13.2(a)(6) (West 2024).

152. *E.g.*, CAL. HEALTH & SAFETY CODE § 7054.7(a)(1) (West 2024); MINN. STAT. ANN. § 149A.95(11) (West 2023); N.M. CODE R. § 16.64.10.8(D) (LexisNexis 2024); OHIO REV. CODE ANN. § 4717.26(D) (West 2023); WASH. REV. CODE ANN. § 68.50.185(1) (West 2023); 035-6 WYO. CODE R. § 6-11(c) (LexisNexis 2019). Similarly, the joint scattering of cremains is subject to a default prohibition that can be waived. *See infra* notes 377–382 and accompanying text.

153. *E.g.*, *Warden v. Dudley Hoffman Mortuary*, No. B206840, 2010 WL 1531407, at *1 (Cal. Ct. App. Apr. 19, 2010); *In re Tri-State Crematory Litig.*, 215 F.R.D. 660, 673 (N.D. Ga. 2003).

154. WASH. REV. CODE ANN. § 68.50.185 official notes (West 2023).

155. For a discussion of possible alternative explanations, such as the protection of funeral directors' financial benefit or consumer preferences, see *infra* note 273.

156. James Martel, building on Bonny Honig, offers an interpretation of Antigone that stresses these qualities of dead bodies. *See* JAMES R. MARTEL, UNBURIED BODIES: SUBVERSIVE CORPSES AND THE AUTHORITY OF THE DEAD 59–60 (2018). *But cf.* Benjamin Eidelson, *Respect, Individualism, and Colorblindness*, 129 YALE L.J. 1600, 1635 (2020) (arguing that what it means to respect living people “as individuals” is to treat them as autonomous).

157. *E.g.*, IND. CODE ANN. §§ 16-21-11-6(b), 16-34-3-4(a) (West 2023); *Planned Parenthood of Minn. v. Minnesota*, 910 F.2d 479, 483–84 (8th Cir. 1990) (finding that MINN. STAT. ANN.

requirements for fetal remains might speak to a sense that fetuses are not full persons.¹⁵⁸ Or at least it might speak to a sense that the individualized disposition of fetal remains would express a belief in the full personhood of fetuses, and that mandating such a disposition from people who do not share the belief is ethically or legally problematic.¹⁵⁹ If that is right, then the legal requirements to treat dead bodies as individuals are among the strongest status protections I have surveyed. They imply that dead bodies have a moral status deserving of individual respect and that the decedents were full persons in life.

E. Names

*[N]ames . . . bring back everything . . . about a person.*¹⁶⁰

The law's final status protection of dead bodies builds on the notion of individual respect. The law treats dead bodies not just as individuals but as individuals with names. It does so by mandating, incentivizing, or enabling the attachment of names to dead bodies at various stages of the disposition process.

To start, most states require that a name tag accompany a dead body throughout the disposition process. That is true for dead bodies traveling to funeral homes and from there to cemeteries for ground burial.¹⁶¹ It is also true for dead bodies arriving at crematories and cremains traveling on from there.¹⁶² Moreover, some states have recently given decedents the power to direct by what chosen names and gender pronouns others ought to refer to them and their remains during the disposition process.¹⁶³

When it comes to the final disposition of dead bodies, states usually require cemeteries to maintain burial records that include,

§ 145.1621 (West 2023), which provides for “the dignified and sanitary disposition” of fetal remains, allows for their collective disposition). *But see* N.C. GEN. STAT. ANN. § 90-210.129(h)(1) (West 2023) (allowing the simultaneous cremation of fetal remains only for “multiple fetuses from the same mother and the same birth”).

158. Even some people opposed to abortion, including those who insist on the “humanity” of fetuses, see *supra* notes 102–106 and accompanying text, might not believe in the full personhood of fetuses.

159. Legislators might, for instance, have ethical qualms about imposing controversial personhood beliefs in their most demanding form on others or First Amendment concerns about imposing religiously motivated practices on others.

160. Maya Lin, *Making the Memorial*, N.Y. REV. OF BOOKS (Nov. 2, 2000), <https://www.oleanschools.org/cms/lib/NY19000263/Centricity/Domain/166/lin-makingthememorial.pdf> [<https://perma.cc/5HYU-4ADK>].

161. *E.g.*, GA. CODE ANN. § 43-18-8(a)(1) (West 2023).

162. *E.g.*, TEX. HEALTH & SAFETY CODE ANN. §§ 716.152(c), 716.155(c), 716.155(e), 716.156(b) (West 2023).

163. *E.g.*, 755 ILL. COMP. STAT. ANN. 65/40(a) (West 2023).

among other information, the name of the decedent and the exact location where their dead body is buried.¹⁶⁴ Some jurisdictions also require that graves be marked with a decedent's name.¹⁶⁵ Congress imposes a similar requirement on the Department of Veterans Affairs, which furnishes grave markers free of charge to all eligible veterans.¹⁶⁶

Even many states that do not mandate inscribed gravestones support their erection and maintenance through various legal means. Courts, for instance, usually respect a testator's or executor's direction for a tombstone, monument, or mausoleum, as long as the cost is reasonable.¹⁶⁷ And even where an estate is insolvent, states often include gravestones and other markers among the funeral expenses that enjoy high priority for purposes of repayment.¹⁶⁸ States also frequently protect gravestones through anti-desecration statutes, which criminalize their destruction or unlawful possession.¹⁶⁹ Finally, many states instruct cemeteries or municipalities to maintain gravestones,¹⁷⁰ restore the markers of abandoned graves,¹⁷¹ or re-erect them upon the reinterment of dead bodies in a new location.¹⁷²

It would be a mistake to conclude that these naming laws have purely bureaucratic significance or only promote states' administrative interests.¹⁷³ They also accommodate and facilitate a widespread social practice of referring to human remains by the names and pronouns of the decedent.¹⁷⁴ Shannon Lee Dawdy documents this social practice in her anthropological work investigating contemporary American death care. Relatives, she shows, often refer to embalmed dead bodies by the

164. *E.g.*, OR. REV. STAT. ANN. § 97.720(1) (West 2023); OR. ADMIN. R. 830-040-0000(7)(a) (2023); WIS. STAT. ANN. § 157.62(5) (West 2023); *see also* N.Y. NOT-FOR-PROFIT-CORP. LAW § 1510(i) (McKinney 2024) (requiring municipalities to record all inscriptions of abandoned cemeteries).

165. *E.g.*, P.R. LAWS ANN. tit. 24, § 3868 (2012) (requiring decedents' names on columbariums).

166. 38 U.S.C. § 2404(c)–(d); 38 C.F.R. § 38.630 (2023).

167. *See* JACKSON, *supra* note 14, at 86, 90.

168. *E.g.*, OHIO REV. CODE ANN. § 2117.25(A)(2)(b) (West 2023); 20 PA. STAT. AND CONS. STAT. ANN. § 3392(4) (West 2023); VT. STAT. ANN. tit. 14, § 1205(a)(2) (West 2023).

169. *E.g.*, OKLA. STAT. ANN. tit. 21, § 1167 (West 2024); S.C. CODE ANN. § 16-17-600(B)(2) (2024); VT. STAT. ANN. tit. 13, § 3764 (West 2023).

170. *E.g.*, N.Y. NOT-FOR-PROFIT CORP. LAW § 1510-a (McKinney 2024).

171. *E.g.*, N.D. CENT. CODE ANN. § 23-06-30 (West 2023).

172. *E.g.*, CAL. HEALTH & SAFETY CODE § 7953 (West 2024); 9 PA. STAT. AND CONS. STAT. ANN. §§ 15.2, 44, 52 (West 2023).

173. Which is not to doubt that they *also* serve those pragmatic goals, as part of states' more general efforts to track their residents' identity and whereabouts. *See, e.g.*, JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED 65–67 (1998).

174. Historically, the affixing of names to dead bodies as a mass phenomenon traversing class divides is of relatively recent vintage. Tom Laqueur traces its spread in the United States to the burials of fallen soldiers during and after the Civil War, and its further popularization to the aftermath of World War I. *See* LAQUEUR, *supra* note 78, at 416–17.

decedents' names and pronouns,¹⁷⁵ and they do the same for the various artifacts into which contemporary craftsmen offer to mold cremains.¹⁷⁶

* * *

By facilitating the social practice of naming human remains, the above laws respond to the anxiety of being forgotten,¹⁷⁷ of dying “nameless in a nameless ditch.”¹⁷⁸ They help preserve the memory of the decedents and express that their life and death, no matter how humble, mattered.¹⁷⁹ And they do so relative to a particular dead body, not in the abstract. Many of the laws, as we saw, ensure through name tag requirements that a very particular dead body ends up in the marked grave. In a quite literal sense, these naming laws thus ensure the irreplaceability of dead bodies. In doing so, they—like the laws against commingling in the previous Section—assert the unique individuality of dead bodies.

One sign that the naming laws are indeed sensitive to the moral import of names and are not just administrative tracking devices comes out in what they omit rather than in what they require. As with their individualization requirements, states usually omit their name tag requirements when regulating the disposition of fetal remains. Even states like Indiana, which mandate a more dignified disposition of fetuses and impose stricter recordkeeping requirements during the disposition process, expressly permit that “the space for a name” on such records “may remain blank.”¹⁸⁰ Such permission shows awareness that names are more than labels. In the eyes of the law, names seem to reflect and assert the full personhood of the decedent.¹⁸¹

Combining this observation with the previous one about dead bodies' unique individuality, we can conclude that the naming laws we saw in this Section are expressive both of the elevated moral status of

175. Shannon Lee Dawdy, *The Embalmer's Magic*, in *THE NEW DEATH: MORTALITY AND DEATH CARE IN THE TWENTY-FIRST CENTURY* 195, 211–12 (Shannon Lee Dawdy & Tamara Kneese eds., 2022).

176. Shannon Lee Dawdy, *American Afterlives: Ghosts in the Commodity*, 6 *J. CONTEMP. ARCHAEOLOGY* 206, 207, 211 (2019).

177. See LAQUEUR, *supra* note 78, at 412.

178. Cohen, *supra* note 143.

179. LAQUEUR, *supra* note 78, at 445–46.

180. IND. CODE ANN. §§ 16-21-11-6(b)(1), 16-34-3-4(a)(1) (West 2023).

181. Or, at least, states like Indiana might fear that this is how name requirements for fetuses might be understood and challenged on First Amendment grounds. For an example of other First Amendment challenges to Indiana's law, compare *Doe No. 1 v. Att'y Gen. of Ind.*, 630 F. Supp. 3d 1033, 1054 (S.D. Ind. 2022) (finding unconstitutional the fetal disposition requirements of § 16-21-11-6 because the requirement “offend[ed] the Free Speech Clause”), *rev'd sub nom. Doe v. Rokita*, 54 F.4th 518 (7th Cir. 2022).

dead bodies and the personhood of the decedent. What is more, those two are presumably intertwined in that the former derives from the latter. The reason that the laws attribute unique individuality to dead bodies is that they regard a given dead body as connected to a particular, unique decedent—whether that decedent ceased to exist at death or continues to exist in the afterlife, for instance as a soul.¹⁸²

What we have seen, then, in surveying the law's protections of dead bodies thus far are three themes. First, the law seems to attribute a moral status to dead human bodies above that of mere things, waste, and dead animal bodies. Second, this elevated moral status in the eyes of the law calls for individual respect and naming. Finally, the elevated moral status of dead bodies recognized by the law appears to be grounded in the personhood of the decedents.

The next Part will build on these observations by analyzing the law's protections of dead bodies against abuse. In it, I will argue that the law attributes dignity to dead bodies. The law, as I mentioned in the Introduction, nowhere defines "dignity." But legislatures and courts seem to use the term to capture dead bodies' elevated moral status. They also seem to use "dignity" as similar in meaning to the attributes we encountered in this Part: dead bodies' singularity, uniqueness, irreplaceability, and non-fungibility. In the eyes of the law, dead bodies' dignity gives rise to the moral imperative to respect them—which is to say, to treat them in accordance with their elevated moral status. This moral imperative in turn underpins the law's various protections of dead bodies. Crucially, as I will argue, the law treats dead bodies themselves as beneficiaries of its protections. Dead bodies themselves, in other words, hold dignity interests in the eyes of the law. As a result, they are vulnerable to abuse and other dignity violations. Dead bodies' beneficiary and victim status is an important addition to my arguments so far about dead bodies' elevated moral status. It shows that the law treats dead bodies not just as high-status objects protected for the benefit of others (a possibility that this Part left open) but as subjects who hold certain moral interests in their own right.

182. For more discussion on the divergent metaphysical beliefs that might underpin the legal protections of dead bodies, see *infra* Section III.A.

II. CORPSE ABUSE

*An impaled corpse is a curse against God.*¹⁸³

In addition to the five status protections I just analyzed, the law protects dead bodies against visual, physical, and sexual abuse.¹⁸⁴ Each of these protections is centrally motivated by dignity interests that the law attributes to dead bodies. The law conceives of dead bodies as subjects who are beneficiaries of the law's dignity protections and victims of its violations.

I will present this argument in three steps, following each Section's analysis of a specific form of corpse abuse. Section II.A will argue that the law's various protections of dead bodies are concerned not only with pragmatic considerations like public health but also with moral considerations—above all, of dignity. Section II.B will argue that the law attributes dignity interests to dead bodies themselves and treats them as beneficiaries of its protections, in addition to treating surviving relatives and other living humans as beneficiaries. Section II.C will rebut the objection that the law treats dead bodies merely as venerated objects.

As this preview indicates, my argument that the law treats dead bodies as beneficiaries is consistent with recognizing that the law treats the living, too, as beneficiaries. I will elaborate on the beneficiary relationship between dead bodies and the living in Section II.B.

183. *Deuteronomy* 21:23 (my translation).

184. Some legislatures and licensing boards have also tried to protect dead bodies against verbal abuse. They have done so, for instance, by penalizing people and especially funeral directors for speaking disrespectfully about or in the presence of dead bodies. *E.g.*, CAL. BUS. & PROF. CODE § 7700 (West 2024) (penalizing “profane, indecent, or obscene language in the course of the preparation for burial, removal, or other disposition of, or during the funeral service for, human remains”); MICH. COMP. LAWS ANN. § 339.1810(1)(e) (West 2023) (penalizing “profane, indecent, or obscene language in the presence of a dead human body, or within the immediate hearing of the family”); MISS. CODE ANN. § 97-29-25(2)(a) (West 2024) (punishing those who “cause through word” to “desecrate any corpse”). They have also done so by criminalizing protests that slander decedents in the presence of dead bodies, above all, at funerals. *E.g.*, MASS. GEN. LAWS ANN. ch. 272, §§ 42A, 42B (West 2023); OKLA. STAT. ANN. tit. 21 § 1166 (West 2024); VT. STAT. ANN. tit. 13, § 3771(b) (West 2023). But the First Amendment curbs these efforts significantly. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 461 (2011) (holding that a Westboro Baptist Church demonstration near a service member's funeral was protected under the First Amendment); *Schoeller v. Bd. of Registration of Funeral Dirs. & Embalmers*, 977 N.E.2d 524, 527, 536 (Mass. 2012) (holding that an embalmer's “undignified and salacious” talk about dead bodies was protected by the First Amendment); Eugene Volokh, *An Interesting Professional Speech Case from 10 Years Ago, Involving Speech About Dead Bodies*, VOLOKH CONSPIRACY (Feb. 28, 2022, 11:59 AM), <https://reason.com/volokh/2022/02/28/an-interesting-professional-speech-case-from-10-years-ago-involving-speech-about-dead-bodies/> [<https://perma.cc/KDD5-YMB9>] (flagging the *Schoeller* case); Benjamin C. Zipursky, *Snyder v. Phelps, Outrageousness, and the Open Texture of Tort Law*, 60 DEPAUL L. REV. 473 (2011) (arguing for the consistency of the tort claims in *Snyder v. Phelps* with the Constitution).

Importantly, moreover, my argument is also consistent with the possibility that the law treats the decedents (the individuals who died) and not their dead bodies as the real beneficiaries and victims. In this Part, I will highlight a few instances in which the decedents appear to be the real beneficiaries, though the law leaves open whether it conceives of the decedents as having ceased to exist at death or as continuing to exist in an afterlife. I will then reckon with the beneficiary status of decedents more fully in Part III.

A. *Visual*

*A town that does not keep its dead out of sight,
that leaves people where they died,
on highways and byways, in parks and parking lots,
is not a town but a hell.*¹⁸⁵

The first form of abuse from which American law seeks to protect dead bodies is visual abuse: their exposure to inappropriate viewing.

The common law has long maintained that there is a right to a decent burial, which entails decent covering. As one court put it, “[t]he only rights (if we may call them rights) left to the dead” include the right “to have the body decently covered.”¹⁸⁶ This right entails that a dead body “must be properly clothed when being taken to the place of burial, and then placed in the ground or tomb.”¹⁸⁷ As a pivotal English court explained, “bodies . . . carried in a state of naked exposure to the grave [] would be a real offence to the living, as well as an apparent indignity to the dead.”¹⁸⁸ And the covering needs to be at least minimally dignified. Wrapping a dead body in plastic sheeting, for instance, is insufficient.¹⁸⁹

Relatedly, the common law has long prohibited casting a dead human body into the open or letting it lie and rot where it falls. One court explained this prohibition as forbidding any casting out “that might be regarded as creating a nuisance, be offensive to the sense of decency, or be injurious to the health of the community.”¹⁹⁰ The common

185. 1 KARL OVE KNAUSGAARD, *MY STRUGGLE* 5 (Don Bartlett trans., 2013).

186. *Litteral v. Litteral*, 111 S.W. 872, 873 (Mo. Ct. App. 1908). I will address the court’s qualified use of “rights” in this case, as well as subsequent qualifications, below. *See infra* notes 292–293 and accompanying text.

187. *Seaton v. Commonwealth*, 149 S.W. 871, 873 (Ky. 1912).

188. *Newman v. Sathyavaglswaran*, 287 F.3d 786, 791 (9th Cir. 2002) (alterations in original, internal quotation marks omitted) (quoting *R v. Stewart* (1840) 12 AD. & E. 773, 777–78).

189. *E.g.*, *State v. Hartzler*, 433 P.2d 231, 233 (N.M. 1967); *Hawkins v. State*, No. 10-05-00237-CR, 2006 WL 1280891, at *2 (Tex. App. May 10, 2006).

190. *Seaton*, 149 S.W. at 873.

law has also required disposing of dead bodies “at the very earliest moment.”¹⁹¹ Here, one court explained that its reasons for discouraging delays included “[p]ublic policy[,] . . . due regard for the public health, . . . the universal sense of propriety,” and “the sentiment of humanity against profanation.”¹⁹²

When parties have violated these requirements, courts have held them criminally and civilly liable.¹⁹³ A 1939 Maine court, for example, convicted an elderly brother for burning his sister’s dead body in his home furnace, in part, it seems, because her body remained initially exposed to view during the cremation.¹⁹⁴ In more recent cases, courts have convicted defendants who exposed dead bodies to view and decomposition for violating corpse abuse statutes rather than committing common law crimes.¹⁹⁵ In one case, a court also convicted a Defendant of corpse abuse who had exposed dead bodies to inappropriate view by photographing them without the consent of relatives and arranging them next to props.¹⁹⁶

When it comes to civil liability, courts have held railroad companies liable for negligence if they failed to properly cover a corpse in transit or to remove the corpse of a decedent struck by their train.¹⁹⁷ Courts have awarded damages for mental anguish to relatives who sued funeral directors and cemeteries for burying dead bodies in shallow graves that led to their exposure.¹⁹⁸ And courts have held liable

191. *Burnett v. Surratt*, 67 S.W.2d 1041, 1041 (Tex. Civ. App. 1934), *superseded by statute on other grounds*, Act. of Feb. 27, 1934, ch. 66, § 1, 1934 Tex. Gen. Laws 146, 157–58, *as recognized in* SCI Tex. Funeral Servs., Inc. v. Nelson, 540 S.W.3d 539 (Tex. 2018).

192. *Id.*

193. *E.g.*, *In re Kanavan*, 1 Me. 226, 226–27 (1821).

194. *State v. Bradbury*, 9 A.2d 657, 657 (Me. 1939) (noting that the defendant did not “get [his sister’s body] all into the fire box at once”).

195. *See, e.g.*, *Hawkins v. State*, No. 10-05-00237-CR, 2006 WL 1280891, at *2 (Tex. App. May 10, 2006); *CANTOR*, *supra* note 20, at 255 (noting that the owner of Tri-State Crematory in Georgia who let hundreds of dead bodies lie around and decompose pled guilty to corpse abuse, among other felonies).

196. *State v. Condon*, 789 N.E.2d 696, 700 (Ohio Ct. App. 2003); *see also* DON HERZOG, *DEFAMING THE DEAD* 211 (2017) (quoting the sentencing judge in this case who called the photographs “disrespectful and really the worst invasion of privacy”).

197. *E.g.*, *Louisville & Nashville R.R. Co. v. Wilson*, 51 S.E. 24, 24, 28 (Ga. 1905); *Kyles v. S. Ry. Co.*, 61 S.E. 278, 281 (N.C. 1908) (“Humanity and decency required that the body and its scattered members should be reverently picked up, laid off the track in some near-by spot and sheltered by a covering from the sun and flies and dust and irreverent eyes, and protected from the dogs . . .”).

198. *E.g.*, *Golston v. Lincoln Cemetery, Inc.*, 573 S.W. 2d 700, 709 (Mo. Ct. App. 1978). One court did the same in a case in which a funeral director failed to deliver a purchased robe and in which the limbs of the dead body were consequently exposed to view. *J.E. Dunn & Co. v. Smith*, 74 S.W. 576, 577 (Tex. Civ. App. 1903). The award of damages for mental anguish in cases dealing with dead bodies constitutes an exception from the general rule that such damages are not recoverable if a plaintiff’s mental anguish results from a breach of contract. *See* Elizabeth F. Emens, *Crossing Boundaries: The Dead Bodies Exception to the Rule Against Emotional Distress*

defendants who published photographs of dead bodies without relatives' authorization.¹⁹⁹

Statutory and regulatory law builds on the common law requirements with various kinds of provisions, which together ensure that dead bodies are covered throughout the disposition process.

First, dead bodies are subject to speedy removal requirements in many states. Typically, these requirements specify that a corpse be embalmed, cremated, or refrigerated within twenty-four or forty-eight hours.²⁰⁰ Sometimes, they further specify that the corpse's final disposition take place within a certain window of time.²⁰¹ The reasons that legislatures have given for such requirements include the prevention of "offensive odors," "expos[ure] to the public view,"²⁰² and recognition of "the inherent dignity of the human body and . . . public health."²⁰³

Second, many states require the covering of dead bodies during their transportation and preparation for final disposition. Some statutes specify, for instance, that funeral establishments and crematories must maintain dead bodies in containers that provide "complete coverage."²⁰⁴ Others require necessary transfers of dead bodies to a new container to "be conducted in privacy with dignity and respect."²⁰⁵

Third, many states require disposition facilities to cover their windows, close their doors, and restrict access to authorized staff while

Damages for Breach of Contract 2 (May 24, 2002) (manuscript on file with author); RESTATEMENT (SECOND) OF CONTS. § 353 cmt. a (AM. L. INST. 1978).

199. *E.g.*, *Fitzsimmons v. Olinger Mortuary Ass'n*, 17 P.2d 535, 537 (Colo. 1932); *Bazemore v. Savannah Hosp.*, 155 S.E. 194, 197 (Ga. 1930); *Douglas v. Stokes*, 149 S.W. 849, 850 (Ky. 1912).

200. *E.g.*, ARK. CODE ANN. § 17-29-311(f)(1) (West 2023); 043-00-001 ARK. CODE R. §§ 6(B)(10)(b), 6(H)(2)(c), 21(C)(1)(b) (LexisNexis 2024); COLO. REV. STAT. ANN. § 12-135-106 (West 2024); 10 GUAM CODE ANN. §§ 30203, 4A101 (2022); IDAHO ADMIN. CODE R. 24.08.01.452 (2024); MD. CODE ANN., HEALTH-GEN. § 5-513(b) (West 2023); 15-005-85 MISS. CODE R. § 4.6.3 (LexisNexis 2024); 172 NEB. ADMIN. CODE § 68-006.04A (2024); N.J. ADMIN. CODE § 8:9-1.1 (2024); N.M. STAT. ANN. § 61-32-20 (West 2023); 140 N. MAR. I. ADMIN. CODE §§ 140-20.2-401(a), -405(c) (2019); S.D. ADMIN. R. 20:45:02:07 (2024); VA. CODE ANN. § 54.1-2811.1(B) (West 2023).

201. *E.g.*, D.C. CODE ANN. § 43-120 (West 2024) (within one week); 172 NEB. ADMIN. CODE § 68-006.04 (2024) (within eight days if refrigerated or thirty days if embalmed); N.D. CENT. CODE ANN. § 23-06-04 (West 2023) (within eight days); 49 PA. CODE § 13.184 (2024) (within ten days).

202. D.C. CODE ANN. § 43-120 (West 2024).

203. 239 MASS. CODE REGS. 3.10(2) (LexisNexis 2024).

204. *E.g.*, MD. CODE ANN., HEALTH-GEN. § 5-513(a) (West 2023); VA. CODE ANN. § 54.1-2811.1(A) (West 2023); *see also, e.g.*, MINN. STAT. ANN. § 149A.93(7) (West 2023) (requiring the body to be "covered in such a manner that the body cannot be viewed"); N.Y. NOT-FOR-PROFIT CORP. LAW § 1517(d) (McKinney 2024) (discouraging the opening of containers); N.M. CODE R. § 16.64.10.8(B)(1)(c) (LexisNexis 2024) (requiring "complete covering"); TEX. HEALTH & SAFETY CODE ANN. § 716.151(a)(2) (West 2023) (same).

205. *E.g.*, N.Y. NOT-FOR-PROFIT CORP. LAW § 1517(f)(2) (McKinney 2024).

processing human remains.²⁰⁶ New York, for instance, maintains these requirements and adds that unauthorized persons shall “not infringe upon the privacy of the remains of deceased human beings.”²⁰⁷ Other jurisdictions also stress the importance of “preserv[ing] the dignity of the remains.”²⁰⁸

Fourth, most states require that the final disposition of dead bodies take place inside a covered area—generally a tomb, crypt, or vault.²⁰⁹ Moreover, many states and territories provide that dead bodies must be covered by a minimum layer of earth when buried in the ground.²¹⁰ The reasons for these requirements, according to one legislature, are “to prevent the creation of any public nuisance or public health hazard and to make it impossible for hogs and other animals, or surface drainage or wash, to uncover [the dead human body].”²¹¹ Some states also require the reburial of exposed human skeletal remains. Such exposure, the Louisiana statute explains, is “harmless from a public health perspective,” but it renders the skeletal remains “susceptible to being looted,” and it is “disrespectful to those interred in the cemetery.”²¹²

Finally, many states prohibit the unauthorized photography of dead bodies.²¹³ North Carolina, for instance, bars such conduct and declares that “[n]o person shall fail to treat a dead human body with respect at all times.”²¹⁴ The federal government, too, has occasionally

206. *E.g.*, 140 N. MAR. I. ADMIN. CODE § 140-20.2-425(c)(5) (2019) (restricting access to crematories); TEX. HEALTH & SAFETY CODE ANN. § 716.152(b) (West 2023) (same); WYO. STAT. ANN. § 33-16-528 (West 2023) (same for embalming).

207. N.Y. NOT-FOR-PROFIT CORP. LAW § 1517(b)(1) (McKinney 2024); *see also, e.g.*, MINN. STAT. ANN. § 149A.95(10) (West 2023) (requiring privacy for cremation); MINN. STAT. ANN. § 149A.941(19) (West 2023) (same for alkaline hydrolysis); N.D. ADMIN. CODE 25-02-01-08 (2024) (same for embalming).

208. *E.g.*, MINN. STAT. ANN. § 149A.95(2) (West 2023); *see also, e.g.*, 140 N. MAR. I. ADMIN. CODE § 140-20.2-501(a) (2019) (requiring that “human remains . . . be treated in a dignified fashion”).

209. *E.g.*, ME. REV. STAT. ANN. tit. 13, § 1032 (2024). Several states and territories also discourage the reopening of graves and vaults, especially during a dead body’s decomposition period. *E.g.*, D.C. CODE ANN. §§ 43-122 to -123 (West 2024). When disinterments are necessary, some states prohibit the reopening of coffins. *E.g.*, IDAHO CODE ANN. § 39-269(2) (West 2024). Puerto Rico specifies that “bones originating from exhumations” may not be deposited “into open ossuaries.” P.R. LAWS ANN. tit. 24, § 3851 (2012).

210. *E.g.*, CAL. HEALTH & SAFETY CODE § 8113.1 (West 2024); 10 GUAM CODE ANN. § 30107 (2022); VT. STAT. ANN. tit. 18, § 5319(b)(1) (West 2023).

211. HAW. CODE R. § 11-22-5(b)(2) (LexisNexis 2023).

212. LA. STAT. ANN. § 8:663(A) (2024).

213. *E.g.*, MICH. COMP. LAWS ANN. § 750.160a(1) (West 2023) (“[A] person shall not knowingly photograph or publicly display a photograph of all or a portion of a decedent located in a human grave.”); S.C. CODE ANN. § 17-5-535 (2024) (restricting access to autopsy photographs and recordings); WYO. STAT. ANN. § 7-4-105 (West 2023) (same).

214. N.C. GEN. STAT. ANN. § 90-210.25(c)(9) (West 2023).

sought to prohibit the photographing of dead bodies. The George W. Bush Administration, for instance, banned the unauthorized photography of returning U.S. war dead from Iraq and Afghanistan, claiming that the ban was meant to “ensure privacy and respect [for] families who have lost their loved ones.”²¹⁵

* * *

The various kinds of provisions surveyed here all speak to a concerted legal effort to keep dead bodies out of sight.²¹⁶ What are we to make of this legal effort? As indicated above, my focus for now will just be on the kinds of considerations motivating the law and not yet on the beneficiaries of those considerations.

One concern fueling the law’s protection of dead bodies against exposure is no doubt public health. Many statutory provisions and court opinions we saw point explicitly to “public health”²¹⁷ or “the health of the community”²¹⁸ as an important motivating consideration. But as both the U.S. Centers for Disease Control and the World Health Organization advise, decaying dead bodies do not usually pose a danger to public health, at least when kept away from sources of drinking water.²¹⁹ To some extent, courts and legislatures acknowledge this by limiting their reliance on public health.²²⁰ Almost always, public health is just one of several considerations to which they point. One legislature, as we saw, even requires the covering of human remains after first conceding that (at least in the case of already decomposed

215. Mary L. Clark, *Keep Your Hands off My (Dead) Body: A Critique of the Ways in Which the State Disrupts the Personhood Interests of the Deceased and His or Her Kin in Disposing of the Dead and Assigning Identity in Death*, 58 RUTGERS L. REV. 45, 67 (2005) (internal quotation marks omitted) (quoting Ann Scott Tyson, *Hundreds of Photos of Caskets Released*, WASH. POST, Apr. 29, 2005, at A8).

216. For a discussion of instances, such as viewings, in which decedents or next of kin can waive the law’s visual protections, see *infra* note 388.

217. HAW. CODE R. § 11-22-5(b)(2) (LexisNexis 2023); 239 MASS. CODE REGS. 3.10(2) (2024); P.R. LAWS ANN. tit. 24, § 3791 (2012).

218. *Seaton v. Commonwealth*, 149 S.W. 871, 873 (Ky. 1912).

219. *Interim Health Recommendations for Workers Who Handle Human Remains After a Disaster*, CTNS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/disasters/handlerremains.html> (last updated Sept. 15, 2008) [<https://perma.cc/89HP-WPGN>]; Julie Fisher & Bob Reed, *Disposal of Dead Bodies in Emergency Conditions*, WORLD HEALTH ORG., https://cdn.who.int/media/docs/default-source/wash-documents/who-tn-08-disposal-of-dead-bodies.pdf?sfvrsn=530b5835_4 (last updated July 2013) [<https://perma.cc/VA76-8JR5>].

220. See Smith, *supra* note 16, at 1495–96, 1502 (arguing that covering requirements, some of which he discusses as part of his analysis of abandonment prohibitions, cannot be reduced to public health concerns alone).

skeletal remains) their exposure is “harmless from a public health perspective.”²²¹

The additional interests to which courts and legislatures point when justifying their covering requirements vary. Some speak of “the universal sense of propriety” and “the sentiment of humanity against profanation,”²²² some of “[g]ood morals—decency—our best feelings.”²²³ The statutes and court opinions that provide for restricted access and view into disposition facilities, and those that curtail the photographing of dead bodies, also voice privacy concerns.²²⁴ But one interest stands out as a repeated touchpoint, though it features under various names: dignity. “Dignity”²²⁵ and “respect,”²²⁶ as courts and legislatures put it, must inform the care of dead bodies “at all times.”²²⁷ Exposure would be “disgraceful,”²²⁸ “disrespectful,”²²⁹ and an “indignity.”²³⁰

These observations also apply to the various other legal protections I have analyzed so far. For many of them, such as the protections against commingling and anonymity, public health concerns hold little explanatory power. Moreover, even for legal protections that public health concerns can help explain, such as the protection against mixing dead bodies and waste, public health explanations are not exhaustive. For instance, accumulated garbage around funeral homes and gravesites may well harbor disease, and the effluent from alkaline hydrolysis may well strain wastewater treatment plants. But states could have adopted more narrowly tailored solutions to those public health concerns than flat-out prohibitions. Sometimes, moreover, public health concerns are overridden by dignity-protecting

221. LA. STAT. ANN. § 8:663(A) (2024).

222. *Burnett v. Surratt*, 67 S.W.2d 1041, 1041 (Tex. Civ. App. 1934); *see also* *Pettigrew v. Pettigrew*, 56 A. 878, 879 (Pa. 1904) (speaking of “the universal sense of propriety”).

223. *In re Kanavan*, 1 Me. 226, 227 (1821); *see also* *Seaton*, 149 S.W. at 873 (speaking of “the sense of decency”).

224. *E.g.*, MINN. STAT. ANN. § 149A.95(10) (West 2023) (cremation); MINN. STAT. ANN. § 149A.941(19) (West 2023) (alkaline hydrolysis); N.Y. NOT-FOR-PROFIT CORP. LAW § 1517(f)(2) (McKinney 2024) (transfers); N.Y. NOT-FOR-PROFIT CORP. LAW § 1517(a)(2), (b)(1) (McKinney 2024) (cremation); N.Y. NOT-FOR-PROFIT CORP. LAW § 1518(a)(2), (b)(1) (McKinney 2024) (human composting); N.D. ADMIN. CODE § 25-02-01-08 (2024) (embalming); *Reid v. Pierce County*, 961 P.2d 333, 335 (Wash. 1998) (photos).

225. *E.g.*, MINN. STAT. ANN. § 149A.95(2) (West 2023); N.Y. NOT-FOR-PROFIT CORP. LAW § 1517(f)(2), 1518(f)(2) (McKinney 2024); 239 MASS. CODE REGS. 3.10(2) (2024); *see also* 140 N. MAR. I. ADMIN. CODE § 140-20.2-501(a) (2019) (“dignified”).

226. *E.g.*, N.Y. NOT-FOR-PROFIT CORP. LAW §§ 1517(f)(2), 1518(f)(2) (McKinney 2024) (“dignity and respect”); N.C. GEN. STAT. ANN. § 90-210.25(c)(9), (c)(14)(g), (e)(1)(i) (West 2023); *Kyles v. S. Ry. Co.*, 61 S.E. 278, 281 (N.C. 1908); *Kanavan*, 1 Me. at 227.

227. N.C. GEN. STAT. ANN. § 90-210.25(e)(9), (c)(14)(g), (e)(1)(i) (West 2023).

228. *Kanavan*, 1 Me. at 227.

229. LA. STAT. ANN. § 8:663(A) (2024).

230. *Douglas v. Stokes*, 149 S.W. 849, 850 (Ky. 1912).

rules. The EPA, for instance, largely ignored mercury and other emission concerns when it ruled that “human bodies” are clearly not “solid waste,” and that human crematoria were therefore exempt from its regulations under the Clean Air Act.²³¹ Even behind legal protections for which public health concerns hold some explanatory power, it would therefore be a mistake to view those concerns as the primary, let alone the only, drivers.²³²

Pragmatic explanations other than public health face similar limitations. As we saw, that is true of administrative explanations for the law’s protections against dead bodies’ anonymity.²³³ And it is also true of economic explanations for the law’s protections against treating dead bodies as property.²³⁴ As the U.S. Court of Appeals for the Third Circuit put it, such laws “are premised on moral and ethical, rather than economic, considerations.”²³⁵

As with the law’s covering provisions, dignity is the dominant moral value articulated by legislatures and courts when justifying the law’s various other protections of dead bodies. Thus, for instance, we saw courts and legislatures point to “principles of human dignity” as underpinning the law’s individualization requirements,²³⁶ and to “dignity and respect” as explaining the law’s refusal to categorize dead bodies as property.²³⁷ Similarly, we saw government officials, litigants, and legislative advocates repeatedly rely on the value of dignity when justifying dead bodies’ legal protections—with terms such as “due reverence and respect,”²³⁸ “dignified final treatment,”²³⁹ “humane dignity,”²⁴⁰ and “the value and dignity of all life.”²⁴¹

However, to understand what the law is after with its covering provisions as well as with its other protections of dead bodies, we cannot

231. Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Other Solid Waste Incineration Units, 70 Fed. Reg. 74870, 74881 (Dec. 16, 2005) (to be codified at 40 C.F.R. pt. 60).

232. Various legal efforts to dispose of human remains differently than of animal remains are also presumably motivated by concerns other than public health, given that human and animal remains pose comparable health risks. See THOMAS C. GREY, THE LEGAL ENFORCEMENT OF MORALITY 33 (1983).

233. See *supra* notes 173-181 and accompanying text.

234. See *supra* notes 43-49 and accompanying text.

235. *Onyeanusu v. Pan Am. World Airways, Inc.*, 952 F.2d 788, 792 (3d Cir. 1992) (footnote omitted).

236. WASH. REV. CODE ANN. § 68.50.185 official notes (West 2023).

237. *People v. Reid*, 201 Cal. Rptr. 3d 295, 299 (Ct. App. 2016).

238. *Missouri Catholic Bishops*, *supra* note 92.

239. *Smith*, *supra* note 104 (internal quotation marks omitted).

240. *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r*, 194 F. Supp. 3d 818, 832 (S.D. Ind. 2016) (internal quotation marks omitted).

241. *Herskovitz*, *supra* note 103 (internal quotation marks omitted).

simply name the dignity interests it purports to protect. We also need to understand who the beneficiaries of those protections are. I will tackle this beneficiary question by considering another kind of corpse abuse: the physical abuse of dead bodies. As I will show, the beneficiaries include dead bodies themselves.

B. Physical

*Curst be he that moves my bones.*²⁴²

The second form of abuse from which American law seeks to protect dead bodies is physical abuse: any unauthorized touching that would disturb their rest.

One such type of touching is mutilation, by which I mean any unauthorized touching that destroys the bodily integrity of a corpse. The common law has long criminalized mutilation under the broader category “abuse of a corpse.”²⁴³ But the vast majority of states have also codified prohibitions against mutilation as statutory crimes. They have either done so by specifying the prohibited conduct under various names—among them “destr[uction],”²⁴⁴ “desecrat[ion],”²⁴⁵ “defile[ment],”²⁴⁶ and, most often, “mutilat[ion]” of human remains.²⁴⁷ Or they have done so by criminalizing “abuse of a corpse” and defining such abuse as any treatment of a dead body that would “outrage ordinary family sensibilities.”²⁴⁸

242. Inscription on William Shakespeare’s tomb; see *Pettigrew v. Pettigrew*, 56 A. 878, 880 (Pa. 1904).

243. See MARSH, *supra* note 14, at 80.

244. *E.g.*, ME. REV. STAT. ANN. tit. 17-a, § 508(1) (2024); N.H. REV. STAT. ANN. § 644:7 (2023); N.J. STAT. ANN. 2C:22-1(1)(a)(2) (West 2023); S.C. CODE ANN. § 16-17-600 (2024); UTAH CODE ANN. § 76-9-704(2)(b) (West 2023).

245. *E.g.*, MISS. CODE ANN. § 97-29-25(2)(a) (West 2023); N.J. STAT. ANN. 2C:22-1(1)(a)(2) (West 2023); S.C. CODE ANN. § 16-17-600 (2024).

246. *E.g.*, VA. CODE ANN. § 18.2-126 (West 2023).

247. *E.g.*, ALASKA STAT. ANN. § 11.61.130(a)(1) (West 2023); ARIZ. REV. STAT. ANN. § 32-1364(A) (2024); CAL. HEALTH & SAFETY CODE §§ 7050.5(a), 7052(a) (West 2024); FLA. STAT. ANN. § 872.06(2) (West 2023); 720 ILL. COMP. STAT. ANN. 5/12-20.5(a) (West 2023); IND. CODE ANN. § 35-45-11-2(1) (West 2023); LA. STAT. ANN. § 8:654 (2024); ME. REV. STAT. ANN. tit. 17-a, § 508(1) (2024); MICH. COMP. LAWS ANN. § 750.160 (West 2023); OR. REV. STAT. ANN. § 166.087(1)(b) (West 2023); P.R. LAWS ANN. tit. 33, § 5187 (2012); 11 R.I. GEN. LAWS ANN. § 11-20-1.1 (West 2024); V.I. CODE ANN. tit. 14, § 2021(a) (2023); WASH. REV. CODE ANN. § 68.50.140(4) (West 2023); WYO. STAT. ANN. § 6-4-502(a) (West 2023).

248. *E.g.*, ALA. CODE § 13A-11-13(a) (2023); DEL. CODE ANN. tit. 11, § 1332 (West 2024); HAW. REV. STAT. ANN. § 711-1108(1)(a) (West 2023); KY. REV. STAT. ANN. § 525.120(1) (West 2023); 18 PA. STAT. & CONS. STAT. ANN. § 5510 (West 2023); see also, *e.g.*, ARK. CODE ANN. § 5-60-101(a)(2) (West 2023) (“offensive to a person of reasonable sensibilities”); COLO. REV. STAT. ANN. § 18-13-101(1)(b) (West 2024) (“normal family sensibilities”); OHIO REV. CODE ANN. § 2927.01 (West 2023) (“reasonable family sensibilities” or “reasonable community sensibilities”); OR. REV. STAT. ANN.

Besides criminalizing mutilation, states have provided two additional enforcement mechanisms to protect the bodily integrity of corpses. First, next of kin can bring a civil suit accusing others of mutilating their relative's dead body and thereby interfering with their right of sepulcher.²⁴⁹ Second, state licensing regimes can threaten to revoke the licenses of death care professionals who physically abuse dead bodies.²⁵⁰

In addition to mutilation, American law seeks to protect dead bodies against other types of unauthorized touching.²⁵¹ Those include moving a dead body from its grave without authorization.²⁵² Such touching may well leave the dead body whole and intact. But it still constitutes an unlawful “disturbance.”²⁵³

The law's reluctance to disturb dead bodies is also visible in its presumption against disinterment. Courts have held repeatedly that a dead body should remain undisturbed unless the party requesting authorization—including next of kin—shows “good and substantial reasons” for disinterment.²⁵⁴ Such reasons need to prevail in a balancing test that typically considers the interests of the public, decedent, next of kin, and cemetery.²⁵⁵ Courts have stressed that they

§ 166.085(3) (West 2023) (“not recognized by generally accepted standards of the community or . . . not generally accepted as suitable practice by other members of the profession”); TENN. CODE ANN. § 39-17-312(a)(1) (West 2023) (“offensive to the sensibilities of an ordinary person”).

249. *E.g.*, *Christensen v. Superior Ct.*, 820 P.2d 181, 186 (Cal. 1991).

250. *E.g.*, 49 PA. CODE § 13.202(2) (2024); ME. REV. STAT. ANN. tit. 32, § 1455-B(9) (2024).

251. *E.g.*, ALASKA STAT. ANN. § 11.61.130(a)(1) (West 2023).

252. *E.g.*, *Commonwealth v. Cooley*, 27 Mass. 37, 40 (1830); *Cantrall v. Great Am. Cas. Co.*, 256 Ill. App. 47, 59–60 (1930); *Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227, 242 (1872); ALASKA STAT. ANN. § 11.61.130(a)(1) (West 2023); ARIZ. REV. STAT. ANN. § 32-1364(B) (2024); CAL. HEALTH & SAFETY CODE § 7052(a) (West 2024); COLO. REV. STAT. ANN. § 18-13-101(1)(a) (West 2024); HAW. REV. STAT. ANN. § 338-25.5 (West 2023); ME. REV. STAT. ANN. tit. 17-a, § 508(1) (2024); MICH. COMP. LAWS ANN. § 750.160 (West 2023); MISS. CODE ANN. § 97-29-19 (West 2024); MONT. CODE ANN. § 44-3-404(3) (West 2023); N.H. REV. STAT. ANN. § 644:7 (2023); N.J. STAT. ANN. 2C:22-1(a)(1) (West 2023); P.R. LAWS ANN. tit. 33, § 5187 (2022); 11 R.I. GEN. LAWS ANN. § 11-20-1 (West 2024); S.C. CODE ANN. § 16-17-600(A)(2) (2024); S.D. CODIFIED LAWS § 34-27-19 (2024); TENN. CODE ANN. § 39-17-312(a)(2) (West 2023); TEX. PENAL CODE ANN. § 42.08(a)(1) (West 2023); 12 TEX. JUR. 3D *Cemeteries* § 61, Westlaw (database updated Jan. 2024); UTAH CODE ANN. § 76-9-704(2)(b)–(c) (West 2023); VT. STAT. ANN. tit. 13, § 3761 (West 2023); VA. CODE ANN. § 18.2-126(A) (West 2023); V.I. CODE ANN. tit. 14, § 2021(a) (2023); WASH. REV. CODE ANN. § 68.50.140(4) (West 2023); W. VA. CODE ANN. § 61-8-14(a) (West 2023).

253. *E.g.*, *Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227, 232–33 (1872).

254. *E.g.*, *Isola v. Siani*, 577 N.Y.S.2d 486, 486 (N.Y. App. Div. 1991) (quoting *Currier v. Woodlawn Cemetery*, 90 N.E.2d 18, 19 (N.Y. 1949)); *Stastny v. Tachovsky*, 132 N.W.2d 317, 325 (Neb. 1964); *see also, e.g.*, *Yome v. Gorman*, 152 N.E. 126, 129 (N.Y. 1926) (Cardozo, J.) (“reason of substance”).

255. *E.g.*, *McGriggs v. McGriggs*, 192 So. 3d 350, 354–55 (Miss. Ct. App. 2015); IOWA CODE ANN. § 144.34 (West 2023); NEV. REV. STAT. ANN. § 451.340 (West 2023); N.D. CENT. CODE ANN. §§ 23-21-02, -03, -23 (West 2023); *see also* Fred O. Smith, Jr., *On Time, (In)Equality, and Death*, 120 MICH. L. REV. 195, 212–13 (2021) (discussing this balancing test).

will give authorization only upon “a strong showing”²⁵⁶ or, even more narrowly, “under circumstances of extreme exigency” alone.²⁵⁷

Judges often capture the sensibility that underpins the various laws protecting dead bodies against physical abuse with the language of sleep. Dead bodies, in the words of a New Mexico court, are “sleeping bod[ies],” and they ought to rest in peace and “sleep on wholly oblivious to the turmoil that rages above [them].”²⁵⁸ Courts speak of a common law right to “undisturbed repose of the human body.”²⁵⁹ And courts stress that the word “cemetery” derives from the Greek word for “sleeping place,”²⁶⁰ or in Justice Story’s translation, “Places of Repose,” where dead bodies “are to sleep their last sleep.”²⁶¹

* * *

Having surveyed the laws protecting dead bodies against physical abuse, it is time to return to the question of who the beneficiaries of the law’s dignity protections are.

256. *Fischer’s Est. v. Fischer*, 117 N.E.2d 855, 857 (Ill. App. Ct. 1954).

257. *Thompson v. Deeds*, 61 N.W. 842, 842 (Iowa 1895). Despite the presumption against them, disinterments are common. Some urban areas, like Manhattan and San Francisco, have been largely cleared of cemeteries. See Ellen Stroud, *Dead Bodies in Harlem: Environmental History and the Geography of Death*, in *THE NATURE OF CITIES: CULTURE, LANDSCAPE, AND URBAN SPACE* 62, 67–69, 73 (Andrew C. Isenberg ed., 2006) (Manhattan); CANTOR, *supra* note 20, at 65 (San Francisco). Large-scale disinterments are usually authorized by officials for the sake of such public goods as public health and urban development. For more on overrides of dead bodies’ dignity interests for the sake of public goods, see *infra* Section III.B. As I describe there, the law tends to limit the moral cost of such overrides—in this case, by requiring dead bodies’ dignified reinterment elsewhere.

258. *Theodore v. Theodore*, 259 P.2d 795, 798 (N.M. 1953).

259. *Thompson v. State*, 58 S.W. 213, 213 (Tenn. 1900); *State ex rel. Comm’r of Transp. v. Med. Bird Black Bear White Eagle*, 63 S.W.3d 734, 746 (Tenn. Ct. App. 2001) (referring to “the right of undisturbed repose”); see also *Sullivan v. Cath. Cemeteries, Inc.*, 317 A.2d 430, 432 (R.I. 1974) (“[T]here is a reluctance to disturb the quiet of the grave and the repose of the dead.”); *Yome*, 242 N.Y. at 129 (“The dead are to rest where they have been laid unless reason of substance is brought forward for disturbing their repose.”).

260. *Humphreys v. Bennett Oil Corp.*, 197 So. 222, 229 (La. 1940).

261. Joseph Story, Address at the Dedication of the Cemetery at Mount Auburn (Sept. 24, 1831). The association of death with sleep is old. In Greek mythology, death and sleep are brothers, and some Christian denominations later believed that the baptized dead would remain asleep until Judgment Day. See HOMER, *ILIAD*, XVI, ll. 676–83; Dawdy, *supra* note 175, at 204. Nor is the legal reliance on sleep language today confined to judges or adherents of those denominations. A Jewish plaintiff, for instance, who sued a funeral home for moving his parents’ dead bodies without authorization accused it of “disrupt[ing] their eternal rest.” *Dallas Man Sues Funeral Company for Mishandling Parents’ Corpses: ‘Someone Disrupted Their Eternal Rest,’* CBS LOCAL (Feb. 7, 2019), <https://www.cbsnews.com/texas/news/dallas-man-sues-cemetery-mishandling-corpse/> [<https://perma.cc/UU9K-XT3N>]; see also SAPPOL, *supra* note 8, at 17 (“[M]embers of . . . subaltern or subordinate groups . . . shared many of the dominant beliefs about the dead body, in particular the belief that the period following death was a kind of ‘sleep’ or ‘repose,’ and that dismemberment or rough treatment disturbs that sleep.”).

One answer is the living. In the context of the law's protections against the physical abuse of dead bodies, this answer finds support in statutory references to ordinary sensibilities and judicial references to public decency. For instance, states, as we saw, often define abuse of a corpse as treatment that would "outrage ordinary family [or community] sensibilities."²⁶² These legislatures do not require that the family or community in fact witness any given incident and feel such outrage.²⁶³ Nevertheless, their focus is on what relatives and the public believe and feel. Those living humans, in other words, are the statutes' intended beneficiaries. The commentary to the Model Penal Code, echoed by several states,²⁶⁴ makes just this point when it explains that "[t]he overarching purpose" behind the reference to ordinary sensibilities is to "protect against outrage to the feelings of friends and family of the deceased."²⁶⁵ Several states lend the point further support by listing their protections against dead bodies' physical abuse in criminal code titles or chapters that reference public harm. Texas, for instance, criminalizes the disturbance and mutilation of corpses in title 9 of its penal code on "Offenses Against Public Order and Decency."²⁶⁶

Living relatives and the public are also beneficiaries to which legislatures and courts repeatedly point in the context of other legal protections. As we saw, for instance, some courts justify their refusal to categorize dead bodies as property in part with reference to "survivors."²⁶⁷ One legislature explained that the commingling of multiple dead bodies "violate[s] common notions of decency and generally held expectations,"²⁶⁸ implying that the law's individualization requirements aim at protecting both the mores and consumer preferences of the public.²⁶⁹ And when justifying the law's

262. *E.g.*, ALA. CODE § 13A-11-13(a) (2023); KY. REV. STAT. ANN. § 525.120(1) (West 2023).

263. In this, American law differs, for instance, from English law, where "public view" is an important element of the offence of outraging public decency. CONWAY, *supra* note 14, at 23–24.

264. *E.g.*, KY. REV. STAT. ANN. § 525.120 1974 Kentucky Crime Commission/LRC commentary (West 2023).

265. MODEL PENAL CODE § 250.10 cmt. 2 (AM. L. INST., Commentaries 1985).

266. TEX. PENAL CODE ANN. § 42.08 (West 2023); *see also, e.g.*, ALA. CODE § 13A-11-13 (2023) ("Offenses Against Order and Safety"); ALASKA STAT. ANN. § 11.61.130 (West 2023) ("Offenses Against Public Order"); HAW. REV. STAT. ANN. § 711-1108 (West 2023) (same); OR. REV. STAT. ANN. § 166.085 (West 2023) (same); ARK. CODE ANN. § 5-60-101 (West 2023) ("Offenses Against Public Health, Safety, or Welfare"); DEL. CODE ANN. tit. 11, § 1332 (West 2024) ("Offenses Against Public Health, Order and Decency"); IND. CODE ANN. § 35-45-11-2 (West 2023) ("Offenses Against Public Health, Order, and Decency"); TENN. CODE ANN. § 39-17-312 (West 2023) ("Offenses Against Public Health, Safety and Welfare").

267. *People v. Reid*, 201 Cal. Rptr. 3d 295, 300 (Ct. App. 2016).

268. WASH. REV. CODE ANN. § 68.50.185 official notes (West 2023).

269. This is consistent with Dawdy's observation that American funerary practices have undergone an increasing turn towards individualization in recent decades. DAWDY, *supra* note 130,

protections against dead bodies' visual abuse, courts, legislatures, and government officials frequently point to the feelings and interests of the living as well. Casting a dead body out into the open, a Maine court explained, "is an outrage upon the public feelings, and torturing to the afflicted relatives of the deceased."²⁷⁰ One legislature said it required the covering of dead bodies to prevent "the annoyance of any person or persons in the neighborhood or . . . the public."²⁷¹ And the federal government justified its prohibition against distributing the photographs of fallen soldiers by pointing to the "privacy and respect [for] families who have lost their loved ones."²⁷² Moreover, whenever the law relies on civil liability suits to enforce its dignity protections of dead bodies, those suits, by their very posture, focus on the mental anguish of relatives.²⁷³

at 211 ("What most . . . want are services and products (rituals and artifacts) that affirm the individuality of the person, or what the business calls personalization.").

270. *In re Kanavan*, 1 Me. 226, 227 (1821).

271. D.C. CODE ANN. § 43-120 (West 2024).

272. Clark, *supra* note 215, at 67 (internal quotation marks omitted) (quoting Ann Scott Tyson, *Hundreds of Photos of Caskets Released*, WASH. POST, Apr. 29, 2005, at A8). Similarly, the Supreme Court upheld the government's refusal to release photos of deputy White House counsel Vince Foster's dead body in response to a FOIA request following his suicide with exclusive reference to the family's feelings and right to privacy. *See Nat'l Archives & Recs. Admin. v. Favish*, 541 U.S. 157, 171-75 (2004).

273. In addition to living relatives and the public at large whom the law expressly names as beneficiaries, there are other living constituencies whom the law might tacitly seek to benefit as well. Funeral directors are one such group. They stand to gain financially from the law's protections of dead bodies and licensing requirements. *See generally* REBECCA HAW ALLENSWORTH, *THE LICENSING RACKET: HOW WE DECIDE WHO GETS TO WORK AND WHY IT GOES WRONG* (forthcoming 2025) (on file with author); Tanya D. Marsh, *Regulated to Death: Occupational Licensing and the Demise of the U.S. Funeral Services Industry*, 8 WAKE FOREST J.L. & POL'Y 5 (2018). Government officials are another such group. They stand to gain politically from the law's protections of dead bodies. For instance, when the Bush Administration announced its prohibition against distributing photographs of fallen U.S. soldiers, critics were quick to dismiss the proffered reason as pretext. The real reason, they charged, was not "ensur[ing] privacy and respect [for] families," but undercutting the government's accountability to its citizens. Clark, *supra* note 215, at 64-65, 67 (internal quotation marks omitted). Whether that particular accusation is persuasive or not, the more general insight is surely plausible: the failure to protect dead bodies, whether from public exposure or otherwise, can challenge the legitimacy of the state. That is particularly true when the decedent died at the hands of state officials or by violence that the state condoned. Not by accident did Emmett Till's open casket funeral help reignite the civil rights movement and Michael Brown's exposed and murdered body fuel the Black Lives Matter movement. *See* Katie Nodjimbadem, *Emmett Till's Open Casket Funeral Reignited the Civil Rights Movement*, SMITHSONIAN MAG. (Sept. 2, 2015), <https://www.smithsonianmag.com/smithsonian-institution/emmett-tills-open-casket-funeral-reignited-the-civil-rights-movement-180956483/> [<https://perma.cc/Y39V-B8TS>]; Smith, *supra* note 16, at 1529-31. Some argue that even the sight of dead bodies who died a natural death can threaten state authority. Political theorist James Martel, for instance, maintains (building on Michel Foucault and Walter Benjamin) that exposed dead bodies reveal the limitations of sovereign power because their materiality and decay fall outside its control. MARTEL, *supra* 156, at 140. If so, then the law's covering requirements for all bodies, not just some, would help hide the state's shortcomings and protect its authority.

But the law also protects another group: the dead themselves. As one court put it, “[t]he right of burial,” which secures undisturbed repose, “exists . . . in favor of the body of [the decedent].”²⁷⁴ And as another court put it, “[a] proper appreciation of the duty we owe to the dead” provides the first reason that dead bodies “should not be exhumed, except under circumstances of extreme exigency.”²⁷⁵ Many states lend support to this view with the titles of the section headings in which they list their criminal protections against dead bodies’ physical abuse, by referencing the harm done to the dead. States, for instance, categorize disturbance and mutilation as “crimes against the dead,”²⁷⁶ “abuse of [a] corpse,”²⁷⁷ “abuse of a dead human body,”²⁷⁸ and “abuse or desecration of a dead human body.”²⁷⁹

Other legal protections, as we saw, also expressly point to the dead as beneficiaries. For instance, some statutes regard the exposure of dead bodies as “disrespectful to those interred in the cemetery.”²⁸⁰ Some provide that the covering requirements aim “to recognize the inherent dignity of the human body,”²⁸¹ to “preserve the dignity of the remains,”²⁸² and to prevent an “infringe[ment] upon the privacy of the remains of deceased human beings.”²⁸³ Similarly, state government litigants and legislative advocates speak of the legal protections as ensuring “humane dignity”²⁸⁴ or “due reverence and respect for the human remains of the deceased.”²⁸⁵

These statements by courts, legislatures, and government officials express more than the descriptive fact that U.S. law seeks to ensure that dead bodies are treated with dignity. They also express the moral belief that the dead stand to benefit or lose from respectful or disrespectful treatment—or, put differently, that the dead hold dignity

274. *Kitchen v. Wilkinson*, 26 Pa. Super. 75, 77 (1904).

275. *Thompson v. Deeds*, 61 N.W. 842, 842 (Iowa 1895).

276. *E.g.*, ARIZ. REV. STAT. ANN. § 32-1364 (2024).

277. *E.g.*, ALA. CODE § 13A-11-13 (2023); HAW. REV. STAT. ANN. § 711-1108 (West 2023); IND. CODE ANN. § 35-45-11-2 (West 2023); KY. REV. STAT. ANN. § 525.120 (West 2023); OHIO REV. CODE ANN. § 2927.01 (West 2023); OR. REV. STAT. ANN. § 166.087 (West 2023); 18 PA. STAT. & CONS. STAT. ANN. § 5510 (West 2023); TENN. CODE ANN. § 39-17-312 (West 2023); TEX. PENAL CODE ANN. § 42.08 (West 2023). In listing these and subsequent titles as support, I assume that the term “abuse” (unlike, e.g., “destruction”) presupposes the vulnerability of dead bodies as subjects.

278. *E.g.*, FLA. STAT. ANN. § 872.06 (West 2023).

279. *E.g.*, UTAH CODE ANN. § 76-9-704 (West 2023).

280. LA. STAT. ANN. § 8:663(A) (West 2024).

281. 239 MASS. CODE REGS. 3.10(2) (2024).

282. MINN. STAT. ANN. § 149A.95(2) (West 2023).

283. N.Y. NOT-FOR-PROFIT CORP. LAW § 1517(b)(1) (McKinney 2024).

284. *Planned Parenthood of Ind. & Ky. v. Comm’r*, 194 F. Supp. 3d 818, 832 (S.D. Ind. 2016) (internal quotation marks omitted).

285. *Missouri Catholic Bishops*, *supra* note 92.

interests. Who exactly the “dead” are whom the law benefits with its dignity protections is ambiguous. Often, the law suggests that the dead who benefit are the dead bodies themselves—as in the judicial claims that the law’s protections “exist[] . . . in favor of the body of [the decedent]”²⁸⁶ or that the “dead body” of the decedent “had the right of sepulture” and “could not be cast aside or mutilated as an inanimate object, having neither rights nor value to any one.”²⁸⁷ But, at other times, legislatures and courts use more open-ended phrases to describe the beneficiaries, such as “those interred in the cemetery,” which might refer to the decedents rather than their dead bodies.²⁸⁸ I will return to these ambiguities in due course,²⁸⁹ but in the meantime, I will speak of dead bodies as dignity holders and beneficiaries of the law’s protections. As I will argue in Section III.A, even if decedents are the real beneficiaries, dead bodies have at least a fictional beneficiary status in the eyes of the law. And so, my talk of dead bodies as beneficiaries is an accurate, even if simplified, description of the law whether or not decedents are the real beneficiaries.²⁹⁰

The moral belief that dead bodies hold dignity interests and therefore benefit from the law’s dignity protections is compatible with the position that those protections also, or even primarily, benefit the living. Indeed, it can yield a straightforward account of why the living stand to benefit as well. On such an account, the law’s dignity protections benefit the living because the denigration of dead bodies to the status of property, waste, or animals, as well as dead bodies’ commingling, anonymity, and visual and physical abuse, all violate the

286. *Kitchen v. Wilkinson*, 26 Pa. Super. 75, 77 (1904).

287. *St. Louis Sw. Ry. Co. v. White*, 91 S.W.2d 277, 278 (Ark. 1936).

288. LA. STAT. ANN. § 8:663(A) (West 2024). Similarly, Samuel B. Ruggles referred in his influential 1856 report (in which he argued for the subject matter jurisdiction of U.S. common law courts over human remains cases) to “the Occupants of Graves” as among the stakeholders in the disinterment dispute at hand. *In re Widening of Beekman St.*, 4 Brad. 503 (N.Y. 1856); Martel, *supra* note 20, at 109. Ruggles later seemed to disambiguate those stakeholders in favor of dead bodies when picturing “[t]he skeleton of the ‘posthumous man’ . . . now legally ‘standing in court’ ” to seek redress for his “eject[ion] . . . from the grave.” RUGGLES, *supra* note 148, at 37; Martel, *supra* note 20, at 110.

289. See *infra* notes 357–361 and accompanying text.

290. Scholars have generally missed the law’s treatment of dead bodies as centers of moral concern and beneficiaries of dignity protections. Elizabeth Emens, though, makes the related observation that courts awarding emotional distress damages in breach of contract cases dealing with dead bodies tend to center those bodies rhetorically and invite readers to identify with the bodies themselves. See Emens, *supra* note 198, at 17. James Martel and Ellen Stroud, moreover, detect both inclination and hesitation among judges and lawmakers to treat dead bodies as persons. See Martel, *supra* note 20, at 110–14; Stroud, *supra* note 15, at 116–22.

dignity interests of dead bodies, and that violation, in turn, offends and upsets relatives and the public.²⁹¹

To be sure, not all courts are fully comfortable with the belief that dead bodies hold dignity interests. As we previously saw, for instance, one court hedged that the right “to have the body decently covered” was one of “[t]he only rights (*if we may call them rights*) left to the dead.”²⁹² Another court expressed similarly conflicted views when it wrote: a “corpse . . . dragged through the streets by the assailants, . . . is conceptually no longer himself personally a subject of torture or even cruelty,” but “death does not extinguish organized society’s reverence for human dignity or the law’s recognition of all aspects of life’s experience; nor does it diminish protection against life’s degradation.”²⁹³

As these examples suggest, even skeptical courts appear to embrace the beneficiary status of dead bodies, at least indirectly. They recognize that “organized society” believes that dead bodies hold dignity

291. These reactions by relatives and the public to the dignity violations of dead bodies can also explain why government officials and funeral directors stand to benefit from the law’s dignity protections. *See supra* note 273. Just as I do not mean to deny that the living, too, are beneficiaries of the law’s protections of dead bodies, I do not intend to downplay the social, economic, and political reasons for those protections. Instead, I aim to highlight that moral reasons, too, inform their protections. The moral reasons for the law’s protections, which focus on dead bodies’ dignity interests, tend to complement the social, economic, and political reasons at play. Take, for instance, the protections’ economic role in increasing the profit of licensed funeral directors. Dead bodies’ dignity interests are an important part of the product that the funeral industry sells. The causal story of how ideas about dead bodies’ dignity interests interact with the social, economic, and political interests of the living is likely multidirectional. But in whichever direction causality may run, we cannot adequately explain the laws protecting dead bodies without recognizing that those laws attribute beneficiary status and dignity interests to dead bodies. Trying to understand those laws with exclusive reference to the social, economic, and political interests of the living would be a bit like analyzing the laws governing children with exclusive reference to the emotional needs of parents, the financial interests of the toy industry, and the state’s interests in rearing a new generation of citizens, failing to recognize that those laws also treat children as moral persons who hold interests and to whom others owe duties. My thanks to Rebecca Haw Allensworth, Alexander A. Reinert, and Emily S. Taylor Poppe for prompting this clarification.

292. *Litteral v. Litteral*, 111 S.W. 872, 873 (Mo. Ct. App. 1908) (emphasis added); *see also Newman v. Sathyavaglswaran*, 287 F.3d 786, 791 (9th Cir. 2002) (speaking about the exposure of dead bodies cautiously as “an *apparent* indignity to the dead” (emphasis added, internal quotation marks omitted) (quoting *R v. Stewart* (1840) 12 AD. & E. 773, 777–78)); *State v. Glass*, 273 N.E.2d 893, 900 (Ohio Ct. App. 1971) (Stephenson, J., dissenting) (endorsing the American Law Report’s articulation that the “idea” that we ought to “let [a dead body] lie” undisturbed “is so deeply woven into our legal and cultural fabric that it is commonplace to hear it spoken of as a ‘right’ of the dead” (quoting *R. F. Martin*, Annotation, *Removal and Reinterment of Remains*, 21 A.L.R.2d 472 (1952))); *Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227, 239 (1872):

[S]trictly speaking, . . . a dead man cannot be said to have rights. Yet it is common so to speak, and the very fact of the common use of such language, and of its being used in such cases as we have quoted, justifies us in speaking of it as a right in a certain qualified sense, and a right which ought to be protected.

293. *Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 438 (S.D.N.Y. 2002); *see also Smith, supra* note 16, at 1520–21 (discussing this case).

interests, benefit from dignity protections, and suffer from dignity violations. They then defer to that belief, even if they themselves question, or reject, the soundness of attributing dignity interests to dead bodies.

If the law indeed treats dead bodies as holders of dignity interests, then the law treats dead bodies as moral persons of sorts. In the next Part, I will propose that we conceive of this moral status as “quasi-personhood.” And I will spell out in greater detail what dead bodies’ quasi-personhood entails and what conceptual work my proposed term accomplishes.

But there is an alternative interpretation of the legal protections and justifications we have seen so far that we ought to consider before moving on. As we saw, some legislatures refer to the mutilation of dead bodies as “desecrat[ion]”²⁹⁴ and some courts speak of “the sanctity of the grave.”²⁹⁵ At first blush, these expressions might seem to suggest that dead bodies in the eyes of the law are sacred or venerated objects, rather than quasi-persons.²⁹⁶ The special status of dead bodies might be akin to that of religious artifacts and national monuments: objects to which the living attach special significance and whose undignified treatment therefore injures the living in their feelings and interests, but not subjects with moral interests and vulnerabilities of their own. On this alternative interpretation, all the legislative and judicial talk of dead bodies as dignity holders would be at best figurative and at worst imprecise, but in any event not something we should understand literally.

The following Section, in which I will analyze one final legal protection, will give us the chance to consider this alternative interpretation more fully and to put it to rest.

294. *E.g.*, MISS. CODE ANN. § 97-29-25(2)(a) (West 2024); N.J. STAT. ANN. § 2C:22-1(1)(a)(2) (West 2023); S.C. CODE ANN. § 16-17-600(A) (2024).

295. *E.g.*, *Fischer’s Est. v. Fischer*, 117 N.E.2d 855, 857 (Ill. App. Ct. 1954); *Silvia v. Helger*, 67 A.2d 27, 28 (R.I. 1949).

296. Several theorists seem to embrace such an account in passing. *E.g.*, NUSSBAUM, *supra* note 139, at 155 (“[The corpse] is an especially valuable and intimate type of property, like a precious sentimental or religious artifact.”); Paul Matthews, *Whose Body? People as Property*, 36 CURRENT LEGAL PROBS. 193, 198 (1983) (suggesting that Edward Coke may have embraced the no-property rule because he treated corpses as objects “sacred to God,” “such as are churchyards, burial-places, churches, chapels, and other sacred places” (internal quotation marks omitted)).

C. Sexual

*But when an old man is killed and dogs defile his grey head,
his grey beard and his privy parts,
we plumb the depths of human degradation.*²⁹⁷

A third and final form of abuse from which American law seeks to shield dead bodies is sexual abuse: necrophilia.

Many states criminalize necrophilia as a sexual offense.²⁹⁸ States with this approach address necrophilia in the context of sexual abuse crimes against living human beings. Usually, this approach also finds expression in the names of the criminal code chapters in which these states prohibit necrophilia—such as “Sex Offenses,” “Sex Crimes,” or “Sexual Abuse.”²⁹⁹ Many other states instead criminalize necrophilia as a corpse-specific offense. By that I mean that these states treat the sexual abuse of dead bodies as parallel to other forms of corpse abuse we already saw.³⁰⁰ I will mostly bracket this corpse-specific approach to necrophilia here because its significance is covered by my analysis in the previous Section.

Some states that take the sexual-offense approach devote a stand-alone provision to necrophilia.³⁰¹ Thus, Washington, for instance, provides that “[a]ny person who has sexual intercourse or sexual

297. HOMER, *ILIAD*, XXII, ll. 74–76, *translated in* MARTEL, *supra* note 156, at 54.

298. For alternative taxonomies, see generally Kim D. Ricardo, *Necrophilia: A New Social-Harm Taxonomy of U.S. Laws*, 27 WM. & MARY J. RACE GENDER & SOC. JUST. 351 (2021); Troyer, *supra* note 16; Tyler Trent Ochoa & Christine Newman Jones, *Defiling the Dead: Necrophilia and the Law*, 18 WHITTIER L. REV. 539 (1997).

299. *E.g.*, CONN. GEN. STAT. ANN. § 53a-73a (West 2023); GA. CODE ANN. § 16-6-7 (West 2023) (“Sexual Offenses”); IDAHO CODE ANN. § 18-6603 (West 2024); IOWA CODE ANN. § 709.18 (West 2023).

300. Several states do so by criminalizing necrophilia within the same or adjacent statutory provisions as corpse mutilation or disturbance. *E.g.*, ARIZ. REV. STAT. ANN. § 32-1364 (2024); N.C. GEN. STAT. ANN. §14-401.22(c) (West 2023); 11 R.I. GEN. LAWS ANN. § 11-20-1.2 (West 2024). More states do so by treating necrophilia as an instance of the “abuse of a corpse” crime that we encountered in the context of mutilation. *E.g.*, KY. REV. STAT. ANN. § 525.120 (West 2023) (defining corpse abuse as treatment of a corpse that “would outrage ordinary family sensibilities”); KY. REV. STAT. ANN. § 525.120 1974 Kentucky Crime Commission/LRC commentary (West 2023) (“[The provision] is intended to include any form of sexual contact, sexual abuse, physical abuse, gross neglect or mutilation.”); OHIO REV. CODE ANN. § 2927.01(A) (West 2023) (defining corpse abuse as treatment of a corpse that the perpetrator “knows would outrage reasonable family sensibilities”); OHIO REV. CODE ANN. § 2927.01 1973 Legislative Service Commission commentary (West 2023) (“[This section] also includes other kinds of conduct, such as copulating with or otherwise mistreating a corpse.”); *see also, e.g.*, FLA. STAT. ANN. § 872.06 (West 2023) (defining corpse abuse as including necrophilia); 720 ILL. COMP. STAT. ANN. 5/12-20.6(b)(1) (West 2023) (same); IND. CODE ANN. § 35-45-11-2(2) (West 2023) (same); OR. REV. STAT. ANN. § 166.087(1)(a) (West 2023) (same); UTAH CODE ANN. § 76-9-704(2)(e) (West 2023) (same).

301. *E.g.*, GA. CODE ANN. § 16-6-7 (West 2023); IDAHO CODE ANN. § 18-6603 (West 2024); NEV. REV. STAT. ANN. § 201.450 (West 2023).

contact with a dead human body is guilty of a . . . felony,” and locates this provision next to others criminalizing rape, child molestation, and voyeurism.³⁰² Other states address necrophilia within the same statutory provision as other sexual offenses. Connecticut, for example, lists necrophilia as an instance of “sexual assault” alongside such other instances as statutory rape and any “sexual contact without such other person’s consent.”³⁰³ New York criminalizes necrophilia as an instance of “sexual misconduct” alongside bestiality and nonconsensual sex under the title heading “Offenses *Against the Person* Involving Physical Injury, Sexual Conduct, Restraint and Intimidation.”³⁰⁴ And the Wisconsin Supreme Court has interpreted Wisconsin’s sexual assault statute to encompass necrophilia.³⁰⁵ That statute criminalizes sexual assault of another “person” and provides that it “applies whether a victim is dead or alive at the time of the sexual contact or sexual intercourse.”³⁰⁶ The court read this provision literally and therefore held that the statute applied not only in cases in which the accused caused the death of the victim but also in cases, such as the one at hand, in which the victim had died independently.³⁰⁷ Other states bar just necrophilia and bestiality together within the same statutory provision. North Dakota, for instance, criminalizes “deviate sexual act[s],”³⁰⁸ which it defines as “any form of sexual contact with an animal, bird, or dead person.”³⁰⁹ And Minnesota refers to the sexual abuse of dead bodies as an instance of bestiality, providing: “Whoever carnally knows a dead body or an animal or bird is guilty of bestiality.”³¹⁰

The combination of necrophilia and bestiality, as well as the language of “deviate” sexual acts, harken back to “crime against nature” statutes that historically sometimes preceded the necrophilia statutes we have seen.³¹¹ Idaho offers the most recent example of such a

302. WASH. REV. CODE ANN. § 9A.44.105(1) (West 2023).

303. CONN. GEN. STAT. ANN. § 53a-73a (West 2023).

304. N.Y. PENAL LAW § 130.20 (McKinney 2024); *id.* tit. H (emphasis added).

305. *State v. Grunke*, 752 N.W.2d 769, 780 (Wis. 2008).

306. WIS. STAT. ANN. § 940.225(3), (7) (West 2023).

307. *Grunke*, 752 N.W.2d at 780.

308. N.D. CENT. CODE ANN. § 12.1-20-12 (West 2023).

309. *Id.* § 12.1-20-02(2); *see also* HAW. REV. STAT. ANN. § 707-700 (West 2023) (defining “deviate sexual intercourse” as “any act of sexual gratification between a person and an animal or a corpse”); *cf.* HAW. REV. STAT. ANN. § 712-1200 (West 2023) (criminalizing “deviate sexual intercourse” that occurs in exchange for payment).

310. MINN. STAT. ANN. § 609.294 (West 2023).

311. Such statutes are still on the books in several states. *E.g.*, LA. STAT. ANN. § 14:89 (2024); MASS. GEN. LAWS ANN. ch. 272, § 34 (West 2023); MICH. COMP. LAWS ANN. § 750.158 (West 2023); MISS. CODE ANN. § 97-29-59 (West 2024); N.C. GEN. STAT. ANN. § 14-177 (West 2023); OKLA. STAT. ANN. tit. 21, § 886 (West 2024); 11 R.I. GEN. LAWS § 11-10-1 (West 2024). Courts have invalidated crime against nature statutes as applied to sexual acts between consenting adults in private. *E.g.*,

succession. Until 2022, Idaho included a provision in its chapter on “Sex Crimes” that read: “Every person who is guilty of the infamous crime against nature, committed with mankind or with any animal, is punishable by imprisonment in the state prison not less than five years.”³¹² The Idaho Legislature repealed this statute in 2022 and replaced it with two provisions—one criminalizing the “sexual abuse of an animal,”³¹³ the other the “sexual abuse of human remains.”³¹⁴ In its bill effecting these changes, the Legislature explained that it was repealing the “crime against nature” provision because it was “an antiquated and unclear statute,” and that it was adding the provisions against bestiality and necrophilia because those “two offenses . . . criminalize behavior which was clearly prohibited by the Infamous Crime Against Nature.”³¹⁵ The Idaho Legislature, in other words, took for granted that “mankind” in the previous wording had included dead bodies.³¹⁶

* * *

Having surveyed the sexual-offense approach that many states take to necrophilia, we can return to the anticipated objection that the law views dead bodies not as quasi-persons but only as venerated or sacred objects. On this alternative interpretation, states would be criminalizing necrophilia as a kind of corpse desecration, akin, say, to

Gryczan v. State, 942 P.2d 112 (Mont. 1997) (same sex); Powell v. State, 510 S.E.2d 18 (Ga. 1998) (different sexes).

312. IDAHO CODE ANN. § 18-6605 (West 1972) (repealed 2022).

313. *Id.* § 18-6602 (West 2024).

314. *Id.* § 18-6603.

315. S. 1325, 6th Leg., 2d Reg. Sess., Statement of Purpose (Idaho 2022).

316. Historically, a more prominent target of that formulation was homosexual sex or “sodomy.” Some predecessors to necrophilia statutes in fact expressly outlawed both necrophilia and consensual sodomy within the same provision. *E.g.*, N.Y. PENAL LAW § 690(5) (McKinney 1950) (repealed 1967); WASH. REV. CODE ANN. § 9.79.100 (West 1937) (repealed 1975). Finally, several states take the sexual-offense approach in necrophilia cases that I’m bracketing here: cases of attempted rape in which the defendant kills the victim and then has sexual intercourse with the victim’s dead body. *See* Ochoa & Jones, *supra* note 298, at 552–56. Several state courts have convicted defendants in such cases of murder and rape, as opposed to murder and attempted rape. The Georgia Supreme Court, for instance, upheld such a conviction because it found that the defendant’s conduct satisfied the statutory elements of force and lack of consent. With respect to the latter, it reasoned that since the element was satisfied in cases in which a victim “was drugged, asleep, unconscious, or in a coma,” there was “no reason why it should be any less applicable in a case in which the defendant has rendered the victim permanently unconscious by killing her.” Lipham v. State, 364 S.E.2d 840, 842 (Ga. 1988); Ochoa & Jones, *supra* note 298, at 552–53. These comparisons between dead bodies and unconscious or sleeping humans support my argument. But they also speak to an equity concern not to reward defendants for killing their victims just prior to forced sexual intercourse. And they further speak to the frequently gradual transition of a dying human from life to death that seems to defy the identification of a sharp point of rupture between living human and dead body.

masturbating on a national monument. But this alternative interpretation has little to recommend it.

States taking the sexual-offense approach treat dead bodies as moral persons of sorts who are vulnerable to sexual abuse. As we saw, they sometimes apply the labels “person[s],”³¹⁷ “victim[s],”³¹⁸ and “mankind” to dead bodies.³¹⁹ They repeatedly speak of necrophilia as the “sexual abuse” of dead bodies.³²⁰ Legislatures sometimes criminalize necrophilia in combination with bestiality, suggesting a comparison between dead bodies and living animals.³²¹ Sometimes, they instead criminalize necrophilia in the same or in parallel statutory provisions as sexual contact with living human beings who are incapacitated.

These legislatures and courts attribute a moral status to dead bodies that puts them well above venerated and sacred objects. States appear to situate them on a spectrum that reaches toward living human beings and puts them in the vicinity of living animals. This elevated moral status also helps explain why those states often punish necrophilia more severely than the desecration of a venerated object.³²² At the most punitive end, Nevada imposes a minimum sentence of five years and a maximum sentence of life with the possibility of parole for necrophilia, while punishing the desecration of flags, for instance, as a misdemeanor.³²³

Dead bodies’ elevated moral status is also consistent with the corpse-specific approach that many states take toward necrophilia. In the previous Section, we already saw many instances of those states treating dead bodies as victims of abuse and as beneficiaries of the law’s protections. In addition, several of those states, like states taking the sexual-offense approach, punish necrophilia more severely than

317. *E.g.*, N.Y. PENAL LAW tit. H (McKinney 2024) (including § 130.20); N.D. CENT. CODE ANN. § 12.1-20-02(2) (West 2023); WIS. STAT. ANN. § 940.225(3) (West 2023).

318. *E.g.*, WIS. STAT. ANN. § 940.225(7) (West 2023); *State v. Grunke*, 752 N.W.2d 769, 771 (Wis. 2008).

319. IDAHO CODE ANN. § 18-6605 (West 1972) (repealed 2022); *see supra* notes 312–316 and accompanying text.

320. *E.g.*, IDAHO CODE ANN. § 18-6603 (West 2024); IOWA CODE ANN. § 709.18 (West 2023).

321. *Supra* notes 304, 308–310, 313–314 and accompanying text.

322. *E.g.*, GA. CODE ANN. §§ 16-6-7, 50-3-1(b) (West 2023) (punishing necrophilia with imprisonment between one and ten years and flag desecration as a misdemeanor); IDAHO CODE ANN. §§ 18-3401, -6603 (West 2024) (punishing necrophilia with imprisonment of up to five years and flag desecration as a misdemeanor); IOWA CODE ANN. §§ 709.18, 718A.1A (West 2023) (punishing necrophilia as a class D felony and flag desecration as a simple misdemeanor); WASH. REV. CODE ANN. §§ 9A.06.030, 9A.44.105(1) (punishing necrophilia as a class C felony and flag desecration as a gross misdemeanor). *But see, e.g.*, CONN. GEN. STAT. ANN. §§ 53a-73a, -258(a) (West 2023) (punishing both necrophilia and flag desecration as Class A misdemeanors); N.D. CENT. CODE ANN. §§ 12.1-07-02, 12.1-20-02(2) (West 2023) (same).

323. NEV. REV. STAT. ANN. §§ 201.290, .450 (West 2023).

desecration crimes.³²⁴ Moreover, several of those states suggest that dead bodies share similarities with living animals. They criminalize necrophilia as well as the mutilation and disturbance of dead bodies, in conformity with the Model Penal Code,³²⁵ right next to their laws criminalizing animal cruelty.³²⁶

Finally, dead bodies' moral status on a spectrum toward living humans and in the vicinity of living animals is consistent with all the other legal protections discussed above: ensuring dead bodies' elevated moral status as compared to property, waste, and dead animals; their respect as individuals with names; and their covering and undisturbed repose. The dignity interests that these protections attribute to dead bodies make more sense if the law views dead bodies as akin to living beings rather than venerated or sacred objects. Take, for instance, the interest in undisturbed repose that courts often capture with the language of sleep, such as the proclamation we saw by a New Mexico court: "Let [the dead body] sleep on wholly oblivious to the turmoil that rages above it. *Requiescat in pace!*"³²⁷ The court says this as though the dead body would cease to be oblivious to the turmoil that rages above it once disinterred. Of course, we are not to take this suggestion of latent consciousness, nor the talk of sleep, literally. They are metaphors. But even as metaphors they make more sense if they can draw on some shared understanding that dead bodies have an almost lifelike nature that sets them apart from things, even sacred things, and positions them somewhere in the vicinity of living beings.

But if this is right and the law puts dead bodies well above venerated objects, what are we to make of legislatures' and courts' talk of desecration? A closer look reveals that the law regards dead bodies as entities that *give* gravesites and other grave-related objects their venerated status, rather than as venerated objects themselves. When legislatures outlaw the "desecration of venerated objects,"³²⁸ for instance, the objects they usually list in parallel to monuments and

324. Namely, as a felony with sentences of up to ten or fifteen years, while punishing the desecration of venerated objects and flags as a misdemeanor. *E.g.*, ALA. CODE §§ 13A-11-12 to -13 (2023); FLA. STAT. ANN. §§ 256.09, 872.06 (West 2023).

325. MODEL PENAL CODE §§ 250.10, .11 (AM. L. INST., Proposed Official Draft 1962).

326. *E.g.*, ALA. CODE §§ 13A-11-13 to -14 (2023); ALASKA STAT. ANN. §§ 11.61.130 to .140 (West 2023); HAW. REV. STAT. ANN. §§ 711-1108 to -1109 (West 2023); KY. REV. STAT. ANN. §§ 525.120 to .135 (West 2023); N.H. REV. STAT. ANN. §§ 644:7 to :8 (2023); TEX. PENAL CODE ANN. §§ 42.08 to .092 (West 2023).

327. *Theodore v. Theodore*, 259 P.2d 795, 798 (N.M. 1953).

328. *E.g.*, N.J. STAT. ANN. § 2C:33-9 (West 2023).

religious artifacts are “place[s] of . . . burial,”³²⁹ “cemetery[ies],”³³⁰ “grave[s],”³³¹ “tomb[s],”³³² and “grave marker[s]”³³³—not dead bodies.³³⁴ The law, in other words, treats dead bodies in parallel to, say, the nation that grounds a national monument’s venerated status or to the god that bestows a religious artifact with its sacred status, rather than to monuments or artifacts.³³⁵

It is possible, as I noted earlier, that the law frequently embraces dead bodies’ beneficiary status indirectly rather than directly: as a moral belief espoused by the public rather than by any given judge or legislator. But even if indirect, its embrace tends to be wholehearted. Judges and legislators, that is, do not usually dismiss the public belief in dead bodies’ beneficiary status as a folk superstition to which they defer with regret. In the necrophilia context, for instance, they do not condemn the law’s protections of dead bodies as enshrining morally unjustified feelings of disgust.³³⁶ Nor have they repealed them alongside sodomy laws or rendered them a dead letter.³³⁷

329. *E.g.*, HAW. REV. STAT. ANN. § 711-1107 (West 2023); ME. REV. STAT. ANN. tit. 17-a, § 507 (2024); N.J. STAT. ANN. § 2C:33-9 (West 2023); 18 PA. STAT. AND CONS. STAT. ANN. § 5509 (West 2023).

330. *E.g.*, CONN. GEN. STAT. ANN. § 53a-218 (West 2023); OHIO REV. CODE ANN. § 2927.11 (West 2023); 11 R.I. GEN. LAWS ANN. § 11-44-31 (West 2024); WIS. STAT. ANN. § 943.012 (West 2023).

331. *E.g.*, KAN. STAT. ANN. § 21-6205 (West 2023).

332. *E.g.*, CONN. GEN. STAT. ANN. § 53a-218 (West 2023).

333. *E.g.*, *id.* § 19a-315b; *see also, e.g.*, OHIO REV. CODE ANN. § 2927.11 (West 2023) (“commemorative marker”).

334. *But see* GA. CODE ANN. § 36-72-1(a) (West 2023) (“[H]uman remains and burial objects are a part of the finite, irreplaceable, and nonrenewable cultural heritage of the people of Georgia which should be protected.”).

335. All of these sources of venerated object status—not just dead bodies, but also the nation and god—may well be moral interest holders, beneficiaries, and potential victims in the eyes of the law. *See, e.g.*, Ela A. Leshem, *Laws and Contracts Across Generations: The State as a Moral Person* (Sept. 14, 2023) (manuscript on file with author). This is not to say that the thing/person axis is the only axis of value or meaning in the eyes of the law. Art, for instance, might fall on an altogether different axis, where the relevant value is aesthetic rather than moral. Nor is it to say that in any imaginable legal system dead bodies always fall on the thing/person axis, let alone that they should so fall. But U.S. laws, descriptively speaking, place dead bodies on a thing/person axis. My thanks to Daniel Markovits for prompting this clarification.

336. According to Nussbaum, disgust is a particularly treacherous emotion that risks death denial and writing off certain acts or people as subhuman and animalistic. NUSSBAUM, *supra* note 139, at 122–23; *see also* Nina Strohminger, *Disgust Talked About*, 9 PHIL. COMPASS 478, 478 (2014) (offering a broad, empirically based understanding of disgust).

337. Necrophilia cases are rare, but states do prosecute them. *E.g.*, *State v. Grunke*, 752 N.W.2d 769, 780 (Wis. 2008). While about a dozen states do not have necrophilia statutes, there is little indication that this omission speaks to a principled commitment against them. Often, such states enact a necrophilia prohibition after a necrophilia case occurs that garners attention. *See, e.g.*, WASH. REV. CODE ANN. § 9A.44.105 (West 2023) (codifying a bill that was introduced shortly after the arrest of the defendant in *State v. Ryan*, 899 P.2d 825 (Wash. Ct. App. 1995)); *Doyle v. State*, 921 P.2d 901, 917 (Nev. 1996) (Steffen, C.J., concurring in part and dissenting in part).

Indeed, courts often speak of the belief in dead bodies as moral interest holders, beneficiaries, and victims as one so deeply woven into our emotional and moral fabric that we would be compromising our own humanity if we were to abandon it. The Georgia Supreme Court made this point when it wrote that the “sentiments connected with decently disposing of the remains of the departed . . . furnish one ground of difference between men and brutes.”³³⁸ I take it that some of the more sweeping judicial pronouncements we saw get at a similar point, among them, that the duty to care for dead bodies is “imposed by the universal feelings of mankind”³³⁹ and “[g]ood morals—decency—our best feelings.”³⁴⁰ These pronouncements suggest that courts regard the moral belief that dead bodies hold dignity interests as too fundamental to be questioned. In that, the law treats the human dignity of dead bodies as a moral axiom, not unlike the human dignity of living humans.

These moral beliefs bring us back to the status anxieties with which we began. If, in the eyes of the law, the unembellished sight and disposition of dead bodies indeed threaten to reduce humans to their material and animal nature, then we should not be surprised that the law views a commitment to dead bodies’ dignified disposition as constitutive of our humanity. Nor should it surprise us that it views violations of dead bodies’ dignity as an assault also on the personhood of the living humans who preceded them.

III. QUASI-PERSONS

*All your buried corpses now begin to speak.*³⁴¹

I have argued thus far that the law attributes dignity interests to dead bodies and that it seeks to protect those dignity interests in a

(noting that NEV. REV. STAT. ANN. § 201.450 (West 2023) was enacted into law as a result of a necrophilia incident).

338. *Louisville & Nashville R.R. Co. v. Wilson*, 51 S.E. 24, 25 (Ga. 1905). This point also helps explain why those who seek the legal recognition of animals’ elevated moral status sometimes emphasize, among other things, the burial practices and grieving capacities of those animals. In a recent case, for instance, in which animal rights activists petitioned New York courts for a writ of habeas corpus on behalf of Happy, an elephant in the Bronx Zoo, the dissenters and amici stressed Happy’s “awareness of death and . . . capacity to grieve” as evidence of her elevated moral status. *In re Nonhuman Rights Project, Inc. v. Breheny*, 197 N.E.3d 921, 969 (N.Y. 2022) (Rivera, J., dissenting).

339. *Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227, 238 (1872).

340. *In re Kanavan*, 1 Me. 226, 227 (1821); see also *Seaton v. Commonwealth*, 149 S.W. 871, 873 (Ky. 1912) (“the sense of decency”); *Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 438 (S.D.N.Y. 2002) (“all aspects of life’s experience”).

341. I AM NOT YOUR NEGRO, at 1:05:27 (Velvet Film 2016) (James Baldwin).

variety of ways. The law, for instance, tries to ensure that dead bodies be treated as distinct from and better than property, waste, and animal carcasses and that they be respected as individuals with a name. It also protects their covering, undisturbed repose, and bodily integrity against visual, physical, and sexual abuse. One way to make sense of these protections is to see them as ensuring that dead bodies be treated in accordance with their liminal moral status. In the eyes of the law, dead bodies hold a status between things and persons, above venerated objects and below living human beings, perhaps in the vicinity of living animals.

In this Part, I propose that we capture dead bodies' liminal moral status with the term "quasi-personhood." This term almost never features in judicial opinions or legal scholarship on dead bodies or other inanimate entities.³⁴² But, as I will show, it builds on the familiar categorization of dead bodies as quasi-property in ways that illuminate important aspects of how the law views their moral status. I will then offer an account of how the law does or does not allow decedents (the individuals who died) and their relatives to modify dead bodies' dignity interests through consensual choices.

Throughout this Part, I continue to focus on unearthing and analyzing the law's latent normative account of dead bodies' status and interests. My aim is to make sense of the law's provocative view that dead bodies are worthy of dignity protections in their own right. As I will contend in Part IV, this view has important normative and practical implications whether or not it is ultimately justified.

A. Quasi-Personhood and Quasi-Property

Father McKenzie
Writing the words of a sermon that no one will hear
No one comes near
Look at him working
Darning his socks in the night when there's nobody there
*What does he care?*³⁴³

By "quasi-persons," I mean entities with a moral status between thing and person. Unlike things, quasi-persons hold interests or

342. See *supra* note 20 (discussing uses of the term "quasi-person" in case law and scholarship, such as judges' historical references to partnerships and Angela Fernandez's conception of the legal status of nonhuman animals).

343. THE BEATLES, *Eleanor Rigby*, on REVOLVER (EMI 1966).

responsibilities.³⁴⁴ Unlike persons, quasi-persons hold only a subset of the interests and responsibilities usually associated with full moral personhood.³⁴⁵ In this sense, dead bodies, as we have seen, are quasi-persons in the eyes of the law. They hold a narrow set of dignity interests, and no responsibilities.³⁴⁶

The concept of quasi-personhood builds on the concept of quasi-property that judges and scholars have applied to dead bodies for more than a century. It does so in three ways, each of which highlights an important feature of the moral status of dead bodies in the eyes of the law.

First, dead bodies' quasi-personhood forms the flipside of their quasi-property status. If dead bodies were mere things, they could be full property. If dead bodies were full persons, they could not be any kind of property. But because dead bodies are neither things nor persons but in-between, they can be quasi-property. The in-between personhood status of dead bodies thus corresponds to their in-between property status.³⁴⁷

344. They need not, and often do not, hold both. Dead bodies, for instance, have certain interests, but no responsibilities in the eyes of the law. And antebellum laws in slave states perversely tended to treat enslaved Black Americans as having certain responsibilities (for instance, under criminal law), but no interests. See VISA KURKI, A THEORY OF LEGAL PERSONHOOD 120 (2019); cf. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1718–20 (1993) (describing “[t]he dual and contradictory character of slaves as property and persons”).

345. This is consistent with Fernandez, who defines quasi-persons in the context of animals as having a legal status between property and persons and holding only a subset of the legal rights usually associated with full legal personhood. See generally Fernandez, *A Quasi Approach*, *supra* note 20. But my focus is on the law's conception of moral quasi-personhood that underpins dead bodies' legal status. Moreover, as applied to dead bodies (in contrast to animals), quasi-personhood can build directly on their existing judicial categorization as quasi-property. That helps us understand how the two concepts are connected and how both allow for a realist and fictionalist understanding. *Infra* notes 354–364 and accompanying text.

346. See, e.g., *St. Louis Sw. Ry. Co. v. White*, 91 S.W.2d 277, 278 (Ark. 1936) (noting that “in one sense this dead body was neither a person nor property,” and that “[i]t had the right of sepulture” and “could not be cast aside or mutilated as an inanimate object, having neither rights nor value to any one”). Dead bodies' liminal moral status is distinct from, albeit related to, their liminal biological and social status between life and disappearance. Cf. KRISTEVA, *supra* note 138, at 4 (viewing corpses as examples of “[t]he in-between, the ambiguous, the composite”); Victor W. Turner, *Betwixt and Between: The Liminal Period in Rites de Passage*, in PROCEEDINGS OF THE AMERICAN ETHNOLOGICAL SOCIETY 4–20 (1964) (building on the concept of “liminality” introduced by Arnold van Gennep and laying the conceptual foundation for thinking of corpses undergoing funeral rites as liminal).

347. On my use of the terms, quasi-personhood and quasi-property refer to two ways of looking at the status of a given entity on the thing/person spectrum rather than to different ends of that spectrum. Which is to say, dead bodies are both quasi-persons and quasi-property no matter where exactly on the moral spectrum between thing and person they may fall (as long as they indeed fall in between). Compared to full dead bodies, for instance, partial human remains often occupy a place on the spectrum that is closer to the “thing” end. See *infra* Section III.B. Yet, partial human remains still constitute quasi-persons and quasi-property in the eyes of the law. My thanks to Ron Levin for prompting this clarification.

Second, the relationship between quasi-personhood and moral personhood mirrors the relationship between quasi-property and property. Quasi-property, as we saw, implicates just a subset of the rights usually associated with property: rights to possess, exclude, and dispose, but not, for instance, rights to use, transfer, enjoy profits, and destroy.³⁴⁸ Similarly, quasi-personhood implicates only a subset of the moral interests and responsibilities often associated with full moral personhood. In the case of dead bodies, that subset comprises dignity interests and not, for instance, autonomy interests, welfare interests, and a responsibility not to harm others.³⁴⁹ What is more, the moral interests implicated by dead bodies' quasi-personhood give rise to the property rights implicated by their quasi-property status. Dead bodies' dignity interests entail a corresponding moral duty in others to ensure their dignified disposition and continued rest; and it is that duty that the law seeks to facilitate by recognizing a limited set of proprietary interests in dead bodies.

The law's recognition that next of kin have a duty to dispose of their relative's body in a dignified manner points to a significant difference between my account of quasi-property and Shyamkrishna Balganesh's influential account. Balganesh, like most property theorists, divides the world into things and persons. He therefore assumes that the law treats dead bodies as *res* (things) and does not view quasi-property rights in dead bodies as structured around a duty of care toward them.³⁵⁰ He explains the law's situationally limited allocation of property rights to next of kin exclusively by pointing to the

348. *Supra* notes 58–61 and accompanying text.

349. It is possible that the analogy extends even more deeply and that the law conceives of moral personhood, similar to property, as a bundle of incidents, not all of which need be present for there to be a moral person in the eyes of the law. But unlike the bundle conception of property, which is a mainstay of property theory, the law's bundle conception of moral personhood has gone nearly unnoticed. *Cf.* Anna di Robilant, *Property: A Bundle of Sticks or a Tree?*, 66 VAND. L. REV. 869, 870–71 (2013) (discussing the contemporary dominance of the bundle concept in U.S. property law). To show that the bundle theory offers a compelling account of the law's more general approach to moral personhood would take an extensive analysis of other areas of law, which is beyond the scope of this Article. Related accounts can be found in Visa Kurki's bundle theory of legal personhood, as well as in Richard Tur's and Ngaire Naffine's proposals that the law has a cluster conception of legal personhood, though none of these accounts focus on the law's underpinning approach to moral personhood. *See generally* KURKI, *supra* note 344; Ngaire Naffine, *When Does the Legal Person Die? Jeremy Bentham and the 'Auto-Icon,'* 25 AUSTL. J. LEGAL PHIL. 79, 87 (2000); Richard Tur, *The 'Person' in Law*, in PERSONS AND PERSONALITY: A CONTEMPORARY INQUIRY 122 (Arthur Peacocke & Grant Gillett eds., 1987).

350. Balganesh, *supra* note 16, at 1904. This assumption is understandable because Balganesh develops a theory of quasi-property that seeks to capture all instances of quasi-property, including hot news, trademarks, and trade secrets. His focus on the common features shared by all those instances, however, risks obscuring what is unique about the law's quasi-property approach to dead bodies.

law's aim of protecting next of kin against emotional anguish and its embrace of anti-commodification instincts around dead bodies.³⁵¹

On my interpretation of the law's approach to dead bodies, those explanations are correct, but not exhaustive. The law also aims to facilitate next of kin's duty to dispose of dead bodies with dignity. This additional aim is not fully reducible to the aim of protecting relatives' feelings, as can be seen from the fact that the common law historically recognized an enforceable duty to dispose of dead bodies with dignity.³⁵² Indeed, a few U.S. states still threaten to hold next of kin who refuse to arrange and, if necessary, pay for the disposition of their relatives liable for the expenses of burial.³⁵³ Moreover, next of kin may feel emotional anguish when their relatives' bodies are treated in an undignified manner because they view dead bodies as quasi-persons. That same view may also stand behind the anti-commodification instincts that Balganesch argues motivate the law's treatment of dead bodies as quasi-property (rather than property). In this sense, my account of quasi-property, albeit distinct, complements Balganesch's.

Turning to the third way in which the concept of quasi-personhood builds on the concept of quasi-property, there is a realist and a fictionalist way of understanding the quasi-personhood of dead bodies, just as there is a realist and a fictionalist way of understanding their quasi-property status. On a realist understanding, the law regards dead bodies themselves as moral interest holders. As moral interest holders, dead bodies really are moral persons in the eyes of the law. But the moral interests that dead bodies hold are highly limited, comprising just a narrow set of interests among those typically held by full moral persons. For that reason, dead bodies are only *quasi*-persons rather than full moral persons.³⁵⁴ On the realist understanding, the

351. *Id.* at 1904, 1914–15.

352. *See, e.g.*, *R v. Stewart* (1840) 113 Eng. Rep. 1007, 1009, 12 Ad. & El. 773, 778 (“[T]he individual under whose roof a poor person dies is bound to carry the body decently covered to the place of burial.”); MARSH, *supra* note 14, at 80.

353. *E.g.*, W. VA. CODE ANN. § 9-5-9 (West 2023).

354. The realist understanding is largely consistent with a belief held by some contemporary philosophers that a human corpse stands in a relationship of personal identity to the living human being it once was. *See, e.g.*, Eric Olson, *The Person and the Corpse*, in *THE OXFORD HANDBOOK OF PHILOSOPHY OF DEATH* 80, 80–82, 87 (Ben Bradley et al. eds., 2013) (analyzing this position under the label “corpse survivalism”). On this view, a person existed as a body in life and continues to exist as a body in death—hence the dead body really is a moral person. But as Parts I and II make clear, the moral status that the law assigns to dead bodies is significantly lower than that of living human beings. Most states, for instance, treat necrophilia as a crime that is significantly less grave than rape. For that reason, the dead body on a realist understanding of the law cannot be said to be a full person; it is only a quasi-person. In the eyes of the law, the dead body thus stands in a relationship of personal identity to the living human only in the sense of being the same entity (i.e., the same human being) and not in the sense of being the same person (i.e., having the same moral status).

qualification “quasi” thus denotes a difference in degree rather than kind. Dead bodies are to some degree moral persons, just as they are to some degree property under a realist account of quasi-property.

By contrast, on a fictionalist understanding, the law regards the decedents as those who really hold that narrow set of dignity interests. The decedents (whether gone forever or still present in an afterlife), and not dead bodies themselves, stand to benefit or lose from the law’s dignity protections.³⁵⁵ But dead bodies are decedents’ remaining physical manifestation in the world. And so, decedents’ dignity interests are inextricably tied to their dead bodies. As a result, it is *as if* dead bodies themselves were holding those interests. On the fictionalist understanding, the qualification “quasi” thus denotes a difference in kind rather than degree. Dead bodies are “like, but not quite” moral persons—just as they are “like, but not quite” property according to Balganesch’s fictionalist account of quasi-property.³⁵⁶

As we saw, legal actors are not always clear as to which understanding of the quasi-personhood of dead bodies—realist or fictionalist—they embrace. Some legislators and judges use such ambiguous phrases as “the dead” or “those interred in the cemetery”³⁵⁷ to refer to the interest holders, which could point to either understanding. Some speak of the “[dead human] body” as holding dignity interests, suggesting a realist understanding.³⁵⁸ Others speak of the “decedent,” suggesting a fictionalist understanding.³⁵⁹ Even these expressions, however, entail metaphysical ambiguity. For example, a “decedent” could refer to the person the decedent once was, but who ceased to exist at death.³⁶⁰ Or it could refer to the person the decedent

355. For a powerful example of such a fictionalist account, see HERZOG, *supra* note 196, at 213, 217 (2017).

356. Balganesch, *supra* note 16, at 1894. It is possible that fictionalist/realist beliefs about quasi-personhood sometimes influence fictionalist/realist beliefs about quasi-property. A judge who conceives of dead bodies as real moral persons may be less inclined to believe that next of kin have real property interests in them than a judge who conceives of them as fictional moral persons.

357. *E.g.*, LA. STAT. ANN. § 8:663(A) (2024).

358. *E.g.*, St. Louis Sw. Ry. Co. v. White, 91 S.W.2d 277, 278 (Ark. 1936); Kitchen v. Wilkinson, 26 Pa. Super. 75, 77 (1904); *see supra* notes 286–287 and accompanying text.

359. *E.g.*, MD. CODE ANN., HEALTH OCC. § 7-603(d)(1) (West 2023) (instructing licensed employees to “[t]reat every decedent with the utmost dignity” when transporting human remains); Martin v. Dennett, 626 P.2d 473, 475 (Utah 1981) (explaining that burial expenses take priority over federal tax liens to “recognize[] and assure[] a decedent the right to a decent burial”); Koerber v. Patek, 102 N.W. 40, 45 (Wis. 1905) (describing next of kin’s duty to bury their relative as owed to “the relative, of whom the body, it is true, is but the symbol, but, for the few hours after life ceases, seems . . . to still represent him who was”); *see supra* note 288 and accompanying text.

360. Some philosophers believe that the law in this case would need to assume the possibility of posthumous harm, which is controversial. The camp of philosophers who embrace the possibility includes, for example, DAVID BOONIN, DEAD WRONG: THE ETHICS OF POSTHUMOUS HARM (2019); 1 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS 79–83 (1984); STEVEN LUPER, THE PHILOSOPHY OF DEATH 97–121 (2009); Barbara Baum Levenbook, *Harming*

continues to be beyond death, in which case the law must be assuming the existence of an afterlife. In any case, it is reasonable for government actors not to resolve these ambiguities fully. Different moral and metaphysical beliefs about dead bodies and decedents, as well as about the afterlife, have dominated American death culture at different times and continue to coexist.³⁶¹ So we should expect the law to incorporate and accommodate a range of different, sometimes inconsistent beliefs.

The concept of quasi-personhood accomplishes explanatory work regardless of whether we adopt a realist or fictionalist understanding. Even on a fictionalist understanding, where the decedents really hold the dignity interests that the law at times attributes to dead bodies themselves, we cannot eliminate the quasi-personhood of dead bodies without explanatory loss.³⁶² If we only posited the personhood of the decedents and left out the quasi-personhood of dead bodies, we would fail to explain the unique place that the law accords to dead bodies as compared to everything else that decedents leave behind—be it their physical property, their intellectual property, or their reputation.³⁶³ As my analysis in Parts I and II showed, the law accords dead bodies elaborate protections. It is explicit about treating them not as property but as entities with elevated moral status. And as we will see in the next Section, the law insists on some of its protections for dead bodies even if the decedents tried to waive them before their death. Recognizing that the law treats dead bodies at the very least *as if* they were quasi-persons helps make sense of these features.³⁶⁴

Finally, the law's assignment of dignity interests to dead bodies, out of the full suite of moral interests, is comprehensible. Dead bodies

Someone After His Death, 94 ETHICS 407 (1984); George Pitcher, *The Misfortunes of the Dead*, 21 AM. PHIL. Q. 183 (1984). The camp of philosophers who reject the possibility includes, for example, Joan C. Callahan, *On Harming the Dead*, 97 ETHICS 341 (1987); Ernest Partridge, *Posthumous Interests and Posthumous Respect*, 91 ETHICS 243 (1981); James Stacey Taylor, *The Myth of Posthumous Harm*, 42 AM. PHIL. Q. 311 (2005).

361. See DAWDY, *supra* note 130, at 143–44, 210–12; Edwin Dethlefsen & James Deetz, *Death's Heads, Cherubs, and Willow Trees: Experimental Archaeology in Colonial Cemeteries*, 31 AM. ANTIQUITY 502, 502–03 (1966). Dawdy, for instance, notes that during the heyday of embalming in the late nineteenth and twentieth century, “the body *was* the person,” whereas earlier decades had been dominated by afterlife beliefs. DAWDY, *supra* note 130, at 210.

362. My thanks to Quinn White for raising the eliminativist objection prompting this discussion.

363. For instance, elaborate protections for decedents' physical property, unlike for dead bodies, presuppose a will. Copyright—in contrast to protections for a gravesite—expires seventy years after death. And most states do not offer legal protections for decedents' reputation through defamation suits. See, e.g., HERZOG, *supra* note 196, at 64–65, 216–18; RAY D. MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD 121–22, 125 (2010).

364. The realist versus fictionalist distinction does not map onto the natural versus artificial distinction that the law often applies to legal persons. Dead bodies are natural legal persons in the limited contexts in which they hold legal rights, even if their underpinning moral quasi-personhood is fictional rather than real.

can neither suffer nor act, and so they lack the necessary qualities and capacities for bearing responsibilities and holding welfare and autonomy interests, whether in their own right or on behalf of decedents. But what qualities or capabilities do dead bodies have that would give rise to their or decedents' moral interests in their dignified treatment? As we saw throughout, legislators, judges, and legal advocates seem to believe that the dignity protections for dead bodies are expressive not only of their own quasi-personhood but also of the decedents' personhood. This suggests that the dignity interests that the law attributes (really or fictionally) to dead bodies might have several grounds: the qualities and capabilities that dead bodies share with decedents; dead bodies' physical continuity with the decedents in life; or dead bodies' persistent or anticipated connection with the decedents in an afterlife.³⁶⁵ We saw hints of such accounts in legislators' emphasis on the "humanity" that decedents and dead bodies share and on "the inherent dignity of the human body" in both life and death.

In addition, we saw several courts try to articulate why they deem it important to protect dead bodies as if they held dignity interests, regardless of whether dead bodies are capable of really holding such interests. What is at stake in our dignified treatment of dead bodies, one court proclaimed, is "the universal sentiment of humanity."³⁶⁶ Protecting dead bodies' dignity, another court asserted, "furnish[es] one ground of difference between men and brutes."³⁶⁷ These pronouncements suggest that some judges view the attribution of dignity interests to dead bodies, and their protection, as constitutive of our humanity—meaning that we would compromise our humanity if we were to abandon such attribution and protection.³⁶⁸ One sense in which lawmakers seem to embrace this thought is implicit in several legal protections I analyzed, such as the law's efforts to distinguish dead bodies from property, waste, and animals, and to keep them out of sight: protecting dead bodies as dignity holders assures living humans that they are not reducible to their material and animal nature. But some

365. The question of what is grounding dead bodies' dignity interests is distinct from the question of who the real holder of those dignity interests is. Even if decedents are part of the explanation of why dead bodies have dignity interests, dead bodies themselves, rather than the decedents, may be holding those interests. *See, e.g.,* St. Louis Sw. Ry. Co. v. White, 91 S.W.2d 277, 278 (Ark. 1936) (attributing rights to the "dead body" itself and grounding those rights in the fact that "this dead body" "was the body of [the decedent] who had been a human being").

366. *Pettigrew v. Pettigrew*, 56 A. 878, 880 (Pa. 1904).

367. *Louisville & Nashville R.R. Co. v. Wilson*, 51 S.E. 24, 25 (Ga. 1905).

368. *See supra* notes 338–340 and accompanying text; *cf.* GIAMBATTISTA VICO, *THE NEW SCIENCE OF GIAMBATTISTA VICO* 8 (Thomas Goddard Bergin & Max Harold Fisch trans., Cornell Univ. Press 2016) (1744) (noting that "*humanitas* in Latin comes first and properly from *humando*, burying").

judges may also be gesturing at a less literal sense in which our treatment of dead bodies as dignity holders constitutes our humanity. What they might mean when claiming that such treatment captures “our best feelings” is that treating dead bodies as singular, unique, irreplaceable, and non-fungible is a morally valuable mode of relating to biological entities around us—one that we see as integral to the moral personhood of living humans.³⁶⁹

Given the difficulties and disagreements involved in spelling out the metaphysical underpinnings of dignity interests, it should not surprise us that the law does not offer a clearer account of why it attributes dignity interests to dead bodies. A virtue of the term quasi-personhood is that it captures U.S. law’s investiture of dead bodies with a subset of moral interests without denying the breadth of at times conflicting moral and metaphysical beliefs that support this legal approach.

B. Dignity and Consent

*For dust you are, and to dust you shall return.*³⁷⁰

My analysis so far has focused on the law’s default protections of dead bodies’ dignity interests. But decedents can often modify those default protections through their premortem consent; and absent contrary instructions by the decedents, their next of kin can do the same after the decedents’ deaths. An identical-looking action (e.g., cutting into or burning a dead body) can thus be perfectly legal sometimes and at other times a crime or tort, depending on whether the decedent or next of kin consented to it (e.g., when requesting embalming or cremation). Understanding the role that consent plays in such cases is important. It bolsters the argument that the concept of quasi-personhood helps us make sense of the laws governing dead bodies. It provides a fuller picture of how the legal protections I analyzed in Parts I and II operate in practice. And, as we will see in Part IV, it also

369. *In re Kanavan*, 1 Me. 226, 227 (1821). The philosopher Cora Diamond seems to have a similar thought in mind when she suggests that relating to dead bodies—and even to fictional entities, such as literary characters—with “tenderness” is a core feature of what it means to be a moral person in the world. Diamond, *supra* note 76, at 83–84. The thought is also reminiscent of Margaret Radin’s theory of property for personhood, according to which the law ought to (and in many respects already does) bestow special property protections for things with which we stand in a relationship constitutive of our personhood. See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959–66 (1982). But here the relationship valued by the law is to an entity of which the law conceives as more than a mere thing (i.e., as a quasi-person) and which, for that reason, the law treats not as property but as quasi-property.

370. *Genesis* 3:19 (New King James).

provides illuminating context for the law's nonconsensual alterations of its default protections in the case of unclaimed bodies.

The authority of decedents and their next of kin to alter the law's protections of dead bodies, I argue in this Section, is circumscribed by dead bodies' dignity interests.³⁷¹ The limited scope that the law gives to consensual alterations by decedents and next of kin supports my argument that the law treats dead bodies as quasi-persons whose dignity matters in dead bodies' own right.

When the law authorizes decedents and next of kin to modify the legal protections of dead bodies through their consensual choices, its authorization seems to rest on two kinds of considerations: public benefit and the open-ended dignity connotations of certain actions involving dead bodies.

Public benefit informs, for instance, the law's permission to donate dead bodies to scientific institutions or to request autopsies. In these cases, the law allows decedents and next of kin to waive the law's protections of dead bodies against uncovering, mutilation, and disturbance for the sake of advancing scientific knowledge and, in the case of autopsies, also for the sake of solving crimes.³⁷² The law in fact regards the public benefit in such cases as so important that it permits autopsies even in certain situations in which decedents and next of kin have objected—for instance, when “necessary” for solving a crime.³⁷³ As we will see in the next Part, the law also allows officials to give certain dead bodies to scientific institutions where no voluntary body donation occurred. Importantly, the law appears to authorize waivers for public benefit in only a narrow set of cases. And even in those cases, the law tightly limits the scope of waivers. Most states, for instance, require that scientific and public institutions restore full protections to donated and autopsied bodies after completing their research and give those bodies a decent burial regardless of contrary requests by the decedents.³⁷⁴

In other cases, the law seems to defer to decedents or next of kin because no social consensus exists on whether a given action is consistent with dead bodies' dignity interests. One set of examples involving such deference are cases in which it is debatable whether the human remains affected by an action constitute a dead body in the relevant sense. When a dead body is whole, the law attributes dignity interests to it; and when a dead body has disintegrated so entirely that

371. Special thanks to Quinn White for helpful discussions of this Section.

372. *E.g.*, *Parker v. Quinn-McGowen Co.*, 138 S.E.2d. 214, 216 (N.C. 1964) (“[E]xcept in the case of an inquest, the avowed purpose of an autopsy is to advance medical knowledge.”).

373. *E.g.*, *Koerber v. Patek*, 102 N.W. 40, 43 (Wis. 1905).

374. *E.g.*, OKLA. STAT. ANN. tit. 21, § 1156 (West 2024).

no identifiable particles remain, the law finds nothing to attribute those dignity interests to.³⁷⁵ But human remains can fall into a wide liminal space between those two extremes. They can, for instance, consist of a skeleton or of a body part or of the “ash” or earth left over from a dead body’s cremation, hydrolysis, or composting. For these partial human remains, people are likely to disagree on whether and to what extent the remains still hold dignity interests.³⁷⁶

Sometimes, jurisdictions unilaterally grant or deny dignity protections to partial human remains.³⁷⁷ But they often instead defer to decedents. Decedents’ consensual choice, in other words, becomes determinative of whether their partial remains require the law’s dignity protections. For example, jurisdictions put virtually no restrictions on where and how decedents and next of kin provide for the disposition of cremains, once cremains have been reduced to a particle size small enough to lose any human semblance—specified by some states as “one-eighth (1/8) inch or less.”³⁷⁸ Typically, decedents and next of kin can, for instance, consent to the joint processing of the cremains of multiple

375. *See, e.g.*, *WTC Families for a Proper Burial, Inc. v. City of New York*, 567 F. Supp. 2d 529, 536–38 (S.D.N.Y. 2008) (denying standing to challenge disposition in landfill because “here there are no identifiable remains . . . , only an undifferentiated mass of dirt”), *aff’d*, 359 F. App’x 177 (2d Cir. 2009); *see also* Rogers, *supra* note 34, at 335 (discussing this case).

376. For instance, different metaphysical beliefs about which qualities and capabilities of dead bodies ground their quasi-personhood will lead to different status determinations for partial human remains. If, say, a recognizably human form is associated with a grounding feature of dead bodies’ quasi-personhood, then skeletons and outer body parts, too, ought to enjoy the law’s dignity protections, but inner body tissues and cremains need not.

377. *See, e.g.*, LA. STAT. ANN. § 8:663 (2024) (requiring continued covering of skeletal remains); P.R. LAWS ANN. tit. 24, § 3851 (2012) (same); ME. REV. STAT. ANN. tit. 17-a, § 508(1) (2024) (expressly protecting body parts and cremains against mutilation or disturbance); TEX. PENAL CODE ANN. § 42.08(c) (West 2023) (same); UTAH CODE ANN. § 76-9-704 (West 2023) (same for body parts and decomposed corpses); N.C. GEN. STAT. ANN. § 14-401.22 (West 2023) (same for “significant” body parts and decomposed corpses); N.J. STAT. ANN. 2C:22-1(c) (West 2023) (expressly exempting cremains from protections against mutilation and disturbance); 5 R.I. GEN. LAWS ANN. § 5-33.2-13.2(b) (West 2024) (permitting the simultaneous cremation of body parts from different dead bodies); S.C. CODE ANN. § 32-8-340(F) (2024) (same for body parts used for anatomical study); ME. REV. STAT. ANN. tit. 22, §§ 3028-A, -C (2024) (distinguishing between “nonsubstantial” and “substantial” “body fragments and body fluids,” and providing that a medical examiner can dispose of the former as medical waste, but must dispose of the latter through release to an educational institution, interment, or cremation followed by “appropriate” disposition); MONT. CODE ANN. § 75-10-1005(4)(c) (2023) (providing, among other things, that “recognizable body parts other than teeth must be disposed of by incineration or interment”).

378. *E.g.*, IND. CODE ANN. § 23-14-31-44(a)(3)(A) (West 2024); UTAH CODE ANN. § 58-9-611(3)(c) (West 2023); WIS. STAT. ANN. § 440.80(2)(b) (West 2023). Such reduction, as some of these statutes emphasize, renders any remaining bone fragments “not distinguishable to the public.” CAL. HEALTH & SAFETY CODE § 7116 (West 2024). The conditions for cremation residue are similar. Before crematories can dispose of it as waste, they must “pulverize any bone fragments to a particle size of one-eighth inch or less,” TEX. HEALTH & SAFETY CODE ANN. § 716.152(d) (West 2023), such that the fragments are reduced “to unidentifiable particles,” NEB. REV. STAT. ANN. § 71-1381(1) (West 2024).

dead bodies³⁷⁹ and to their joint burial in an urn³⁸⁰—actions that would violate the law’s individualization requirements if done without their consent. They can also scatter remains out in the open alongside other remains, thus waiving their protections against commingling, anonymity, and uncovering.³⁸¹ And they can even choose such practices as shooting remains into the sky as part of a firework, forging them into dinnerware glazing, pressing them into vinyl records, or melting them into gun bullets³⁸²—all of which would violate the law’s protections against mutilation and disturbance if done without decedents’ or next of kin’s consent.

A second set of examples where open-ended dignity connotations appear to motivate the law’s authorization of waivers involves cases in which social understandings of what dead bodies’ dignity interests demand have changed.³⁸³ For example, embalming dead bodies—with its incisions and stitches³⁸⁴—appeared to its nineteenth-century critics

379. *E.g.*, MINN. STAT. ANN. § 149A.95(13) (West 2023).

380. *E.g.*, CAL. HEALTH & SAFETY CODE § 7054.7(a)(3) (West 2024); 410 ILL. COMP. STAT. ANN. 18/40(e)(2) (West 2023); IND. CODE ANN. § 23-14-31-46(2) (West 2023); MINN. STAT. ANN. § 149A.95(16) (West 2023); MONT. CODE ANN. § 37-19-706(3)(b) (West 2023); OHIO REV. CODE ANN. § 4717.27(D)(2)(b) (West 2023); S.C. CODE ANN. § 32-8-345(E) (2024); TENN. CODE ANN. § 62-5-508(b)(2) (West 2023); TEX. HEALTH & SAFETY CODE ANN. § 716.303(2) (West 2023); WIS. STAT. ANN. § 440.80(3) (West 2023). Many states also view certain choices of urns, such as the choice of shared family urns, as unambiguously implying such consent. *E.g.*, CAL. HEALTH & SAFETY CODE § 7054.7(a)(3)(A) (West 2024); MINN. STAT. ANN. § 149A.95(16) (West 2023).

381. Here, too, most states view the choice of certain scattering methods—such as scattering at sea, by air, or in a cemetery’s scattering garden—as implying consent. *E.g.*, CAL. HEALTH & SAFETY CODE § 7054.7(a)(2) (West 2024); 410 ILL. COMP. STAT. ANN. 18/40(e)(1) (West 2023); IND. CODE ANN. § 23-14-31-46(1) (West 2023); MINN. STAT. ANN. § 149A.95(16) (West 2023); MONT. CODE ANN. § 37-19-706(3)(a) (West 2023); OHIO REV. CODE ANN. § 4717.27(D)(2)(a) (West 2023); S.C. CODE ANN. § 32-8-345(E)(1) (2024); TENN. CODE ANN. § 62-5-508(b) (West 2023); TEX. HEALTH & SAFETY CODE ANN. § 716.303(1) (West 2023). Disagreements on whether the scattering of remains is dignified are ongoing. The Catholic Church, for instance, continues to oppose the practice, even after lifting its ban on cremation in 1963. *See* Mirkes, *supra* note 92, at 684 & n.6; LAQUEUR, *supra* note 78, at 546.

382. DAWDY, *supra* note 130, at 107, 184–87; Victoria J. Haneman, *Tax Incentives for Green Burial*, 21 NEV. L.J. 491, 498–503 (2021).

383. A third set of examples involves cases in which the line is blurry between actions that violate a given dignity protection materially and actions that do so only de minimis and should therefore not be considered violations at all. Here, too, some legislatures and courts simply decide that a given action either possessed or lacked sufficient materiality to violate a dignity protection. *See, e.g.*, *People v. Bullington*, 80 P.2d 1030, 1032–33 (Cal. Dist. Ct. App. 1938) (holding that defendant’s alleged removal of two gold crowns from the teeth of a corpse did not constitute mutilation). But often, legislatures leave it instead up to decedents and next of kin to make the call. Examples include the commingling of leftover remains in cremation chambers and various disposition methods’ mingling of dead body particles, waste, and invertebrate animals, all of which are plausibly de minimis. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 7054.7(b) (West 2024) (requiring a consent form acknowledging the risk of commingling posed by “small amounts of residue from previous cremations”); MINN. STAT. ANN. § 149A.95(4)(9) (West 2023) (requiring a similar acknowledgment).

384. CANTOR, *supra* note 20, at 85–86.

to violate bodies' dignity interests in undisturbed repose and bodily integrity, amounting to "un-Christian" "mutilation."³⁸⁵ But against such charges, the embalming industry successfully promoted an alternative cultural meaning according to which embalming actually enables rather than compromises dead bodies' undisturbed repose. Leaning heavily on the metaphor of sleep, early advertisements promised that the new method would "admit of contemplation of the person Embalmed, with the countenance of one asleep."³⁸⁶ Similarly, embalming textbooks celebrated that thanks to the new method "death [would] ha[ve] no more power over us than a long sleep" because embalming would allow a dead body to "remain entire, and as it were asleep in its bed, till awakened by the last trumpet to a joyful resurrection, where in its flesh it shall see God."³⁸⁷

The law quickly made space for this alternative understanding of embalming as consistent with dead bodies' dignity interests by giving decedents and next of kin the option to choose it.³⁸⁸ Similar cultural reinterpretations have preceded the legalization of each new disposition method since.³⁸⁹ In fact, as we saw, we are currently in the midst of several such cultural reinterpretations, with respect not only to the new disposition methods of alkaline hydrolysis and human composting but

385. Tanya D. Marsh, *A New Lease on Death*, 49 REAL PROP. TR. & EST. L.J. 421, 425 (2015).

386. TROYER, *supra* note 138, at 14 (internal quotation marks omitted) (quoting ROBERT W. HABENSTEIN & WILLIAM M. LAMERS, *THE HISTORY OF AMERICAN FUNERAL DIRECTING* 217 (4th ed. 1996), which ends the quoted advertisement with "the countenance of a one asleep").

387. *Id.* at 15–17 (internal quotation marks omitted) (quoting CARL LEWIS BARNES, *THE ART AND SCIENCE OF EMBALMING* 182–83 (Indianapolis, Middle St. Pub. Co. 1896)).

388. The lifelike countenance of embalmed bodies also helps explain why the law gives decedents and next of kin the option to arrange for a viewing (i.e., a period during visitations and funeral services in which the dead body lies clothed, but otherwise uncovered for everyone to see). States do not accommodate the choice of all kinds of viewings, but only those that allow for a reinterpretation consistent with dead bodies' dignity interests, as can be seen from the restrictions that several states and territories impose on the display of unembalmed bodies during viewings. *See, e.g.*, 140 N. MAR. I. ADMIN. CODE § 140-20.2-401(b) (2019) (limiting viewings of unembalmed bodies to a duration of ten hours); OR. ADMIN. R. 830-030-0080(1) (2024) (limiting viewings of unembalmed bodies to a duration of six hours and prohibiting them for "unwashed, human remains"); P.R. LAWS ANN. tit. 24, § 3812(2) (2012) (limiting viewings of unembalmed dead bodies to the first twenty-four hours after death). States also ensure through additional means that viewings not expose attendees to the sight of putrefying bodies. Embalmers, for instance, face liability for negligent infliction of mental suffering and breach of contract when they fail to embalm a dead body properly, leading it to show signs of putrefaction. *See, e.g.*, *Flores v. Baca*, 871 P.2d 962, 968 (N.M. 1994); *Chelini v. Nieri*, 196 P.2d 915, 917 (Cal. 1948); *Brown Funeral Homes & Ins. Co. v. Baughn*, 148 So. 154, 157 (Ala. 1933); *Pat H. Foley & Co. v. Wyatt*, 442 S.W.2d 904, 905 (Tex. Civ. App. 1969); *Carey v. Lima, Salmon & Tully Mortuary*, 335 P.2d 181, 182 (Cal. Dist. Ct. App. 1959); *Loy v. Reid*, 65 So. 855, 855–56 (Ala. Ct. App. 1914); *see also* Emens, *supra* note 198, at 14 (analyzing cases of botched embalmings and arguing that the transitory nature of putrefying bodies, which are dead yet animated by other organisms, disturbs judges and leads them to award damages for emotional distress).

389. *See, e.g.*, STEPHEN PROTHERO, *PURIFIED BY FIRE: A HISTORY OF CREMATION IN AMERICA* 146 (2001); Philip R. Olson, *Basic Cremation*, 8 WAKE FOREST J.L. & POL'Y 149, 166 (2018).

also, for instance, the joint burial of human and pet remains.³⁹⁰ And while some states have already responded by legalizing those practices, it remains to be seen whether all legislatures will become convinced that the practices can be plausibly reinterpreted as consistent with dead bodies' dignity interests.

Crucially, when neither considerations of public benefit nor open-ended dignity connotations apply, then the law protects dead bodies' dignity interests regardless of requests to the contrary by decedents or next of kin. As we saw, for example, several jurisdictions prohibit the joint cremation of dead bodies regardless of consent.³⁹¹ Once statutes or courts classify an action as abuse of corpse, consent is similarly irrelevant. The elderly brother, for example, who uncovered and burned his sister's dead body in his home furnace was convicted of the common law crime of abuse of corpse, even though he was the next of kin authorized to choose the disposition method and nothing in the record indicated that he acted contrary to her wishes.³⁹² Necrophilia statutes, too, provide no consent-based exemptions from their criminal prohibitions. Even if a decedent before her death consented to a defendant's sexual act with her body after death, that act would still amount to a criminal offense. These examples suggest that the law regards at least some of its dignity protections as setting a moral floor below which nobody may opt to go.

Realists and fictionalists will understand the waivers of dead bodies' dignity interests, as well as the limitations on those waivers, in different ways. But both realist and fictionalist understandings rely on the quasi-personhood of dead bodies. From the realist perspective, dead bodies hold the dignity interests that are being waived. And so, the moral power to waive them really belongs to dead bodies. Decedents and next of kin, though, get to exercise that moral power on behalf of dead bodies because dead bodies cannot represent themselves. On this realist picture, the law's tight limitations on waivers are unsurprising. Given dead bodies' quasi-personhood status, it makes sense that dead bodies have not only limited moral interests but also limited moral powers. What is more, the law, in limiting the authority of decedents and next of kin to waive dead bodies' dignity interests, may be

390. See *supra* notes 131–137 and accompanying text.

391. *E.g.*, KY. REV. STAT. ANN. § 367.97514(1) (West 2023); N.C. GEN. STAT. ANN. § 90-210.129(h) (West 2023); 140 N. MAR. I. ADMIN. CODE § 140-20.2-425(b)(7) (2019); 5 R.I. GEN. LAWS ANN. § 5-33.2-13.2(a)(6) (West 2024).

392. See *State v. Bradbury*, 9 A.2d 657, 658 (Me. 1939); *Recent Case*, 53 HARV. L. REV. 1047, 1048 (1940) (citing to the record, in which the Defendant explained that his sister had desired cremation and that he sought to fulfill her wish in his home furnace to save money). Cantor also recounts the example of a court that refused to enforce a decedent's request that his skin be used after his death to add a leather binding to his book of poetry. CANTOR, *supra* note 20, at 269.

protecting dead bodies against choices that it views as too unjustified or too inherently undignified to be in the best interest of dead bodies.

From the fictionalist perspective, by contrast, decedents are the ones who really hold the dignity interests that are being waived. And so, the moral power to waive them belongs to the decedents, who then either exercise that power themselves before their death or have next of kin exercise it on their behalf after their death. On this fictionalist picture, the law's tight limitations on waivers are harder to explain. Why would the law regard many dignity interests that decedents have with respect to their dead bodies as inalienable? The question is particularly puzzling in the case of necrophilia because the waiver limitations here pertain to actions that the law otherwise views as fully subject to consent—namely, sex. Why would it be that the consent of two legally competent human beings renders sex between them legal when both are still alive, but not when one is dead?

Different necrophilia statutes we saw suggest different answers, though all lead us back to the quasi-personhood of dead bodies. Statutes that criminalize necrophilia in the same breath as bestiality, for instance, appear to suggest that sexual contact between beings of different moral status—namely between a person and a quasi-person, be it animal or corpse—is too undignified for the law to permit it under any circumstances.³⁹³ Here, in other words, the fact that the dead body is a *quasi*-person rather than a full moral person is the reason that necrophilia is criminal, regardless of the decedent's consent.

By contrast, some other necrophilia statutes criminalize necrophilia in the same breath as sex with a mentally incapacitated living human being (for instance, due to sleep, drugs, or disability); and there, too, the statutes do not provide an exception for when the incapacitated person consents prior to their incapacitation to having sex once they are incapacitated.³⁹⁴ This analogy seems to suggest that the permissibility of sex depends on continuous consent. And since dead

393. For another example in which considerations of indignity motivate legal limitations on waivers, see Richard W. Garnett, *Why Informed Consent? Human Experimentation and the Ethics of Autonomy*, 36 CATH. LAW. 455, 495–97, 504–07 (1996).

394. *E.g.*, IOWA CODE ANN. §§ 709.1, .18 (West 2023) (criminalizing necrophilia as an instance of “sexual abuse” in § 709.18 and defining that term in § 709.1 as including a sexual act “done while the other is under the influence of a drug inducing sleep or is otherwise in a state of unconsciousness” or while “[s]uch other person is suffering from a mental defect or incapacity which precludes giving consent, or lacks the mental capacity to know the right and wrong of conduct in sexual matters”); CONN. GEN. STAT. ANN. § 53a-73a (West 2023) (treating necrophilia as an instance of “sexual assault” next to other instances, which include sexual contact with another person who is “physically helpless” and “sexual contact without such other person’s consent”); *see also* CONN. GEN. STAT. ANN. § 53a-73a(a)(1)(C) (West 2011) (amended 2013) (including a prohibition against sexual contact with another person who is “mentally incapacitated to the extent that such other person is unable to consent to such sexual contact”).

bodies, like incapacitated individuals, are no longer able to renew or withdraw their consent during the sexual act, sex with them is impermissible regardless of prior consent. Here, in other words, the fact that the dead body is a quasi-*person* rather than a mere thing is the reason that necrophilia is criminal, regardless of the decedent's consent. Its personhood aspects trigger the law's expectation of continuous consent.³⁹⁵

This analysis suggests that conceiving of dead bodies as quasi-persons is helpful in making sense of the law's limitations on dignity waivers regardless of whether we view those limitations through a realist or fictionalist lens. The law's approach to waivers and their limitations thus lends further support to the argument that the law treats dead bodies as quasi-persons.

Having analyzed to what extent consensual choices can alter the law's default protections for dead bodies, I turn next to the law's nonconsensual alterations of those protections for unclaimed bodies.

IV. UNCLAIMED BODIES

*I will give them in My house and within My walls
a memorial and a name better than sons and daughters,
an everlasting name will I give them that shall not be cut off.*³⁹⁶

So far, this Article has focused on understanding the default protections that American law bestows on dead bodies. It has analyzed eight protections against dead bodies' status denigration and abuse. And it has argued, based on that analysis, that the law treats dead bodies as quasi-persons. In this final Part, I will use the opening example of unclaimed bodies to show that this account helps us not only to understand but also to criticize and reform the law's treatment of dead bodies. The example of unclaimed bodies thus illustrates some of the practical legal consequences of my account of dead bodies' quasi-

395. These arguments depart from the only scholarly explanations I have seen for the lack of consent provisions for necrophilia—namely that it signals that necrophilia laws are not concerned with harm to the dead, but rather with harm to the living. See Hilary Young, *The Right to Posthumous Bodily Integrity and Implications of Whose Right It Is*, 14 MARQ. ELDER'S ADVISOR 197, 233 (2013); John Harris, *Doing Posthumous Harm*, in *THE METAPHYSICS AND ETHICS OF DEATH* 213, 215 (James Stacey Taylor ed., 2013):

If [sex with the dead, whether consensual or not] is treated as a crime, it is so because it is alleged to raise issues of public decency or propriety or indeed of public order. . . . [W]hatever offence it involves, it is not the crime of rape; it is not a crime that involves violation. . . . [I]t is not violence to the person, not a violation of personal integrity.

396. *Isaiah* 56:5 (my translation, building on 2 ROBERT ALTER, *THE HEBREW BIBLE: A TRANSLATION WITH COMMENTARY: PROPHETS* 810 (2019)).

personhood. Importantly, as I will argue, these consequences follow whether or not the law's treatment of dead bodies as quasi-persons is sound. As long as we otherwise continue to protect dead bodies as quasi-persons, our lesser protection of unclaimed bodies is wrongful and ought to be reformed.³⁹⁷

Unclaimed bodies, colloquially understood, are all dead bodies that lack relatives willing or able to take care of their disposition. The colloquial understanding thus includes the dead bodies of decedents who left behind estates with sufficient funds to cover their burial expenses. But as we will see when examining the pertinent statutes, the law usually defines unclaimed bodies as dead bodies in need of burial at public expense. In other words, they are the bodies of decedents who died in poverty and lacked next of kin financially able or willing to arrange and pay for their disposition.³⁹⁸ Unclaimed bodies, I will show, do not enjoy the full range of status and abuse protections discussed above. By giving them weaker protections, we fail to respect them as quasi-persons.

I focus on unclaimed bodies here because the legal regime governing their mistreatment persists to this day and has received little attention from legal scholars.³⁹⁹ But the patterns of mistreatment that this case study identifies are not unique to unclaimed bodies. They are shared, above all, by our longstanding histories of desecrating, segregating, and commercially exploiting the dead bodies of Native Americans and Black Americans.⁴⁰⁰ And so, what follows will carry

397. For discussions of this methodological move from descriptive to normative reasoning, see *infra* notes 526–529, 553–562, 566, and accompanying text. The success of this move does not depend on my having developed my descriptive account thus far without reference to unclaimed bodies. For, as I will argue, there is no consistent descriptive account of our historical and ongoing treatment of claimed and unclaimed bodies that could escape the normative conclusion that the lesser treatment of unclaimed bodies amounts to a moral wrong. See *infra* notes 557–562 and accompanying text. My thanks to Josh Chafetz, Mailyn Fidler, Mark Graber, John Rappaport, and Daniel Wilf-Townsend for prompting this clarification.

398. See RUTH RICHARDSON, *DEATH, DISSECTION AND THE DESTITUTE* 126–27 (1987) (arguing that “unclaimed” was from its inception a financial category). In the rare cases in which no relatives claim the dead bodies of decedents who leave estates big enough to cover their burial, states and counties tend to arrange for their burial differently than for the disposition of legally unclaimed bodies. See PRICKETT & TIMMERMANS, *supra* note 97, at 105, 118–19, 175–76; Heeju Sohn, Stefan Timmermans & Pamela J. Prickett, *Loneliness in Life and in Death? Social and Demographic Patterns of Unclaimed Deaths*, PLOS ONE, Sept. 2020, at 3.

399. Norman Cantor, Mary Clark, Ray Madoff, Tanya Marsh, and Alix Rogers are among the rare legal scholars to mention it. But they discuss it briefly and mostly as a regime of the past. See CANTOR, *supra* note 20, at 173; Clark, *supra* note 215, at 68–70; MADOFF, *supra* note 363, at 27–28; MARSH, *supra* note 14, at 37–39; Rogers, *supra* note 34, at 320–21.

400. These histories have received some scholarly attention. See, e.g., BERRY, *supra* note 122; Diane O'Donoghue, *Bone Rooms, Bone Wounds: Genocidal Foreshadowing and Posthumous Harm* (Apr. 23, 2024) (manuscript on file with author); Angela R. Riley & Kristen A. Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859, 876–77 (2016); Alix Rogers, *Owning Geronimo but Not Elmer McCurdy: The Unique Property Status of Native American*

implications beyond the immediate context of unclaimed bodies. Spelling out the manifestations of each pattern in these longstanding histories would be too vast an undertaking for this Article. It would require grappling with the looting of Native American gravesites, the racial segregation of cemeteries, museum displays of Native American remains, postmortem mutilations during lynchings, and much more. But I hope that the shared patterns between our mistreatment of unclaimed bodies and our mistreatment of Black and Native American bodies will be apparent, and I will highlight instances in which the mistreatment of unclaimed bodies intersects with that of Black and Native American bodies.

A. History

*No dirges for my fancied death;
No weak lament, no mournful stave[.]*⁴⁰¹

Most states today have laws that allow, or even obligate, local officials to give unclaimed bodies to medical schools and other research institutions within their state.⁴⁰² South Carolina offers a fairly typical

Remains, 60 B.C. L. REV. 1, 8–11 (2019); Smith, *supra* note 255, at 198–99, 204–05. They have also been the targets of multiple legal reform efforts—such as statutes penalizing the removal of Native American remains and requiring their repatriation in cooperation with contemporary tribes, and statutes voiding racially restrictive covenants and punishing cemeteries for refusing to bury dead bodies on the basis of race, color, or national origins. *E.g.*, Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013; CONN. GEN. STAT. § 10-390 (West 2023); DEL. CODE ANN. tit. 7, § 5401 (West 2024); IND. CODE ANN. § 14-21-1-25.5 (West 2023); LA. STAT. ANN. § 8:681 (2024); ME. STAT. tit. 22, § 2842-B (2023); MINN. STAT. ANN. § 307.08 (West 2023); MONT. CODE ANN. §§ 22-3-901 to -921 (West 2023); OKLA. STAT. ANN. tit. 8, § 36 (West 2024); OKLA. STAT. ANN. tit. 21, § 1168.2 (West 2024); OR. REV. STAT. ANN. §§ 97.740 to .760 (West 2023); WYO. STAT. ANN. § 7-4-106 (West 2023); IOWA CODE §§ 523L.304(3), .307 (2024); S.D. CODIFIED LAWS § 34-27-5 (2024); TEX. HEALTH & SAFETY CODE ANN. § 711.032 (West 2023); WASH. REV. CODE ANN. § 68.50.035 (West 2023). These reform efforts have often fallen short. *See, e.g.*, Smith, *supra* note 255, at 229–30, 235 (arguing that the legal protections for Black American and Native American remains too often rely on biological kin for enforcement and thus fail to reckon with the long history of systemic family separations). Other histories with overlapping patterns of mistreatment include, for instance, our treatment of dead bodies that had contracted HIV. *See* Mark E. Wojcik, *Discrimination After Death*, 53 OKLA. L. REV. 389, 400–04 (2000).

401. QUINTUS HORATIUS FLACCUS, *CARMINA*, II, poem 20, ll. 21–22 (John Conington trans., London, George Bell & Sons 1882) (23 B.C.E.).

402. *E.g.*, ALA. CODE §§ 22-19-20 to -30 (2023); ARIZ. REV. STAT. ANN. §§ 11-303, 11-600, 36-803 to -808 (2024); ARK. CODE ANN. §§ 20-17-701 to -710 (West 2023); CAL. HEALTH & SAFETY CODE §§ 7200 to 7208 (West 2024); COLO. REV. STAT. ANN. §§ 15-19-301 to -309 (West 2024); CONN. GEN. STAT. ANN. §§ 19a-270 to -282 (West 2023); DEL. CODE ANN. tit. 29, § 4711 (West 2024); FLA. STAT. ANN. §§ 406.49 to .61 (West 2023); GA. CODE ANN. §§ 31-21-20 to -26 (West 2023); 410 ILL. COMP. STAT. ANN. 510/0.01 to 510/4 (West 2023); IOWA CODE ANN. §§ 142.1 to .13 (West 2023); KAN. STAT. ANN. §§ 65-901 to -905 (West 2023); KY. REV. STAT. ANN. §§ 311.300 to .350, 72.450 (West 2023); LA. STAT. ANN. §§ 17:2271 to :2280 (2024); ME. REV. STAT. ANN. tit. 22, §§ 2881 to 2900 (2024); MD. CODE ANN., HEALTH-GEN. §§ 5-401 to -409 (West 2023); MASS. GEN. LAWS ANN. ch. 113, §§ 1 to 5

example of these so-called “anatomy acts.” It provides that all local officials, which today mostly means medical examiners and coroners, must turn over the dead body of anyone who died in poverty or by execution and went unclaimed by next of kin to an anatomy board.⁴⁰³ The board in turn distributes these bodies to scientific institutions in the state.⁴⁰⁴ Following their use for medical teaching and research, the law further provides that “the bodies must be decently and respectfully disposed of by . . . [those] receiving them.”⁴⁰⁵

States passed their anatomy acts between the mid-nineteenth and mid-twentieth centuries. Medical schools at that time were multiplying rapidly in the United States, from just four in 1800 to over 160 in 1900.⁴⁰⁶ As the number of medical schools increased, so did the demand for dead bodies. Prior to passing their anatomy acts, states had struggled to meet that demand. Dissection was anathema to most Americans, making voluntary body donations exceedingly rare.⁴⁰⁷ Some legislatures had made the dead bodies of executed criminal defendants available for dissection, a practice that had made its first reported appearance in the American colonies with the public dissection of an executed Native American man in Boston in 1733.⁴⁰⁸ During slavery, it

(West 2023); MICH. COMP. LAWS ANN. §§ 333.2652 to .2663 (West 2023); MISS. CODE ANN. §§ 41-39-5 to -7 (West 2024); MO. ANN. STAT. § 194.150 (West 2023); MONT. CODE ANN. §§ 50-21-101 to -102 (West 2023); N.H. REV. STAT. ANN. §§ 291:1 to :4 (2023); N.J. STAT. ANN. §§ 45:9-49 to -55 (West 2023); N.M. STAT. ANN. §§ 24-12-1 to -3 (West 2023); N.Y. PUB. HEALTH LAW §§ 4211 to 4215 (McKinney 2024); N.C. GEN. STAT. ANN. §§ 130A-415 to -418 (West 2023); OHIO REV. CODE ANN. §§ 1713.34 to .42 (West 2023); OKLA. STAT. ANN. tit. 63, §§ 91 to 99 (West 2024); OR. REV. STAT. ANN. §§ 97.170 to .200 (West 2023); 35 PA. STAT. AND CONS. STAT. ANN. §§ 1091 to 1097, 1114 (West 2023); S.C. CODE ANN. §§ 44-43-510 to -590 (2024); S.D. CODIFIED LAWS §§ 34-26-8 to -12 (2024); TENN. CODE ANN. §§ 68-4-102 to -113 (West 2023); TEX. HEALTH & SAFETY CODE ANN. §§ 691.001 to .035 (West 2023); UTAH CODE ANN. § 26B-8-225 (West 2023); WASH. REV. CODE ANN. §§ 68.50.060 to .090 (West 2023); WIS. STAT. ANN. §§ 157.02 to .04 (West 2023); WYO. STAT. ANN. §§ 35-4-601 to -607 (West 2023).

403. S.C. CODE ANN. §§ 44-43-510 to -540 (2024). In South Carolina, as in many other states, coroners must wait a minimum number of days before considering a dead body unclaimed and making it available for scientific research. *See id.* § 44-43-550. During that period, they often try to locate and contact next of kin. *See, e.g.*, Stefan Timmermans & Pamela J. Prickett, *Who Counts as Family? How Standards Stratify Lives*, 87 AM. SOCIO. REV. 504, 511, 513–14 (2022) (“Every county and state has a system for identifying and notifying relatives, but there is little uniformity across jurisdictions, except for the legal pressure to conduct ‘due diligence’ to contact relatives prior to body disposition.”). The right to claim and control a relative’s dead body devolves from one next of kin to the next in a specified order. *See, e.g.*, S.C. CODE ANN. § 32-8-320 (2024).

404. S.C. CODE ANN. § 44-43-550 (2024).

405. *Id.* § 44-43-560.

406. SAPPOL, *supra* note 8, at 2, 48.

407. *See* David C. Humphrey, *Dissection and Discrimination: The Social Origins of Cadavers in America, 1760-1915*, 49 BULL. N.Y. ACAD. MED. 819, 819–20 (1973).

408. SAPPOL, *supra* note 8, at 100, 123; *see also* Richard Ward, *Introduction to A GLOBAL HISTORY OF EXECUTION AND THE CRIMINAL CORPSE* 4–17 (Richard Ward ed., 2015) (discussing historical practices of desecrating the bodies of those punished with the death penalty both before

was also common for masters to sell the dead bodies of their slaves to physicians.⁴⁰⁹ But these legalized means of procuring dead bodies were too limited in numbers to meet the schools' needs.⁴¹⁰ For a long time, medical schools therefore relied on grave robbery as an extralegal means of securing their supply.⁴¹¹ Grave robbers often targeted the dead bodies of white indigent people and Black people, both free and enslaved.⁴¹² But sometimes they robbed the graves of the white middle and upper classes as well.⁴¹³

Americans took the idea for their anatomy acts mainly from England.⁴¹⁴ There, Benthamite members of Parliament began to push for the use of unclaimed bodies in the 1820s.⁴¹⁵ They proposed—in terms

and after their execution, including the rise of post-execution anatomical dissections in eighteenth-century England and North America).

409. See Humphrey, *supra* note 407, at 820, 822 (explaining that enslavers regularly delivered bodies of deceased slaves to anatomists in the nineteenth century and quoting an anatomy professor in New York City who used the skeleton of a Black man who “belonged to a friend” in his classes in the 1760s (internal quotation marks omitted)).

410. See *id.* at 819–21.

411. See SAPPOL, *supra* note 8, at 113; SHULTZ, *supra* note 5, at 15.

412. See, e.g., Humphrey, *supra* note 407, at 819–22 (quoting anatomists in Philadelphia, Chicago, and Ann Arbor in the eighteenth and nineteenth centuries who said they procured dead bodies from indigent gravesites, and describing protests by a group of free and enslaved Black Americans in New York City in 1788 and by inhabitants of a predominantly white almshouse in Philadelphia in 1845 against the pervasive grave robberies at their burial grounds); Todd L. Savitt, *The Use of Blacks for Medical Experimentation and Demonstration in the Old South*, 48 J.S. HIST. 331, 339 (1982) (concluding that the vast majority of anatomical cadavers in antebellum Virginia were those of Black Americans); BERRY, *supra* note 122, at 157 (asserting that the majority of dissected bodies in the nineteenth century were those of Black Americans); SHULTZ, *supra* note 5, at 66–68 (quoting from a late nineteenth-century diary of a grave robber in Washington, D.C., suggesting that half of the cemeteries he plundered were those of Black Americans); Emily Bazelon, *Grave Offense*, LEGAL AFFS., July/Aug. 2002 (discussing an “indignation meeting” held by hundreds of Black Americans in Philadelphia in 1882 in response to grave robberies targeting their cemetery); Edward C. Halperin, *The Poor, the Black, and the Marginalized as the Source of Cadavers in United States Anatomical Education*, 20 CLINICAL ANATOMY 489, 490–492 (2007) (quoting historical sources in late eighteenth-century New York City and mid-nineteenth-century Baltimore and Charleston, South Carolina, that cadavers for anatomical study were stolen exclusively from the graves of Black Americans).

413. See, e.g., SHULTZ, *supra* note 5, at 85–88 (recounting the 1878 grave robbery and near dissection of former Congressman John Scott Harrison, son of President William Henry Harrison and father of then-President-to-be Benjamin Harrison, which catalyzed support for Ohio's anatomy act); Halperin, *supra* note 412, at 491 (mentioning another 1878 incident involving a “well-known citizen of Cleveland” with similar catalyzing effect in both Ohio and Indiana); Humphrey, *supra* note 407, at 820–21 (noting a New York newspaper's objections to grave robbery following the theft of corpses of “some respectable persons”).

414. SAPPOL, *supra* note 8, at 119, 128–29. Occasionally, American legislators also looked to other countries. The Select Committee of the Massachusetts House of Representatives in its 1830 report, for instance, praised France as a model for anatomy legislation because it sent the dead bodies of all hospital patients who remained unclaimed after twenty-four hours to medical schools for dissection. See GARY LADERMAN, *THE SACRED REMAINS: AMERICAN ATTITUDES TOWARD DEATH, 1799-1883*, at 84 (1996).

415. RICHARDSON, *supra* note 398, at 108–09.

that many American anatomy acts came to mirror closely—that dead bodies from “hospitals, infirmaries, workhouses, poor-houses, foundling-houses, houses of correction, and prisons” should be given to medical institutions whenever they went unclaimed.⁴¹⁶ The legal appropriation of unclaimed bodies promised to provide medical schools with a steady supply of dead bodies while allowing members of the upper and middle classes to rest securely in their graves.⁴¹⁷

In 1831, Massachusetts became the first state to enact an anatomy law, a year before the British Parliament enacted a similar law.⁴¹⁸ But it was only after the Civil War that states began to adopt anatomy acts more widely.⁴¹⁹ By that point, the medical profession commanded significantly more respect thanks to advances in its knowledge and skill.⁴²⁰ By World War I, the majority of states had passed anatomy acts.⁴²¹

Most states have retained their anatomy acts to this day.⁴²² These acts continue to benefit medical schools, where unclaimed bodies now make up about twenty percent of dissected corpses, supplementing for shortages in voluntary body donations.⁴²³ In addition, unclaimed

416. SAPPOL, *supra* note 8, at 120.

417. RICHARDSON, *supra* note 398, at 122. The anatomy acts also promised the advantages of eliminating legal and reputational dangers for physicians and reducing the risk of riots. SAPPOL, *supra* note 8, at 4.

418. SAPPOL, *supra* note 8, at 123. Connecticut, New Hampshire, and New York followed suit between 1833 and 1854. *Id.* But Connecticut and New Hampshire quickly repealed their anatomy acts, and several other states rejected them upon debate. *Id.*; Rogers, *supra* note 34, at 320.

419. *See* SAPPOL, *supra* note 8, at 123–24.

420. *Id.* at 5. It may have helped that the carnage of the war had desensitized many men to the sight of dead bodies. *See* LADERMAN, *supra* note 414, at 93, 124, 137, 139, 145–46. In addition, the professionalization and anonymity of death care increased, while the influence of theological objections to dissection decreased—at least among urban elites. *See* Rogers, *supra* note 34, at 319–20; LADERMAN, *supra* note 414, at 165–66.

421. Rogers, *supra* note 34, at 320–21.

422. *See supra* note 402 and accompanying text. The United States is no outlier in this regard. A survey of seventy-one countries worldwide suggests that two-thirds of those countries use unclaimed bodies for anatomy education. *See* Juri L. Habicht, Claudia Kiessling & Andreas Winkelmann, *Bodies for Anatomy Education in Medical Schools: An Overview of the Sources of Cadavers Worldwide*, 93 ACAD. MED. 1293, 1295–97 (2018).

423. Neela Dasgupta, *Unclaimed Bodies at the Anatomy Table*, 291 JAMA 122, 122 (2004) (estimating twenty percent, but for both U.S. and Canadian medical schools). There is significant regional variation. In 2002, for instance, unclaimed bodies made up forty percent of medical school cadavers in Maryland. D. Gareth Jones & Maja I. Whitaker, *Anatomy’s Use of Unclaimed Bodies: Reasons Against Continued Dependence on an Ethically Dubious Practice*, 25 CLINICAL ANATOMY 246, 250 (2012). Moreover, lesser-known scientific institutions and institutions in states with comparatively small populations tend to suffer more severe shortages of voluntary donations. *See* Daniel H. Coelho & Arthur L. Caplan, *The Unclaimed Cadaver*, 72 ACAD. MED. 741, 741–42 (1997); Ann Garment, Susan Lederer, Naomi Rogers & Lisa Boulton, *Let the Dead Teach the Living: The Rise of Body Bequeathal in 20th-Century America*, 82 ACAD. MED. 1000, 1003 (2007).

bodies sometimes benefit dental schools;⁴²⁴ mortuary schools;⁴²⁵ forensic science programs;⁴²⁶ search and rescue units training dogs to detect dead bodies;⁴²⁷ and research teams studying diseases,⁴²⁸ testing military weapons and protective gear,⁴²⁹ and running crash safety tests for cars or other vehicles.⁴³⁰ They do so at the expense of the poor.⁴³¹ And what few statistics we have suggest that anatomy acts disproportionately affect not only men⁴³² but also Black Americans.⁴³³

According to recent conservative estimates, more than thirty thousand bodies go unclaimed in America each year—more than one out of every one hundred U.S. deaths.⁴³⁴ Sometimes, these unclaimed bodies remain unidentified. That is especially true along the U.S.-Mexico border where many unclaimed bodies are those of migrants

424. *E.g.*, TENN. CODE ANN. § 68-4-104 (West 2023).

425. *E.g.*, ARIZ. REV. STAT. ANN. § 11-600(B) (2024); 410 ILL. COMP. STAT. ANN. 510/1 (West 2023).

426. *E.g.*, TEX. HEALTH & SAFETY CODE ANN. § 691.030(a)(2) (West 2023).

427. *E.g.*, *id.* § 691.030(a)(3).

428. *E.g.*, Nelkin & Andrews, *supra* note 83, at 274. Because unclaimed bodies are usually stored for several weeks prior to scientific use, they cannot be used for more time-sensitive purposes, such as organ and tissue transplants. *See* ISERSON, *supra* note 11, at 89.

429. *E.g.*, ISERSON, *supra* note 11, at 123.

430. *E.g.*, Nicholas Wade, *The Quick, the Dead, and the Cadaver Population*, 199 SCIENCE 1420, 1420 (1978) (paraphrasing the Secretary of Transportation who explained that “almost all the cadavers” used for crash tests “come from the ‘willed body program,’ and that family permission is secured *whenever possible*” (emphasis added)).

431. Not only are the dead bodies of decedents who lived in poverty more likely to be unclaimed, but states usually skip scientific donations when a decedent’s estate can cover burial costs. *See, e.g.*, KY. REV. STAT. ANN. § 72.450 (West 2023) (instructing the coroner to use a decedent’s assets to “defray burial expenses” or, if an unclaimed body is “buried at public expense,” to “deliver such body . . . to a state medical school”); Sohn et al., *supra* note 398, at 3, 6–10, 13.

432. *See id.* at 6, 14 (finding that “3.14 percent of male deaths went unclaimed compared to 1.54 percent of female deaths” in Los Angeles County during the period studied, and noting that men are more likely to lack kin support, especially after divorce); Kenna Quinet, Samuel Nunn & Alfarena Ballew, *Who Are the Unclaimed Dead?*, 61 J. FORENSIC SCIS. S131, S133 (2016) (finding that 85.8 percent of unclaimed bodies in Marion County, Indiana, were male during the period studied, compared to 44.6 percent of general county deaths).

433. Sohn et al., *supra* note 398, at 6 (finding that 3.93 percent of deaths of Black Americans were unclaimed, compared to 2.24 percent of deaths of whites and 0.81 percent of other deaths in Los Angeles County). What limited evidence we have suggests that Black Americans were also historically disproportionately affected. *See, e.g.*, Humphrey, *supra* note 407, at 824.

434. Their number may be closer to 100,000—roughly three out of every one hundred U.S. deaths. Mary Jordan & Kevin Sullivan, *Alone in Death*, WASH. POST (Sept. 17, 2021, 8:01 AM), <https://www.washingtonpost.com/nation/2021/09/17/alone-death> [<https://perma.cc/PY9P-L6Q6>] (noting that unclaimed bodies in Maryland, one of the few states to track their numbers, made up about four percent of deaths in 2020); *see also* Mary Jordan & Kevin Sullivan, *The Unclaimed Soldier: A Final Salute for the Growing Number of Veterans Who Have No One to Bury Them*, WASH. POST (Nov. 11, 2021, 9:00 AM), <https://www.washingtonpost.com/politics/2021/11/11/unclaimed-soldier/> [<https://perma.cc/JM9W-KR8K>] [hereinafter Jordan & Sullivan, *The Unclaimed Soldier*] (“There is no requirement for local governments—who are responsible for unclaimed bodies—to report them to any national authority, so there is no official count.”).

dying in the desert.⁴³⁵ More often, these so-called unclaimed bodies are identified and their next of kin contacted.⁴³⁶ But their relatives are either too poor to pay for their disposition or unwilling to do so.⁴³⁷ In life, the unclaimed often had a history of substance abuse, mental illness, imprisonment, and estrangement from family and friends.⁴³⁸ With family ties weakening and deaths from drug overdoses rising,⁴³⁹ the proportion of decedents who go unclaimed appears to be increasing.⁴⁴⁰ In Maryland, for instance, the proportion of unclaimed decedents more than doubled between 2000 and 2021.⁴⁴¹

It is with this broader historical and contemporary context in mind that I will now take a closer look at the disposition methods of unclaimed dead bodies, both past and present. In particular, I will analyze the ways in which we do not afford unclaimed bodies the same quasi-personhood treatment as other dead bodies.

B. Mistreatment

*I am numbered with those who go down to the Pit; . . .
like bodies lying in the grave
of whom You are mindful no more,
and who are cut off from Your care.*⁴⁴²

There have been significant changes in our treatment of unclaimed bodies across U.S. history—foremost among them, the transition from grave robberies to anatomy acts. What is more, the details of how officials did and continue to dispose of unclaimed bodies

435. See JASON DE LEÓN, *THE LAND OF OPEN GRAVES: LIVING AND DYING ON THE MIGRANT TRAIL* 216 (2015).

436. See Sohn et al., *supra* note 398, at 2–3 (noting that very few bodies remain unidentified and that seventeen percent of bodies that had gone initially unclaimed in L.A. County were eventually reclaimed by relatives); Timmermans & Prickett, *supra* note 403, at 512–15 (describing the extensive search for kin that the Los Angeles Medical Examiner-Coroner’s office typically conducts).

437. Sohn et al., *supra* note 398, at 2, 13, 15.

438. Quinet et al., *supra* note 432, at 137.

439. See PRICKETT & TIMMERMANS, *supra* note 97, at 108, 230–33 (describing a decline in family support over the last few decades); MERIANNE ROSE SPENCER, ARIALDI M. MINIÑO & MARGARET WARNER, U.S. DEP’T OF HEALTH & HUM. SERVS., NAT’L CTR. FOR HEALTH STAT., DATA BRIEF NO. 457, *DRUG OVERDOSE DEATHS IN THE UNITED STATES, 2001-2021*, at 6 (2022) (noting that drug overdose deaths rose fivefold between 2001 and 2021).

440. See PRICKETT & TIMMERMANS, *supra* note 97, at 233. Pamela Prickett and Stefan Timmermans attribute the recent increase and projected future increase in the percentage of unclaimed decedents primarily to weakening family connections. *Id.* at 231–33, 258–59. But the causes of this increase call for further study.

441. *Id.* at 12 (reporting that the percentage of decedents going unclaimed in Maryland increased from 2.1 percent in 2000 to 4.5 percent in 2021).

442. *Psalms* 88:5–6 (Jewish Publ’n Soc’y 1985).

vary from state to state and, in most states, even county to county.⁴⁴³ Despite these changes and variations across time and space, there are discernible patterns in our treatment of unclaimed bodies. This Section will examine our treatment of dead bodies through the lens of the default protections that I analyzed in Parts I and II. Those protections, I argued, otherwise dominate the law of dead bodies and give expression to their quasi-personhood. But as we will see here, our treatment of unclaimed bodies, both in law and in fact, often compromises those protections. The result is that we fail to respect unclaimed bodies as quasi-persons.

1. Property

The anatomy acts designed to end the grave robbery age expressly prohibit the sale and purchase of unclaimed bodies.⁴⁴⁴ Nevertheless, it is still the case that we treat those bodies in some ways as property, procuring them for dissection disproportionately from the poor and from Black Americans.⁴⁴⁵ Legislators and advocates supporting the anatomy acts in the nineteenth century often justified the acts as measures of economic restitution.⁴⁴⁶ The poor, they argued, had incurred a debt to society during their lifetimes by burdening public institutions with their needs. Scientific use of their dead bodies was a means of repaying that debt and reimbursing society for its expenses.⁴⁴⁷ As Assemblyman Rollin Germain explained when supporting the New York anatomy act in 1854, the poor, “having been supported by public alms—by offering up their bodies, to the advancement of a humane science, . . . will make some returns to those whom they have burdened by their wants.”⁴⁴⁸ Or as a Washington Post editorialist put it in 1887: “Why would those who . . . have been a burden to [society] be permitted to say what shall be done with their remains? Why should they not be compelled to be of some use after death, having failed to be of value to

443. See, e.g., COLO. REV. STAT. ANN. § 30-17-104 (West 2024) (delegating the disposition of unclaimed bodies to the county level).

444. E.g., N.J. STAT. ANN. § 45:9-51 (West 2023); N.D. CENT. CODE ANN. § 23-06-18 (West 2023); 35 PA. STAT. AND CONS. STAT. ANN. § 1095 (West 2023); TENN. CODE ANN. § 68-4-103(d) (West 2023); WIS. STAT. ANN. § 157.03(1) (West 2023); WYO. STAT. ANN. § 35-4-603 (West 2023).

445. See *supra* notes 431–433 and accompanying text.

446. See SAPPOL, *supra* note 8, at 4.

447. See *id.* Similar reasoning also pervaded debates over the British anatomy act that influenced American legislators. See, e.g., RICHARDSON, *supra* note 398, at 146; LAQUEUR, *supra* note 78, at 359–60; SAPPOL, *supra* note 8, at 120.

448. SAPPOL, *supra* note 8, at 130 (internal quotation marks omitted) (quoting *Speech of Mr. Germain, of Erie, Delivered in the Assembly, in Committee of the Whole, February 28, upon the Bill “For the Promotion of Medical Science,”* BUFF. MORNING EXPRESS, Mar. 7, 1854, at 2).

the world during life?”⁴⁴⁹ This restitutive rationale for the anatomy acts was in effect a property rationale: it viewed the state as *appropriating* unclaimed bodies by both moral and legal right and hence it regarded unclaimed bodies as sovereign property. Indeed, it embraced precisely what the law otherwise takes a categorical stance against: seizing dead bodies as debt collateral—in this case, by using unclaimed bodies as collateral for the social debt that the decedents had accumulated in life.⁴⁵⁰

In more recent decades, a slightly different version of this sovereign property rationale continues to prevail. In 2016, for instance, the director of Maryland’s State Anatomy Board justified the state’s procurement of unclaimed bodies for research: “We’re going to spend public funds, but the public is also going to get the benefit to advance medical study through the use of the body before it’s cremated.”⁴⁵¹ The emphasis here is on the cost that the public incurs when disposing of unclaimed bodies rather than on the cost it incurred when supporting the decedents during their lifetimes. But the upshot is similar: in exchange for the public expense of disposition, the public acquires a use right to the body. The cost of disposition functions as a purchase price. And the resulting use right amounts to a sovereign property interest in the unclaimed body.

Traces of the sovereign property rationale can be seen in multiple aspects of the anatomy acts and their implementation.⁴⁵² For one, the acts routinely limit and offload the public expense of dispositions. For instance, the acts require educational and research institutions to pay handling fees to the state that cover the expenses of procurement and disposition whenever they accept unclaimed bodies.⁴⁵³ Sometimes, states can even boast of making a profit by stretching the

449. Garment et al., *supra* note 423, at 1001 (internal quotation marks omitted) (quoting *For Medical Colleges*, WASH. POST, Apr. 28, 1887, at 2).

450. *Supra* notes 40–42 and accompanying text.

451. Block, *supra* note 10.

452. In light of anatomy acts’ latent treatment of unclaimed bodies as sovereign property, it is only fitting that both professionals and laypeople encountering the procurement of unclaimed bodies in practice often default to property language. Thus, a funeral director who for many years oversaw the procurement of unclaimed bodies at a New York medical school referred to those bodies as “city property” that city officials were “loaning” to his school. Nina Bernstein, *Unearthing the Secrets of New York’s Mass Graves*, N.Y. TIMES (May 15, 2016), <https://www.nytimes.com/interactive/2016/05/15/nyregion/new-york-mass-graves-hart-island.html> [<https://perma.cc/S6AM-RVYV>] (internal quotation marks omitted). A granddaughter who ended up claiming her grandmother’s dead body from the Maryland medical examiner’s office explained, “I was not going to let my grandmother become property of the state.” Block, *supra* note 10.

453. *E.g.*, MO. ANN. STAT. § 194.150(2) (West 2023); N.J. STAT. ANN. § 45:9-52 (West 2023); N.M. STAT. ANN. § 24-12-2(B) (West 2023); OKLA. STAT. ANN. tit. 63, § 98 (West 2024); 35 PA. STAT. AND CONS. STAT. ANN. § 1093 (West 2023); TENN. CODE ANN. § 68-4-108 (West 2023); TEX. HEALTH & SAFETY CODE ANN. § 691.032 (West 2023).

statutory definitions of such fees.⁴⁵⁴ When relatives claim the body with delay, some anatomy acts condition the body's release on a full reimbursement of public expenses.⁴⁵⁵ When states or counties themselves end up disposing of an unclaimed body (for instance, because anatomy boards have rejected it as unfit for scientific use), the acts often put caps on their allowable disposition expenses.⁴⁵⁶ And even in the absence of caps, states and counties frequently seek to reduce their disposition costs by using cremation rather than burial to dispose of unclaimed bodies.⁴⁵⁷ All this casts disposition expenses and handling fees in a similar light as the price tags that grave robbers and anatomists attached to the dead bodies of Black Americans and the poor. Indeed, the ledgers with which state officials and research institutions track the procurement of unclaimed bodies closely resemble the ledgers of nineteenth-century body snatchers. They are meticulous lists that assign each body a number, note its condition, and record its fee.⁴⁵⁸

Understanding unclaimed bodies as state property can also help make sense of why anatomy acts are careful to use only the bodies of their own citizens for scientific advancement. The unclaimed bodies of "stranger[s]" and "traveler[s]" that anatomy acts routinely exempt from dissection *belong* to another sovereign.⁴⁵⁹ By abstaining from appropriating the unclaimed bodies of outsiders, in other words, states avoid trespassing on another sovereign's property.⁴⁶⁰ Several anatomy

454. Jones & Whitaker, *supra* note 423, at 250.

455. *E.g.*, OKLA. STAT. ANN. tit. 63, § 95 (West 2024).

456. *E.g.*, N.M. STAT. ANN. §§ 24-13-3 to -4 (West 2023); 35 PA. STAT. AND CONS. STAT. ANN. § 1092 (West 2023); W. VA. CODE ANN. § 9-5-9(b) (West 2023); *see also* MISS. CODE ANN. § 73-11-58(7) (West 2024) (instructing that "[t]he method of disposition must be in the least costly . . . manner that complies with law" for unclaimed bodies); OR. REV. STAT. ANN. § 97.170(3)(c), (5) (West 2023) (same).

457. *E.g.*, Katie Zezima, *Indigent Burials Are on the Rise*, N.Y. TIMES (Oct. 10, 2009), <https://www.nytimes.com/2009/10/11/us/11burial.html> [<https://perma.cc/D4RF-Q6GX>]. The sovereign property rationale is also consistent with the only recently abandoned New York practice of using jail inmates from Rikers Island to dig mass graves for unclaimed bodies on Hart Island. That practice appropriates the labor of inmates who are viewed as repaying their debt to society by toiling for fifty cents an hour to reduce the debt of the unclaimed poor. *See* Dan Lewis, *What Happens When a Homeless New Yorker Dies*, SMITHSONIAN MAG. (Oct. 6, 2013), <https://www.smithsonianmag.com/history/what-happens-when-a-homeless-new-yorker-dies-808498/> [<https://perma.cc/NBA7-NE7L>].

458. Stroud, *supra* note 15, at 116. As Daina Ramey Berry notes, these ledgers also "eerily mirror[] plantation ledgers." BERRY, *supra* note 122, at 186–89.

459. *E.g.*, CONN. GEN. STAT. ANN. § 19a-282 (West 2023); MASS. GEN. LAWS ANN. ch. 113, § 2 (West 2023); N.H. REV. STAT. ANN. § 291:3 (2023); OHIO REV. CODE ANN. § 1713.38 (West 2023); WIS. STAT. ANN. § 157.03 (West 2023); WYO. STAT. ANN. § 35-4-602 (West 2023); ALA. CODE § 22-19-23 (2024); ME. REV. STAT. ANN. tit. 22, § 2883 (2024); MISS. CODE ANN. § 41-39-7 (West 2024); N.J. STAT. ANN. § 45:9-49 (West 2023); S.C. CODE ANN. § 44-43-540 (2024).

460. An additional explanation is that next of kin may take longer to claim the body of a relative traveling out of state or that officials may take longer to identify it, and so the risk is

acts, moreover, carve out an exception to their exemptions for strangers or travelers who are, in the acts' words, "tramp[s],"⁴⁶¹ "vagrant[s],"⁴⁶² and "vagabond[s]"⁴⁶³—or, in the case of North Carolina, "migrant agricultural workers" and their "dependents."⁴⁶⁴ These are the bodies of the "stateless" whose appropriation poses no risk of offending another sovereign.⁴⁶⁵

The sovereign property rationale, finally, can also help explain why anatomy acts limit the use of unclaimed bodies to in-state institutions,⁴⁶⁶ criminalize their removal beyond state borders,⁴⁶⁷ and sometimes even instruct the officials in charge of overseeing the procurement of unclaimed bodies to "prevent the poor from strolling from one district to another" lest they die and require burial at public expense in a different county.⁴⁶⁸ The thought seems to be that states and counties should get to benefit from their own unclaimed bodies and should also only be responsible for their own.⁴⁶⁹

greater that the body's use for dissection will cause offense. *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. § 691.026 (West 2023) (requiring the retention of "an unclaimed body . . . of a traveler who died suddenly . . . for six months for purposes of identification"). That same risk may not arise when the traveler is a so-called "tramp," *infra* note 461 and accompanying text, who has been visibly abandoned by next of kin. *See* MADOFF, *supra* note 363, at 27–28 (interpreting the exemption of travelers as a protection of affluent decedents).

461. *E.g.*, CONN. GEN. STAT. ANN. § 19A-282 (West 2023); OHIO REV. CODE ANN. § 1713.38 (West 2023); N.H. REV. STAT. ANN. § 291:3 (2023).

462. *E.g.*, CONN. GEN. STAT. ANN. § 19a-282 (West 2023).

463. *E.g.*, ME. REV. STAT. ANN. tit. 22, § 2883 (2024).

464. N.C. GEN. STAT. ANN. § 130A-418 (West 2023); MARSH, *supra* note 14, at 39.

465. *Cf.* HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 276–80 (Harcourt, 1994) (1951) (analyzing statelessness).

466. *E.g.*, CONN. GEN. STAT. ANN. § 19a-270b (West 2023); GA. CODE ANN. § 31-21-21 (West 2023); IOWA CODE ANN. § 142.8 (West 2023); KAN. STAT. ANN. § 65-903 (West 2023); MASS. GEN. LAWS ANN. ch. 113, § 4 (West 2023); N.H. REV. STAT. ANN. § 291:2 (2023); N.J. STAT. ANN. § 45:9-51 (West 2023); OHIO REV. CODE ANN. § 1713.38 (West 2023); S.D. CODIFIED LAWS § 34-26-11 (2024); TENN. CODE ANN. § 68-4-105(a) (West 2023); WASH. REV. CODE ANN. § 68.50.080 (West 2023); WIS. STAT. ANN. § 157.03 (West 2023); WYO. STAT. ANN. § 35-4-603 (West 2023); MD. CODE ANN., HEALTH-GEN. § 5-408(b) (West 2023) (providing an exception to the requirement of in-state use only for voluntary donations); TEX. HEALTH & SAFETY CODE ANN. § 691.030(d) (West 2023) (same). *But see* OKLA. STAT. ANN. tit. 63, § 94(C) (West 2023) (providing an exception to the requirement of in-state use if "the number of bodies available exceed[s] the needs of authorized institutions in this state").

467. *E.g.*, KY. REV. STAT. ANN. § 311.320 (West 2023); MO. ANN. STAT. § 194.140(2) (West 2023); N.D. CENT. CODE ANN. § 23-06-18 (West 2023); 35 PA. STAT. AND CONS. STAT. ANN. § 1095 (West 2023).

468. MISS. CODE ANN. §§ 43-31-27, -29, -31 (West 2024).

469. An additional explanation is that the in-state use of unclaimed bodies may help make anatomy acts more palatable to the state's voters who stand to benefit from a jurisdictional limitation. Such concern with public opinion is evident, for instance, in anatomy acts' occasional pairing of their in-state use requirement with a prohibition against outrage-provoking use. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 113, § 4 (West 2023) ("[The unclaimed body] shall be used only for the promotion of anatomical science in the commonwealth in such manner as not to outrage public feeling . . ."); N.H. REV. STAT. ANN. § 291:2 (2023) ("[Unclaimed bodies] shall be used only in the

2. Waste

Next, our treatment of unclaimed bodies frequently fails to put the same distance between body disposition and waste disposal that we create for other dead bodies. The anatomy acts, with their various attempts to offload disposition costs, approach unclaimed bodies as a fiscal and logistical challenge akin to waste disposal and provide for scientific use as a recycling solution.

Unclaimed bodies also frequently “go to waste.” Compared to other dead bodies, that is, unclaimed bodies tend to reach more advanced stages of decomposition before being disposed. Some of that is a result of delays in discovering unclaimed bodies.⁴⁷⁰ Because decedents whose bodies go unclaimed frequently lived alone and were estranged from family and friends, it can take days or even weeks for officials to find their dead bodies.⁴⁷¹ Moreover, once unclaimed bodies reach the morgue, inadequate refrigeration and delays in identifying the decedent and contacting next of kin tend to exacerbate unclaimed bodies’ decomposition.⁴⁷² The state statutes that require funeral

state for the promotion of science, and in such manner as not to outrage or annoy the public . . .”); WASH. REV. CODE ANN. § 68.50.080 (West 2023) (limiting use of unclaimed bodies “in this state only, and so as in no event to outrage the public feeling”).

470. In the case of border-crossing migrants, the advanced decomposition of unclaimed bodies might be a feature of governmental choice rather than oversight. As anthropologist Jason De León and others have documented, the Clinton Administration in 1994 adopted a strategy of deterring border crossings from Mexico to the United States by sealing populated areas and otherwise relying on the southwestern deserts as “natural barriers,” whose “searing heat” would put “[i]llegal entrants . . . in mortal danger.” U.S. BORDER PATROL, BORDER PATROL STRATEGIC PLAN: 1994 AND BEYOND 2 (1994), https://www.honorfirst.com/uploads/4/7/0/8/47087249/1994_08_08_bp_strategic_plan.pdf [<https://perma.cc/65CQ-HKYF>]; DE LEÓN, *supra* note 435, at 32 (emphasis and internal quotation marks omitted). Implementation of this strategy, which continues to this day, seems to have led to a dramatic increase in migrant deaths and disappearances because many more migrants now try to cross through the deserts. Robin C. Reineke, *Two Decades of Death and Disappearance Along the U.S.-Mexico Border*, CULTURAL ANTHROPOLOGY (Oct. 19, 2021), <https://culanth.org/fieldsights/two-decades-of-death-and-disappearance-along-the-u-s-mexico-border> [<https://perma.cc/ND3L-BDC5>]; Pamela J. Prickett & Stefan Timmermans, *No Olvidados: Unclaimable Bodies of the US-Mexico Border*, IMMANENT FRAME (Oct. 6, 2021), <https://tif.ssrc.org/2021/10/06/no-olvidados-unclaimable-bodies-of-the-us-mexico-border/> [<https://perma.cc/74PJ-SYE5>]. If found at all, their dead bodies are often decomposed beyond recognition because of the deserts’ heat and vultures. Many of these bodies then go unclaimed. Robin C. Reineke, *Forensic Citizenship Among Families of Missing Migrants Along the U.S.-Mexico Border*, 26 CITIZENSHIP STUD. 21, 23 (2022). Anthropologist Robin Reineke is among the scholars and activists who have picked up on the waste-like treatment that the government’s deterrence policy inflicts on migrants’ dead bodies. She relays her colleagues’ description of the work of volunteer forensic scientists as ensuring through their identification efforts that unclaimed “bodies become people, individuals who belong to the community, rather than objects or waste to be disposed of.” *Id.* at 31 (internal quotation marks omitted) (quoting Amade M’charek & Sara Casatelli, *Identifying Dead Migrants: Forensic Care Work and Relational Citizenship*, 23 CITIZENSHIP STUD. 738, 739 (2019)).

471. Quinet et al., *supra* note 432, at 137.

472. See, e.g., Elizabeth Howell Boldt, *Nail in the Coffin: Can Elderly Americans Afford to Die?*, 21 ELDER L.J. 149, 150 (2013); Michael Waters, *No One Really Knows What to Do With All of*

establishments to refrigerate an unembalmed dead body within twenty-four or forty-eight hours of receipt do not always apply to public morgues.⁴⁷³ What statutes tend to ensure instead is that officials and scientists not proceed too quickly to dissecting an unclaimed body, lest next of kin miss their chance to claim them beforehand.⁴⁷⁴

Finally, the burial grounds of unclaimed bodies tend to bear some resemblance to waste dumping grounds. Historically, that was true of potter's fields.⁴⁷⁵ And reports of such unkempt grounds continue.⁴⁷⁶ As we saw in the Introduction, the District of Columbia until a few years ago buried its unclaimed bodies in an overgrown cemetery plot "next to heaps of trash."⁴⁷⁷ And New Orleans buries the cremated remains of its unclaimed dead in mass graves inside a private cemetery that borders "the city dump, a junkyard, . . . industrial ruins," and a "swamp."⁴⁷⁸

3. Animals

A related difference in our treatment of unclaimed bodies compared to other dead human bodies is the lesser distance that we put between unclaimed bodies and animals.

From their earliest days, the anatomy acts provoked the criticism that they put the "poor and oppressed . . . upon a level with the

America's Unclaimed Corpses, ATLANTIC (Feb. 12, 2019), <https://www.theatlantic.com/health/archive/2019/02/unclaimed-bodies-problem/582625/> [<https://perma.cc/E8GS-G74P>]; see also, e.g., Rick Rojas, *A Mother's Search for Her Son Leads to a Pauper's Grave and More Questions*, N.Y. TIMES (Nov. 19, 2023), <https://www.nytimes.com/2023/11/19/us/jackson-mississippi-dexter-wade-missing-buried.html> [<https://perma.cc/F4A4-2DT5>] (reporting a delay of more than five months in identifying the body of Dexter Wade and notifying his mother, leading to its temporary burial in an unmarked gravesite for unclaimed bodies, even though his mother regularly called the police department to inquire and Wade carried identifying information when he was struck and killed by a police car). My thanks to Chaz Arnett and Evelyn Atkinson for pointing me to this case.

473. *E.g.*, COLO. REV. STAT. ANN. §§ 12-135-103(16), -106 (West 2024).

474. *E.g.*, N.M. STAT. ANN. § 24-13-1 (requiring that unclaimed bodies be held in the morgue for at least two weeks after death, cremains at least two years); 140 N. MAR. I. ADMIN. CODE § 140-20.2-505(a) (2019) (bodies at least two weeks); MO. ANN. STAT. § 194.150(1) (West 2023) (at least thirty days); KAN. STAT. ANN. § 65-904 (West 2023) (at least sixty days); S.D. CODIFIED LAWS § 34-26-10 (2024) (same); UTAH CODE ANN. § 53B-17-301(4) (West 2023) (same); WIS. STAT. ANN. § 157.03 (West 2023) (at least three months); V.I. CODE ANN. tit. 19, § 1701 (2023) (at least one year). *But see* N.M. STAT. ANN. § 24-13-1 (West 2023) (requiring burial or cremation within thirty days of determination of unclaimed status).

475. *E.g.*, SAPPOL, *supra* note 8, at 35.

476. In addition to the neglect of unclaimed bodies' burial grounds, their collective burial can evoke associations with waste disposal. See PRICKETT & TIMMERMANS, *supra* note 97, at 148 (quoting a woman who wanted to prevent her sister's unclaimed body from being "dumped 'like she was garbage' in a mass grave").

477. Davis, *supra* note 4; see also McCoy, *supra* note 3 (describing the plot as located next to "trash cans").

478. DAWDY, *supra* note 130, at 191.

beasts that perish.”⁴⁷⁹ A New York Democrat denounced his state’s 1854 anatomy bill for treating “the bodies of men of no greater import than the bodies of dogs.”⁴⁸⁰ English critics leveled similar charges, accusing the anatomy act’s champions of looking upon “the poor . . . as beasts of burden.”⁴⁸¹

To this day, several American anatomy acts expressly authorize the mingling of unclaimed bodies and animals. These acts allow coroners to give the tissue of unclaimed bodies to search and rescue organizations for the purpose of training dogs to detect human remains.⁴⁸² Louisiana passed such a law as recently as 2016, after a county medical examiner was convicted of giving tissue from a claimed body she had autopsied to a cadaver dog training camp in which she had enrolled her own dog.⁴⁸³ In practice, the close association of unclaimed bodies and animals also persists in other ways—for example, by disposing of unclaimed bodies in crematories that otherwise process pet remains, as discussed in the Introduction.⁴⁸⁴

4. Individuals

Next, our treatment of unclaimed bodies affords them less individualization compared to other dead bodies. The law condones, and sometimes even enables, such treatment. It typically limits its

479. RICHARDSON, *supra* note 398, at 100 (internal quotation marks omitted) (quoting COBBETT’S WKLY. POL. REG., Jan. 28, 1832, at 267–69); *see also* SAPPOL, *supra* note 107, at 4 (describing criticisms of U.S. anatomy acts by poor people and middle-class egalitarians who charged that “[t]he dissector was a butcher who reduced the human body to the status of thing, to the condition of ‘meat’ ”).

480. SAPPOL, *supra* note 8, at 131 (internal quotation marks omitted) (quoting Patrick Maguire, Democrat, N.Y.C. Assembly Debate (Mar. 17, 1854), *in* N.Y. HERALD, Mar. 18, 1854).

481. RICHARDSON, *supra* note 398, at 188 (internal quotation marks omitted) (quoting Petition from the Inhabitants of Blackburn: HofC: V&P App’x, Feb. 15, 1832). English newspapers also published a cartoon that likened those champions to butchers putting up human meat for sale. *Id.* at 222. And they reported in 1829 that when the inmates of a workhouse for the poor heard about the anatomy bill pending in Parliament they began to suspect that the workhouse soup contained not only animal meat but also the human remains of deceased fellow inmates. *Id.* at 221–22.

482. *E.g.*, OKLA. STAT. ANN. tit. 63, § 96 (West 2024); TEX. HEALTH & SAFETY CODE ANN. § 691.030(3) (West 2023); UTAH CODE ANN. § 26B-8-225(3) (West 2023); WYO. STAT. ANN. § 35-4-601 (West 2023).

483. Act of June 17, 2016, No. 628, § 1, 2016 La. Sess. Law Serv. (West) (codified at LA. STAT. ANN. § 9:1551(F)); *see* Olejnik v. England, 147 F. Supp. 3d 763, 769 (W.D. Wis. 2015). The legislative pattern in this case resembles the historical shift from grave robberies to anatomy acts: Louisiana responded to the illegal, scientific use of a claimed body by giving officials and institutions legal means to meet their research and training needs and ensuring that they henceforth use unclaimed bodies alone. *Cf. supra* notes 413, 417 and accompanying text (discussing similar motivations behind the historical shift from grave robberies to anatomy acts).

484. McCoy, *supra* note 3.

individualization requirements to private funerary establishments⁴⁸⁵ or else allows state and local officials to contract around the requirements by authorizing officials to take the place of the decedent's next of kin.⁴⁸⁶

To this day, the whole-body burial of unclaimed bodies often occurs in mass graves. On Hart Island, for instance, New York City buries unclaimed bodies in trenches of up to one thousand children or fifty adult corpses each.⁴⁸⁷ Moreover, until a few decades ago, morgues sometimes embalmed freshly delivered bodies in group baths.⁴⁸⁸

Unclaimed bodies that are cremated rather than buried whole tend to enjoy less individualization as well. Sometimes, morgues cremate multiple bodies at the same time.⁴⁸⁹ An employee of the University of Michigan, for instance, explained that its morgue for several years “was burning more than one body at once. It was more expedient We operated like we were moving product around a warehouse.”⁴⁹⁰ More often, though, the mingling of cremated unclaimed bodies occurs later: during their disposition. Most jurisdictions appear to inter the cremains of unclaimed bodies in joint vaults or plots. Sometimes, the cremains of each unclaimed body are stored in separate containers within a shared vault.⁴⁹¹ But sometimes, the cremains are also just scattered together.⁴⁹² Los Angeles County, for instance, pours the cremains of all unclaimed bodies of any given year—1,624 in 2022—into one grave plot.⁴⁹³

485. A rare exception proves the point: Oklahoma is, as far as I can tell, the only state that requires the individualized cremation of unclaimed bodies—but only if those bodies are sent to *other* states and cremated in those other states. OKLA. STAT. ANN. tit. 63, § 97 (West 2024).

486. *E.g.*, ALA. CODE § 34-13-11(a)(12) (West 2023); ALASKA STAT. ANN. § 13.75.020(a)(7) (West 2023); ARIZ. REV. STAT. ANN. § 36-831(C) (2024); ARK. CODE ANN. § 20-17-102(d)(1)(K) (West 2023); GA. CODE ANN. § 31-21-7(b)(11) (West 2023); HAW. REV. STAT. ANN. § 531B-4(a)(11) (West 2023); 755 ILL. COMP. STAT. ANN. 65/5(7) (West 2023); KAN. STAT. ANN. § 65-1734(a)(8) (West 2023); MD. CODE ANN., HEALTH OCC. § 7-410(e) (West 2023); OHIO REV. CODE ANN. § 2108.81(B)(10) (West 2023); OKLA. STAT. ANN. tit. 21, § 1158(9) (West 2024); TENN. CODE ANN. § 62-5-703(11) (West 2023); W. VA. CODE ANN. § 30-6-22a(b)(11) (West 2023). Some states have a more open-ended delegation that would include public officials disposing of unclaimed bodies. *E.g.*, S.C. CODE ANN. § 32-8-320(A)(9) (2024); VA. CODE ANN. § 32.1-291.9(A)(10) (West 2023).

487. *See* Lewis, *supra* note 457.

488. ISERSON, *supra* note 11, at 108.

489. Coelho & Caplan, *supra* note 423, at 741.

490. ANNIE CHENEY, BODY BROKERS: INSIDE AMERICA'S UNDERGROUND TRADE IN HUMAN REMAINS 131 (2006) (internal quotation marks omitted). Morgue staff did not seem to distinguish between donated and unclaimed bodies.

491. Williams, *supra* note 2.

492. *E.g.*, Julieta Chiquillo, *Dallas County Rules Out Liquid Cremation as It Seeks New Home for Unclaimed Bodies*, DALLAS NEWS (Nov. 21, 2018, 6:01 PM), <https://www.dallasnews.com/news/2018/11/22/dallas-county-rules-out-liquid-cremation-as-it-seeks-new-home-for-unclaimed-bodies/> [https://perma.cc/M45G-2DPM] (noting that until recently cremains were poured into one vault and scattered into the Gulf of Mexico).

493. A CERTAIN KIND OF DEATH (New Box Media 2003); City News Serv., *LA County Honors 1,624 Unclaimed Dead in Mass Burial at Boyle Heights Cemetery*, L.A. DAILY NEWS (Dec. 8, 2022,

In addition to the physical mingling of unclaimed bodies, their lesser individualization finds manifestation in the frequent separation of their burial sites. Historically, unclaimed bodies were usually buried in potter's fields—exclusive cemeteries for the poor.⁴⁹⁴ Often, those indigent cemeteries were in turn segregated by race, with separate sections for Black Americans.⁴⁹⁵ Today, unclaimed bodies still tend to rest in separate cemeteries or cemetery sections. Sometimes, those are the specially dedicated cemeteries of prisons or mental health institutions.⁴⁹⁶ Sometimes, they are municipal cemeteries for the poor or sections within private cemeteries that counties have leased for their unclaimed bodies.⁴⁹⁷ Either way, the burial of unclaimed bodies in separate gravesites suggests a view that regards them first as members of groups—the poor, the incarcerated, the mentally ill—rather than first as individuals.

5. Names

We also honor unclaimed bodies less frequently with names than other dead bodies. When Jeremy Bentham first pitched the idea of anatomy acts, he suggested that the name of each unclaimed decedent should be published in a newspaper to render their scientific use more dignified and to make it easier for estranged family members to claim them. But U.S. states do not usually mandate the publication of their unclaimed decedents' names upon identification.⁴⁹⁸ On the contrary, states historically relied on the anonymity of unclaimed decedents to garner electoral support for their anatomy acts. Several states initially limited the application of their acts to more densely populated urban areas, where unclaimed decedents were more likely to have led an anonymous existence.⁴⁹⁹ New York's medical faculty had gestured at

5:26 PM), <https://www.dailynews.com/2022/12/08/la-county-honors-1624-unclaimed-dead-in-mass-burial-at-boyle-heights-cemetery/> [<https://perma.cc/GA7P-VE5F>].

494. *E.g.*, LADERMAN, *supra* note 414, at 41–42.

495. *See, e.g.*, Smith, *supra* note 255, at 243 (discussing BIRMINGHAM, ALA., GEN. CODE tit. 9, art. II, § 4791 (1930), which “banned ‘colored’ paupers and white paupers from being buried in the same public grounds,” and the history of segregated cemeteries).

496. *See, e.g.*, Robyn Ross, *Laid to Rest in Huntsville*, TEX. OBSERVER (Mar. 11, 2014, 11:34 AM), <https://www.texasobserver.org/prison-inmates-laid-rest-huntsville/> [<https://perma.cc/328H-T2HA>]; Harmon, *supra* note 148.

497. *E.g.*, Michael Laris, *Fairfax Moves Forward with Cemetery for the Poor*, WASH. POST (June 23, 2013, 7:43 PM), https://www.washingtonpost.com/local/trafficandcommuting/fairfax-moves-forward-with-cemetery-for-the-poor/2013/06/23/fa08cf2a-d378-11e2-a73e-826d299ff459_story.html [<https://perma.cc/EQA7-7LZF>].

498. *But see* OR. REV. STAT. ANN. § 97.160(3) (West 2023) (requiring hospitals or sanitariums to publish the name of a decedent if no next of kin are known).

499. *E.g.*, Massachusetts, New York, Pennsylvania, and Tennessee. SAPPOL, *supra* note 8, at 121, 123; *see also* Weinmann, *supra* note 14, at 78 (noting that, as of 1929, Tennessee limited its

this point already in 1826, when lobbying for an anatomy act. Using unclaimed bodies from within New York City, they explained, would mean that those bodies could be drawn from the “multitudes from all nations,” who were “unconnected” and “might therefore be used, without offence.”⁵⁰⁰

Today, the anonymity of unclaimed bodies often persists during their transportation and disposition. Numbers rather than names tend to dominate the tracking of unclaimed bodies during their delivery to scientific institutions and counties,⁵⁰¹ even though coroners succeed at identifying most of them.⁵⁰² Names are often absent from the burial sites of unclaimed bodies as well. Some such sites lack any grave marker—among them, as many as three hundred thousand graves of unclaimed psychiatric patients across the country.⁵⁰³ Others have collective markers with epitaphs, but no names.⁵⁰⁴ Yet others have individual or collective markers inscribed with only a number. Los Angeles, for instance, labels each mass grave for the cremains of its unclaimed bodies with only their year of death.⁵⁰⁵ And the Arizona State Prison in Florence used to mark the grave of each unclaimed inmate with their prison number, stamped on metal plaques resembling license plates.⁵⁰⁶

anatomy act to counties with populations of four thousand or more). Michael Sappol argues that this tactic “defused the objections of rural legislators.” SAPPOL, *supra* note 8, at 121. This urban/rural divide mirrors Evelyn Atkinson’s observation in a related context that “the doctrine [of damages for mental anguish in delayed telegraph cases communicating death or illness was] accepted in many rural state courts but rejected in more urban locales.” Evelyn Atkinson, *Telegraph Torts: The Lost Lineage of the Public Service Corporation*, 121 MICH. L. REV. 1365, 1367 (2023).

500. SAPPOL, *supra* note 8, at 117 (internal quotation marks omitted) (quoting P&S Faculty, Response to the Report of Regents, Feb. 18, 1826, at 150-51 [HS]).

501. *See, e.g.*, Stroud, *supra* note 15, at 116.

502. *See, e.g.*, Sohn et al., *supra* note 398, at 2; *see also* Timmermans & Prickett, *supra* note 403, at 512 (noting that in 2017, for instance, the L.A. Medical Examiner-Coroner’s office identified all but eighteen of 9,204 unclaimed bodies); Quinet et al., *supra* note 432, at 135–36 (finding that the Marion County’s coroner’s office in Indiana identified all unclaimed bodies between 2004 and 2011).

503. Harmon, *supra* note 148, at 907–08.

504. *E.g.*, Block, *supra* note 10.

505. Stefan Timmermans & Pamela Prickett, Opinion, *Today Is L.A. County’s Crucial Annual Memorial for the Living and the Dead*, L.A. TIMES (Dec. 5, 2018, 3:10 AM), <https://www.latimes.com/opinion/op-ed/la-oe-timmermansandprickett-county-burials-20181205-story.html> [https://perma.cc/FG64-HC7B].

506. ISERSON, *supra* note 11, at 619. Some prison cemeteries add an identifiable mark to the gravestones of inmates who were executed or died on death row. *See, e.g.*, Ross, *supra* note 496 (“If the inmate was executed, the headstone bears the letters ‘X’ or ‘EX,’ or a prison number beginning ‘999’—the designation for death row.”); *see also* Harmon, *supra* note 148, at 903, 906, 970 n.286, 972, 979 n.332 (describing graves of unclaimed psychiatric patients that were marked with only numbers).

6. Visual Abuse

Next, unclaimed bodies are subject to more visual abuse than other dead bodies. The law's covering protections do not apply with the same robustness to unclaimed bodies as to other corpses.

The scientific uses that anatomy acts allow frequently entail the uncovering of unclaimed bodies. And even though most states subsequently require the decent disposition of unclaimed bodies,⁵⁰⁷ many allow certain acts of uncovering to persist. New York, for instance, allows for the indefinite retention of unclaimed body parts for scientific study.⁵⁰⁸ Several states, as we saw, also allow the tissue of unclaimed bodies to be used for the training of search and rescue dogs—thus exempting it from the requirement of decent disposition.⁵⁰⁹ Finally, most states allow virtually any legal disposition method to fulfill the requirement that unclaimed bodies be decently disposed, even if it involves some exposure to view.⁵¹⁰ Several states, for instance, have at times scattered the cremains of unclaimed bodies at sea.⁵¹¹ And in

507. *E.g.*, GA. CODE ANN. § 31-21-23 (West 2023); 410 ILL. COMP. STAT. ANN. 510/4 (West 2023); KY. REV. STAT. ANN. § 311.340 (West 2023); LA. STAT. ANN. § 8:651 (2024); MASS. GEN. LAWS ANN. ch. 113, § 4, ch. 114, § 43M (West 2023); MISS. CODE ANN. § 41-39-7 (West 2024); NEB. REV. STAT. ANN. § 23-1816 (West 2024); N.H. REV. STAT. ANN. § 291:2 (2023); N.D. CENT. CODE ANN. § 23-06-17 (West 2023); OR. REV. STAT. ANN. §§ 97.200(1), 146.121(3) (West 2023); S.C. CODE ANN. § 44-43-560 (2024); S.D. CODIFIED LAWS § 34-26-11 (2024); UTAH CODE ANN. §§ 26B-8-225(1), 53B-17-303(2) (West 2023); WASH. REV. CODE ANN. § 68.50.110 (West 2023); WYO. STAT. ANN. §§ 35-4-605 (West 2023).

508. N.Y. PUB. HEALTH LAW § 4215(2) (McKinney 2024).

509. *See supra* notes 482–483 and accompanying text. Most states, moreover, lack restrictions on the public display of unclaimed bodies from elsewhere—such as the use of unclaimed bodies from China in plastination exhibitions. Jones & Whitaker, *supra* note 423, at 251; Lisa A. Giunta, *The Dead on Display: A Call for the International Regulation of Plastination Exhibits*, 49 COLUM. J. TRANSNAT'L L. 164, 180–84 (2010); S. Hildebrandt, *Capital Punishment and Anatomy: History and Ethics of an Ongoing Association*, 21 CLINICAL ANATOMY 5, 10 (2008); Traci McKee, *Resurrecting the Rights of the Unclaimed Dead: A Case for Regulating the New Phenomenon of Cadaver Trafficking*, 36 STETSON L. REV. 843, 846–48 (2007).

510. *E.g.*, 410 ILL. COMP. STAT. ANN. 510/4 (West 2023); LA. STAT. ANN. § 8:651 (2024); MASS. GEN. LAWS ANN. ch. 113, § 4, ch. 114, § 43M (West 2023); N.M. STAT. ANN. § 24-13-1 (West 2023); N.D. CENT. CODE ANN. § 23-06-17 (West 2023); OR. REV. STAT. ANN. §§ 97.200(1), 146.121(3) (West 2023); TENN. CODE ANN. § 68-4-103(c) (West 2023); UTAH CODE ANN. § 53B-17-303(2) (West 2023); WASH. REV. CODE ANN. § 68.50.110 (West 2023); WYO. STAT. ANN. § 35-4-605 (West 2023); 10 GUAM CODE ANN. § 4A103 (2022); 140 N. MAR. I. ADMIN. CODE § 140-20.2-505 (2019).

511. *See, e.g.*, Waters, *supra* note 472 (North Carolina); Kevin Bliss, *Families Must Pay for Cremation Bill of Loved Ones Who Die in Prison*, PRISON LEGAL NEWS (Dec. 1, 2020), <https://www.prisonlegalnews.org/news/2020/dec/1/families-must-pay-cremation-bill-loved-ones-who-die-prison/> [https://perma.cc/8YL3-3XVS] (unclaimed prisoners in California); Prickett & Timmermans, *supra* note 470 (unclaimed migrants in California); April Baer, *More Unclaimed Bodies as Economy Impacts Funerals*, NPR (Jan. 10, 2010, 12:11 AM) (Oregon); Chiquillo, *supra* note 492 (Texas). As I noted, people disagree over whether cremains, too, call for dignity protections against visual exposure, and the law navigates that disagreement by subjecting the scattering of cremains to a default prohibition that decedents and next of kin can waive. *See supra*

some states, the cremains of unclaimed psychiatric patients have sat on the shelves of hospital storage rooms or lain strewn across the floor of a basement for decades.⁵¹²

To be sure, many states require the thorough covering of unclaimed bodies during their distribution to scientific institutions.⁵¹³ But unlike states' covering protections for other dead bodies, these provisions never speak of unclaimed bodies' dignity as a motivating reason. They only speak of preventing public observation.⁵¹⁴ That, combined with statutory instructions to use unclaimed bodies "so as in no event to outrage the public feeling,"⁵¹⁵ creates the impression that the anatomy acts insist on covering unclaimed bodies to hide their distribution rather than to protect them.

7. Physical Abuse

Unclaimed bodies are also subject to more physical abuse than other dead bodies. To start, unclaimed bodies are routinely embalmed once they reach the morgue.⁵¹⁶ Though such embalment aids with the bodies' preservation, it inevitably involves incisions into the body that many view as mutilation, sometimes on religious grounds.⁵¹⁷ Indeed, even in the absence of religious objections, the embalming technique used for unclaimed bodies is particularly prone to being perceived as mutilation.⁵¹⁸ To preserve unclaimed bodies for prolonged periods of

notes 377–382 and accompanying text. Such waivers are usually absent in the case of unclaimed bodies. *See infra* notes 530–537 and accompanying text.

512. As was the case for the unclaimed bodies of hundreds of psychiatric patients in Oregon State Hospital and Hawaii State Hospital. *See* Stephen Ceasar, *Shelves of Forgotten Souls*, L.A. TIMES (May 13, 2011, 12:00 AM), <https://www.latimes.com/world/la-xpm-2011-may-13-la-na-cremated-remains-20110514-story.html> [<https://perma.cc/57AR-BNHU>]; Nalea J. Ko, *Remembrance of Those Cast Aside*, HONOLULU STAR BULL. (July 2, 2008), <https://archives.starbulletin.com/2008/07/02/news/story07.html> [<https://perma.cc/8H4E-W4L2>]; *see also* Harmon, *supra* note 148, at 975–77 (discussing these instances).

513. *E.g.*, GA. CODE ANN. § 31-21-24 (West 2023); ME. REV. STAT. ANN. tit. 22, § 2885 (2024); MO. ANN. STAT. § 194.160(2) (West 2023); N.J. STAT. ANN. § 45:9-50 (West 2023); N.C. GEN. STAT. ANN. § 130A-415(e) (West 2023); 35 PA. STAT. AND CONS. STAT. ANN. § 1094 (West 2023); S.C. CODE ANN. § 44-43-560 (2024); TEX. HEALTH & SAFETY CODE ANN. § 691.031(c) (West 2023).

514. *E.g.*, GA. CODE ANN. § 31-21-24 (West 2023) (providing that unclaimed "bodies shall be well enclosed in suitable incasements and carefully deposited free from public observation").

515. WASH. REV. CODE ANN. § 68.50.080 (West 2023); *see also, e.g.*, MASS. GEN. LAWS ANN. ch.113, § 4 (West 2023) ("in such manner as not to outrage public feeling"); N.H. REV. STAT. ANN. § 291:2 (2023) ("in such manner as not to outrage or annoy the public").

516. *See, e.g.*, KY. REV. STAT. ANN. § 311.330 (West 2023); MD. CODE ANN., HEALTH-GEN. § 5-406(c) (West 2023); MICH. COMP. LAWS ANN. § 333.2655 (West 2023); N.M. STAT. ANN. § 24-12-1(F) (West 2023); S.D. CODIFIED LAWS § 34-26-10 (2024); TEX. HEALTH & SAFETY CODE ANN. § 691.025(a) (West 2023); UTAH CODE ANN. § 53B-17-301(4) (West 2023); WIS. STAT. ANN. § 157.03(2) (West 2023).

517. *See, e.g.*, Chaudhry v. City of Los Angeles, 751 F.3d 1096, 1101 (9th Cir. 2014).

518. *See, e.g.*, Block, *supra* note 10.

identification and scientific use, coroners tend to use disinfecting phenol when draining and replacing the body's fluid, with the result that the tissue swells and the bodies turn "puffy."⁵¹⁹

Subsequent to their embalment, many unclaimed bodies undergo additional mutilations. Those, as we saw, can include anatomical dissections, crash tests, and experiments with military weapons and protective gear, among others.⁵²⁰ During the 1950s, for instance, the U.S. Army used unclaimed bodies from the Baltimore Medical Examiner's Office to test the efficacy of new helmets against land mines.⁵²¹ No wonder, then, that several states feel a need to exempt unclaimed bodies from their statutory protections against corpse abuse and mutilation.⁵²²

Finally, even if and when unclaimed bodies are eventually buried, they continue to be at greater risk of disturbance. Since unclaimed bodies typically lack relatives who would object to their disinterment and because their gravesites are often uncared for and therefore abandoned in the law's eyes,⁵²³ cemetery corporations, real estate developers, and municipalities can move their remains with relative ease.⁵²⁴

519. *Id.*

520. *Supra* notes 423–430 and accompanying text.

521. ISERSON, *supra* note 11, at 123.

522. *E.g.*, TEX. HEALTH & SAFETY CODE ANN. § 691.033(e) (West 2023); UTAH CODE ANN. § 76-9-704(3) (West 2023); WYO. STAT. ANN. § 6-4-502(b)(iii) (West 2023).

523. *See, e.g.*, Associated Press, *Md., Del. Have Different Rules for Burying Poor*, CBS NEWS (June 12, 2011, 6:39 PM), <https://www.cbsnews.com/baltimore/news/md-del-have-different-rules-for-burying-poor/> [<https://perma.cc/32GN-5JZN>].

524. *See, e.g.*, *Trs. of First Presbyterian Church in Newark v. Alling*, 148 A.2d 510, 514 (N.J. Super. Ct. Ch. Div. 1959) (holding that relocation of bodies from an abandoned and dilapidated cemetery was justified); *Touro Synagogue v. Goodwill Indus. of New Orleans Area, Inc.*, 96 So. 2d 29, 37–38 (La. 1957) (holding synagogue could sell abandoned cemetery); *Frost v. Columbia Clay Co.*, 124 S.E. 767, 770 (S.C. 1924) (discussing cemetery abandonment); *see also* Smith, *supra* note 255, at 212 (discussing the weaker protections of abandoned cemeteries).

8. Disrespected Quasi-Persons⁵²⁵

The foregoing analysis implies that our treatment of unclaimed bodies is out of step with the status of dead bodies as quasi-persons.⁵²⁶ To reach this conclusion, we need not regard any aspect of our treatment of unclaimed bodies as intrinsically undignified.⁵²⁷ We may personally think, for instance, that cremation followed by scattering into mass graves alongside others who died that year is a perfectly dignified, even redemptive, way to be disposed of after a socially isolated life.⁵²⁸ But given that we as a society otherwise express through our default legal protections that dead bodies hold certain dignity interests, we fail to respect unclaimed bodies as quasi-persons by depriving them of those dignity protections.⁵²⁹

525. I am omitting here a section discussing the sexual abuse of unclaimed bodies because I am not aware of evidence that unclaimed bodies are more often subject to such abuse than other dead bodies. There is, however, a longstanding figurative association between dead bodies' scientific use and sexual abuse. As Sappol notes, some nineteenth-century critics referred to anatomical dissection as "a rape of the dead body." SAPPOL, *supra* note 8, at 87. They also called it an "unnatural act"—language familiar from the laws criminalizing necrophilia alongside bestiality and, historically, sodomy. *Id.* (internal quotation marks omitted). Perhaps the attachment of sexual fears to the fate of dissected bodies should not surprise us, given their frequent uncovering. During the age of grave robberies, the sight of a woman's grave "empty of all but her grave clothes" may well have triggered associations with necrophilia. SHULTZ, *supra* note 5, at 79. Similar fears seem to have persisted for some at the sight of naked bodies on medical dissection tables. As a poem asked in 1880: "[Who] would want the mortal remains of / Wife, mother, daughter, sister, / Upon the block, with veins, arteries, / Nerves, muscles, exposed to view?" SAPPOL, *supra* note 8, at 88 (internal quotation marks omitted) (quoting G.D. Spencer, A Poem on the Hubbardton Raid: Read in the Congregationalist Church Hubbardton, May 12, 1880, at 26).

526. This is consistent with Stroud's observation that "the corpses of the least powerful—the poor, the nonwhite, the unknown—are the ones most often treated as things." Stroud, *supra* note 15, at 117.

527. Nor need we be committed to the complete erasure of class disparities in death. The legal protections I have analyzed are expressive of moral floors and defaults below which our treatment of unclaimed bodies should not go, but they need not impose moral ceilings. In that way, they lend themselves to a sufficientarian account of equality that need not conflict with the radical variations we otherwise see in the care, pomp, and expense with which dead bodies are disposed—typically in accordance with a decedent's social and economic standing while alive. See, e.g., ZYGMUNT BAUMAN, MORTALITY, IMMORTALITY AND OTHER LIFE STRATEGIES 54 (1992); DAWDY, *supra* note 130, at 147–49. Not only are these class disparities permissible under the law, the law often enshrines them. It provides, for instance, that estate administrators may spend as much on funeral and disposition costs as befits the "social rank to which the decedent belonged." *In re Allen's Estate*, 26 P.2d 396, 398 (Wash. 1933).

528. See, e.g., @deedeemooreco.2304, *Comment to havoctrend, A Certain Kind of Death—Documentary*, YOUTUBE (Oct. 22, 2012), <https://www.youtube.com/watch?v=ErooOhzE268> [<https://perma.cc/6A9X-DK7F>] ("I got choked up at all those cremains buried together . . . not just because they had no one to claim them and they died alone, but that they didn't have to be buried alone. They were buried with thousands of other lost souls. It made my heart happy knowing that." (alteration in original)).

529. The descriptive fact that we otherwise treat dead bodies as quasi-persons thus carries normative consequences, whether we personally embrace or reject such treatment. This observation speaks to a broader moral phenomenon. The law's codification of certain norms changes the moral import of those norms. My Article traces this phenomenon methodologically by

Someone may object to this conclusion that none of the supposedly lesser protections we saw are unique to unclaimed bodies. After all, other dead bodies too can be legally uncovered, disturbed, mutilated, mingled, and anonymized, and their cremains can be scattered. Dead bodies donated to science, for instance, are subject to similar treatment.⁵³⁰

However, for unclaimed bodies, in contrast to others, we lack any affirmative indication that the decedents meant to waive the law's protections (for instance, as a sacrifice for the advancement of science).⁵³¹ True, several states have opt-out clauses that allow decedents to object to the scientific use of their bodies,⁵³² and sometimes also to cremation.⁵³³ But the existence of these clauses does not mean that decedents tacitly consented to our treatment of their unclaimed bodies. First, multiple aspects of our lesser treatment fall outside the purview of those opt-out clauses because they are unrelated to scientific use and cremation, such as the mingling and anonymity of unclaimed

offering a descriptive account first and a conditional normative account second. This methodological tack seems particularly apt for norms as culturally contingent and malleable as those around dead bodies, where moral facts may not be discernible outside their legal and social context. Cf. HERODOTUS, *The Histories* 3.38, in *THE LANDMARK HERODOTUS: THE HISTORIES* 224 (Robert B. Strassler ed., Andrea L. Purvis trans., 2007) (contrasting the funerary customs of Hellenes and Kallatiai and concluding that “custom is king of all”). My thanks to Quinn White for helpful discussions of my methodology.

530. See, e.g., *Bennett v. Regents of the Univ. of Cal.*, 34 Cal. Rptr. 3d 579, 585 (Ct. App. 2005) (holding that CAL. HEALTH & SAFETY CODE § 7054.4 (West 2024) exempts donated bodies used for scientific research from the legal prohibition against simultaneous cremation).

531. Anatomists who criticize the scientific use of unclaimed bodies tend to focus on this absence of affirmative consent. See Peter A. Kahn, Thomas H. Champney & Sabine Hildebrandt, *The Incompatibility of the Use of Unclaimed Bodies with Ethical Anatomical Education in the United States*, 10 *ANATOMICAL SCIS. EDUC.* 200, 200 (2017). My account shifts this focus. I locate the central wrong in the lesser dignity protections for unclaimed bodies. And I view the absence of affirmative consent as a precondition for that wrong if and only if a given dignity protection is otherwise waivable in that jurisdiction.

532. E.g., CONN. GEN. STAT. ANN. § 19a-282 (West 2023) (prohibiting the anatomical use of the unclaimed body “of a person who is known to have expressed a desire that his body should be buried”); IOWA CODE ANN. § 142.1 (West 2023); IOWA ADMIN. CODE r. 645-100.8(1) (2024); KAN. STAT. ANN. § 65-904(a) (West 2023); MASS. GEN. LAWS ANN. ch. 113, § 2 (West 2023); MISS. CODE ANN. § 73-11-58(7) (West 2024) (applying to disposition by funeral director, not coroner); MONT. CODE ANN. § 50-21-102(6) (West 2023); N.Y. PUB. HEALTH LAW § 4211(3)(b) (McKinney 2024); N.D. CENT. CODE ANN. § 23-06-15 (West 2023); WASH. REV. CODE ANN. § 68.50.070(2) (West 2023); WIS. STAT. ANN. § 157.03(1) (West 2023); WYO. STAT. ANN. § 35-4-602(a)(i) (West 2023). Few states give relatives the power to object to scientific use in the absence of financial means to pay for the disposition. GA. CODE ANN. § 31-21-21(a) (West 2023); IOWA ADMIN. CODE r. 645-100.8(1) (2024). But states usually provide for an opt-out in their codifications of the UAGA, which might override the scientific use authorized by their anatomy acts. E.g., S.D. CODIFIED LAWS § 34-26-54 (2024).

533. E.g., 755 ILL. COMP. STAT. ANN. 65/30 (West 2023) (“No person shall be allowed to authorize cremation when a decedent has left written instructions that he or she does not wish to be cremated.”).

bodies in mass graves.⁵³⁴ Moreover, not all states have an opt-out clause,⁵³⁵ and few include an additional requirement of mental competence.⁵³⁶ Finally, even if such clauses were on the books and broadened to cover all lesser protections, decedents can hardly be considered to have given tacit consent, given how little known and how infeasible in practice the opt-outs appear to be.⁵³⁷

The perhaps better objection to the conclusion of unequal quasi-personhood is that our laws treat all dead bodies formally as equals. They subject each dead body to the same conditional fate of being used and disposed of as an unclaimed body unless it is claimed by next of kin. Or put differently, our unclaimed bodies regime treats each dead body according to the same disposition hierarchy, carefully laid out by statute, with the authority of disposition devolving to the next family member in line and eventually to the state whenever the body remains unclaimed.⁵³⁸

However, formal equality here is of little comfort given how *functionally* unequal our treatment of unclaimed bodies is. Only those who lack the financial means to afford their own disposition will be used

534. While virtually all states empower decedents to direct the details of their disposition, such directions are generally only binding “to the extent that the decedent’s estate or the person controlling the disposition are financially able to” carry them out. 755 ILL. COMP. STAT. ANN. 65/40(a) (West 2023); TEX. HEALTH & SAFETY CODE ANN. § 711.002(g) (West 2023). What is more, they are sometimes only binding on next of kin and not on the state. *E.g.*, TEX. HEALTH & SAFETY CODE ANN. § 711.002(a) (West 2023).

535. *See, e.g.*, Bazelon, *supra* note 412 (describing Pennsylvania’s statutory elimination of the ability to opt out).

536. MISS. CODE ANN. § 41-39-7 (West 2024) (exempting the unclaimed bodies of decedents “with mental illness and . . . intellectual disability” from scientific use).

537. Many states, for instance, limit the timing for binding opt-outs in their anatomy acts to the decedent’s “last illness” or “last sickness.” *E.g.*, IOWA CODE ANN. § 142.1 (West 2023); KAN. STAT. ANN. § 65-904(a) (West 2023); MASS. GEN. LAWS ANN. ch. 113, § 2 (West 2023); N.D. CENT. CODE ANN. § 23-06-15 (West 2023); WIS. STAT. ANN. § 157.03(1) (West 2023); WYO. STAT. ANN. § 35-4-602(a)(i) (West 2023). None impose a requirement to inform decedents of their options. Indeed, Massachusetts even specifies that the decedent’s objection must occur “of his own accord.” MASS. GEN. LAWS ANN. ch. 113, § 2 (West 2023). Furthermore, the hurdles for efficacious opt-outs under states’ UAGAs are significant. *See, e.g.*, S.D. CODIFIED LAWS § 34-26-5 (2024). Advance directives are rare across society. Timmermans & Prickett, *supra* note 403, at 521. But they are especially rare among decedents who then go unclaimed. *E.g.*, Quinet et al., *supra* note 432, at 137. Finally, it is unclear whether opt-outs from the anatomy acts become known to coroners, let alone whether they are enforceable if ignored. *See* Bernstein, *supra* note 452.

538. *E.g.*, ALA. CODE § 34-13-11(a)(12) (West 2023); ALASKA STAT. ANN. § 13.75.020(a)(7) (West 2023); ARIZ. REV. STAT. ANN. § 36-831(C) (2024); ARK. CODE ANN. § 20-17-102(d)(1)(K) (West 2023); GA. CODE ANN. § 31-21-7(b)(11) (West 2023); HAW. REV. STAT. ANN. § 531B-4(a)(11) (West 2023); 755 ILL. COMP. STAT. ANN. 65/5 (West 2023); KAN. STAT. ANN. § 65-1734(a)(8) (West 2023); MD. CODE ANN., HEALTH OCC. § 7-410(e) (West 2023); OHIO REV. CODE ANN. § 2808.81(B)(10) (West 2023); OKLA. STAT. ANN. tit. 21, § 1158(9) (West 2024); TENN. CODE ANN. § 62-5-703(11) (West 2023); W. VA. CODE ANN. § 30-6-22a(b)(11) (West 2023); W. VA. CODE R. §§ 6-1-24, 24.2.7 (2023); S.C. CODE ANN. § 32-8-320(A)(9) (2024); VA. CODE ANN. § 32.1-291.9(A)(10) (West 2023).

and disposed of as an unclaimed body.⁵³⁹ The decedents whose bodies are subject to lesser legal protections are in practice poor, and also disproportionately Black.⁵⁴⁰ Worse, the laws subjecting them to that treatment were designed to target the poor and isolated so that science could advance without disturbing the dead bodies of the more affluent remainder of society.⁵⁴¹ And this design took shape against the backdrop of grave robbing practices that targeted the poor and Black Americans.⁵⁴² The history matters. It gives the functional inequality with which we have historically treated unclaimed bodies an unmistakable flavor of subordination. Nor can the intervening decades be said to have purged our treatment of that flavor.⁵⁴³ The anatomy acts with their classist language remain on the books in most states, including references to “poorhouse[s],”⁵⁴⁴ “almshouse[s],”⁵⁴⁵ and “insane asylums,”⁵⁴⁶ as well as “tramp[s],”⁵⁴⁷ “vagrant[s],”⁵⁴⁸ and “vagabond[s].”⁵⁴⁹ Unclaimed bodies used for science continue to come from the poor and, disproportionately, Black Americans.⁵⁵⁰ And even when their bodies end up not being used for science, our practices still perpetuate classism—as can be seen, for instance, in the continued prevalence of separate gravesites for unclaimed bodies, and their deficient upkeep.⁵⁵¹

Our unequal treatment of unclaimed bodies constitutes a moral wrong if we embrace the law’s conception of dead bodies as quasi-persons. For it deprives unclaimed bodies of legal protections that are both reflective and expressive of dead bodies’ quasi-personhood and, by extension, the decedents’ personhood. Just as our laws fail to treat those bodies as full and equal quasi-persons, they fail to treat those decedents

539. *See supra* note 431 and accompanying text.

540. *See supra* note 433 and accompanying text.

541. *Supra* note 417 and accompanying text.

542. *Supra* note 412 and accompanying text.

543. As someone, for instance, might try to argue by pointing to states’ interim passage of UAGAs, which allow next of kin, in the absence of objections by the decedent, to donate a dead body to science and thus arguably provide an alternative authorization for the use of unclaimed bodies whenever next of kin’s disposition authority devolves to state officials. *See generally* Paul M. Powers, *Unclaimed Bodies: What the State Can Legally Do to You Even After Death*, 15 T.M. COOLEY J. PRAC. & CLINICAL L. 277, 281 (2013) (making a similar argument).

544. *E.g.*, MO. ANN. STAT. § 194.150(1) (West 2023); TENN. CODE ANN. § 68-4-103 (West 2023).

545. *E.g.*, COLO. REV. STAT. ANN. § 15-19-302(1) (West 2024); CONN. GEN. STAT. ANN. § 19a-270 (West 2023); N.J. STAT. ANN. § 45:9-49 (West 2023); S.C. CODE ANN. § 44-43-530 (2024).

546. *E.g.*, MO. ANN. STAT. § 194.150(1) (West 2023).

547. *E.g.*, CONN. GEN. STAT. ANN. § 19a-282 (West 2023); OHIO REV. CODE ANN. § 1713.38 (West 2023); N.H. REV. STAT. ANN. § 291:3 (2023).

548. *E.g.*, CONN. GEN. STAT. ANN. § 19a-282 (West 2023).

549. *E.g.*, ME. REV. STAT. ANN. tit. 22, § 2883 (2024).

550. *Supra* notes 431, 433, and accompanying text.

551. *Supra* notes 496–497, 523, and accompanying text.

as full and equal persons.⁵⁵² Judging by the law's latent account of quasi-personhood, that failure harms either the unclaimed bodies themselves or the decedents.

But what if we reject the law's attribution of quasi-personhood to dead bodies as illusory? The utilitarian drafters of the anatomy acts claimed that the acts were justified once one took seriously that only the living could be morally harmed.⁵⁵³ More recent defenders continue these assertions, reasoning from the premise that "[d]espite ancient superstitions, the corpse cannot be 'hurt' " to the conclusion that "if research is conducted only on unclaimed bodies, there is little basis for objection."⁵⁵⁴

Contrary to these assertions, we must conclude that our unequal treatment of unclaimed bodies is morally wrong even if the law were mistaken in its attribution of quasi-personhood to dead bodies. The fact that the law otherwise protects dead bodies as quasi-persons casts our lesser protections of unclaimed bodies inevitably in a denigrating light. Whether we personally embrace those positions or not, we live in a society that in law and in fact generally treats dead bodies as quasi-persons and sees that treatment as a reflection of their personhood in life. Our lesser protections thus communicate to all the living poor that we do not regard them as equal persons in both life and death. Put differently, our treatment of their unclaimed bodies makes clear that we regard their lives as less valuable and their deaths as less worthy of grief.⁵⁵⁵ That is a significant expressive harm, with which we compound

552. In the contexts of segregated cemeteries and desecrated Native American graves, states have begun to show awareness that the degree to which a dead body is or is not paid equal respect expresses underlying beliefs about the equal personhood of that decedent. They have done so by grounding statutory commitments to the equal treatment of dead bodies in the notion of common human dignity. *E.g.*, MONT. CODE ANN. § 22-3-802(2)(a) (West 2023); MINN. STAT. ANN. § 307.08(1), (7)(a) (West 2023); W. VA. CODE ANN. § 29-1-8a(a), (h) (West 2023); FLA. STAT. ANN. § 872.05(1) (West 2023); DEL. CODE ANN. tit. 7, § 5401(4) (West 2024); WYO. STAT. ANN. § 7-4-106(e) (West 2023). Insofar as states have recently come to protect Native American gravesites and slave cemeteries more than other burial grounds, for instance by exempting them from identification and cemetery-upkeep requirements, we might view their enhanced protections as attempts at restitution: attempts to counter states' longstanding disrespect with prolonged respect for the quasi-personhood of the dead bodies buried in those graves. *Cf. Rogers, supra* note 400, at 30–53 (discussing enhanced protections of Native American gravesites and remains pursuant to the Native American Graves Protection and Repatriation Act).

553. *See, e.g.*, RICHARDSON, *supra* note 398, at 122 (“[W]here there are no relations to suffer distress, there can be no inequality of suffering, and consequently no unfairness shown to one class more than another.” (internal quotation marks omitted) (quoting Report of the Select Committee on Anatomy, 1828, at 10)).

554. CHRISTINE QUIGLEY, *THE CORPSE: A HISTORY* 207–08 (1996).

555. *See* JUDITH BUTLER, *PRECARIOUS LIFE: THE POWERS OF MOURNING AND VIOLENCE* xiv, 19–49 (Verso 2020) (2004) (making a similar argument in the context of the war on terror).

the material and social harms that we otherwise inflict on the living poor and isolated who will go unclaimed in death.⁵⁵⁶

There is no escaping this expressive harm as long as the law maintains its quasi-personhood approach. If law and society had instead consistently been treating dead bodies as mere things, it might have been possible to view the disparate treatment of claimed and unclaimed bodies as morally innocuous.⁵⁵⁷ Take, for instance, the analogy to old coats in the Introduction and imagine that states provided for the preservation of coats left behind by affluent decedents, while throwing the coats of indigent decedents into the trash. It might be possible to view such disparate treatment as reflecting society's economic and aesthetic preferences for higher-quality coats rather than a judgment of moral worth. But our laws treat bodies as more than mere things, as "more than raiment."⁵⁵⁸ They treat dead bodies as quasi-persons with dignity interests. As such, the lesser treatment of unclaimed bodies amounts to a pronouncement on their moral status—a pronouncement that these bodies, and by extension the indigent decedents whose bodies they were, possess less dignity. To be sure, the laws' lesser treatment of unclaimed bodies may also reflect more innocuously that these bodies, unlike claimed bodies, often lack living relatives and thus lack an additional set of interest holders who would benefit from their protection.⁵⁵⁹ But unclaimed bodies' lesser treatment cannot be reduced to a statement of this difference alone. Since our laws' protections of claimed bodies against mingling, mutilation, and more appeal not only to the interests of living relatives, but also to the interests of the decedents and dead bodies themselves, the withholding of those same protections from unclaimed bodies effectively denies them and indigent decedents the recognition of being equal interest holders.⁵⁶⁰ Not to mention that living relatives with interests may well

556. See Smith, *supra* note 255, at 1476, 1519 (discussing this harm to the living in the context of mistreating the dead bodies of Black Americans and Native Americans).

557. My thanks to Ben Grunwald for prompting this clarification.

558. DU BOIS, *supra* note 1, at 94 (quoting *Matthew* 6:25).

559. My thanks to Kevin Emerson Collins, Guha Krishnamurthi, John O. McGinnis, Rachel Sachs, and Aaron Saiger for prompting this clarification.

560. Nor can I think of another consistent descriptive account of our treatment of claimed and unclaimed bodies that would fit the "data" and avoid my normative conclusion. To say, for instance, that the laws governing claimed and unclaimed bodies consistently facilitate private spending and guard the public fisc does nothing to alleviate the expressive harm of unclaimed bodies' lesser treatment. Similarly, to claim that our laws governing claimed and unclaimed bodies consistently reflect public concerns and protect public feelings would stand in tension with the law's expressions of additional concern for claimed bodies for their own sake. It would also give rise to the same expressive harm of disrespect. After all, the lesser protections of unclaimed bodies would effectively communicate that the public feels greater concern for claimed than unclaimed bodies. My thanks to Yariv Brauner, Brian Galle, Tara Grove, Andrea Katz, John Rappaport, and Sean H. Williams for prompting these clarifications.

be present in the case of many unclaimed bodies, too.⁵⁶¹ These relatives just lack the financial means to assert their interests.⁵⁶²

The harm inflicted by our careless disposition of unclaimed bodies can also become more than expressive if that disposition means we are more likely to continue our careless treatment of indigent people who are now alive. Our failure to respect unclaimed bodies as quasi-persons is a missed opportunity to face up to our failure to respect those decedents as persons in life. Our failure to tend adequately to their physical death permits us to ignore our failure to tend adequately to their social death in life.⁵⁶³ Having missed that opportunity, we might be less likely to change course and strive for a more inclusive and equal society in the future.⁵⁶⁴

C. Reform

*Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tost to me[.]*⁵⁶⁵

To address the ongoing moral wrong of disrespecting unclaimed bodies as quasi-persons, we ought to implement at least four sets of legal reforms, all else equal: first, repealing all anatomy acts; second, increasing the financial assistance for indigent dispositions; third, authorizing more than just relatives to arrange for private dispositions; and finally, applying full legal protections to the public disposition of unclaimed bodies. These legal reforms provide examples of the practical implications that my account of dead bodies' quasi-personhood carries. They follow as long as the law otherwise continues to treat dead bodies as quasi-persons.⁵⁶⁶ Though whether we should in fact implement each

561. See *supra* notes 2, 437, and accompanying text.

562. See *supra* note 398 and accompanying text.

563. For more on the concept of "social death" in life, see, for example, MBEMBE, *supra* note 77, at 75, 92.

564. Whether that is in fact the case is, as far as I can tell, an open empirical question. But there is a long tradition of assuming that care toward dead bodies can be a force of moral betterment and political reform, regardless of whether their quasi-personhood is illusory. See, e.g., BUTLER, *supra* note 555, at 20; PRICKETT & TIMMERMANS, *supra* note 97, at 238–40.

565. Emma Lazarus, *The New Colossus* (1883) (internal quotation marks omitted), reprinted in EMMA LAZARUS: SELECTED POEMS AND OTHER WRITINGS 20 (Gregory Eiselein ed., Broadview Press 2002).

566. The conditional nature of my reform proposals makes them compatible with the long-term possibility of leveling our treatment of dead bodies down rather than up. Meaning, my account is open to the possibility that those who reject the law's quasi-personhood treatment of dead bodies as unsound may want to target our treatment of claimed rather than unclaimed bodies

reform depends on whether the wrong I have identified outweighs the cost of mitigation in each case. This Section discusses each set of legal reforms in turn. As we will see, some of them have already been implemented by a subset of jurisdictions, or with respect to a subset of unclaimed bodies, giving reformers instructive models to learn from and expand upon.

We should repeal all anatomy acts as a first step to address our current and historical treatment of unclaimed bodies. Without such acts, unclaimed bodies can no longer be used scientifically unless a decedent has expressly requested such use.⁵⁶⁷ Indeed, in recent years, a handful of states have undertaken such repeals.⁵⁶⁸ In some other states, medical schools have stopped using unclaimed bodies as a matter of policy.⁵⁶⁹ Such policy changes mark an important step. But outright repeal of the anatomy acts is preferable, because it binds scientific institutions, rather than relying on their discretion, and because it averts the expressive harm of leaving anatomy acts, with their classist language and history, on the books.

By endorsing the repeal of all anatomy acts, I do not mean to deny the utility of using dead bodies for scientific research.⁵⁷⁰ Nor do I mean to imply that equality considerations always trump utility

and remove many of the legal protections analyzed in Parts I and II. But until our society and legal system in fact start treating all dead bodies as mere things, the disparate treatment of unclaimed bodies inflicts a wrong, and we ought to remedy this wrong in the short term by respecting unclaimed bodies, too, as quasi-persons. My thanks to Ethan J. Leib, John Rappaport, and R. Anthony Reese for prompting this clarification.

567. Insofar as states also authorize public officials to use unclaimed bodies for science under the UAGA, they ought to curtail that authority. *See, e.g.*, ALA. CODE § 34-13-11(a)(12) (2023).

568. *E.g.*, D.C. CODE ANN. § 3-201 (West 1983), *repealed by* Act of Oct. 8, 2016, No. 21-160, § 3032, 63 D.C. Reg. 10775; IND. CODE ANN. § 21-44-1-2 (West 2007) (*repealed* 2019); MINN. STAT. ANN. § 149A.94(2) (West 2005), *repealed by* Act of May 23, 2007, ch. 114, § 75, 2007 Minn. Laws 26; NEB. REV. STAT. ANN. § 71-1002(1) (West 2005), *repealed by* Act of Sept. 1, 2019, Laws 2019, LB 559, § 6; NEV. REV. STAT. ANN. §§ 451.350 to .470 (West 2023), *repealed by* Act of May 29, 2023, ch. 60, § 17, 2023 Nev. Laws; N.Y. PUB. HEALTH LAW § 4211(3-a)(a) (West 2024), *amended by* Act of Aug. 18, 2016, ch. 247, § 1, 2016 N.Y. Laws (exempting NYC from the anatomy act); VT. STAT. ANN. tit. 33, § 2302 (West 2013), *repealed by* Act of July 1, 2013, No. 32, § 1, 2013 Vt. Legis. Serv. (West); VA. CODE ANN. § 32.1-288 (West 2013), *repealed by* Act of Mar. 7, 2014, ch. 228, 2014 Va. Legis. Serv. 228 (West); W. VA. CODE ANN. § 18B-4-8(d), (f) (West 2000), *repealed by* Act of July 3, 2017, ch. 114, 2017 W.V. Laws 240 (West).

569. Jones & Whitaker, *supra* note 423, at 250 (pointing to medical schools in Kansas and Oregon); Coelho & Caplan, *supra* note 423, at 741 (listing Arizona, Louisiana, Utah).

570. According to one estimate, the approximately three thousand dead bodies used in car safety tests between 1961 and 1990 contributed to vehicle safety improvements that have in turn helped save more than four thousand lives and prevent one hundred and forty-three thousand injuries per year. Albert I. King, David C. Viano, Nicholas Mizeres & John D. States, *Humanitarian Benefits of Cadaver Research on Injury Prevention*, 38 J. TRAUMA 564 (1995); *see also* ISERSON, *supra* note 11, at 122 (discussing this study). Likely, countless more lives have been saved and injuries and diseases healed thanks to anatomical studies. *See, e.g.*, Garment et al., *supra* note 423, at 1001, 1004 (discussing the importance that medical schools assign to the anatomical dissection of dead bodies).

considerations—let alone that they do so when the equality at stake is primarily that of the dead while the utility is that of the living. But the wrong of disrespecting unclaimed bodies as quasi-persons counsels in favor of meeting the utility needs of living persons in ways that do not entail such wrongs. At present, such alternatives appear to be available and feasible.⁵⁷¹ For one, legislatures could encourage additional voluntary donations of dead bodies. They could, for instance, condition the receipt of funds or licenses for hospitals, physicians, and funeral directors on distributing information about whole-body donations to patients and clients, as is sometimes already the case for organ donations.⁵⁷² And if donation shortages of dead bodies persisted, states could enact presumed consent laws.⁵⁷³ Such laws, though, should perhaps expressly exempt unclaimed bodies.⁵⁷⁴ After all, the unclaimed face greater practical obstacles to opting out than other decedents and their relatives. Unless states required express consent from unclaimed decedents, we would again end up with a body procurement regime that would disproportionately rely on unclaimed bodies. Given the history of grave robberies and anatomy acts, such disproportionate reliance would continue to carry connotations of subordination.

States should also increase funding for indigent dispositions, all else equal. Currently, financial assistance for indigent dispositions at the state and local level varies widely, and is rarely enough to cover the cost of cremation, let alone full-body burial.⁵⁷⁵ Too often, that prevents

571. Their feasibility is supported by the facts that the scientific demand for dead bodies is finite and largely already met by voluntary donations. *See* Dasgupta, *supra* note 423, at 122 (estimating that eighty percent of medical school cadavers in the United States and Canada are voluntarily donated).

572. *E.g.*, MASS. GEN. LAWS ANN. ch. 112, § 84C (West 2023); 42 U.S.C. § 1320b-8; *see also* MADOFF, *supra* note 363, at 30–31 (discussing such conditions on Medicare and Medicaid reimbursement for hospitals).

573. If such laws allowed next of kin to object to the scientific use of their relative's dead body, the results would likely differ little from our current regime. If, by contrast, the presumed consent laws restricted opt-outs to decedents alone, many more dead bodies would likely become available for scientific use. But the advisability of this latter path depends on many considerations, including the open empirical question of whether and to what extent such a regime would incentivize next of kin with financial means to refuse to claim the dead bodies of their relatives (if these relatives did not opt out during their lifetimes) in order to avoid their scientific use. My thanks to Matthew Kim for raising this concern.

574. Possibly, they should exempt the poor more generally to avoid other disparities as well. *See generally* MICHELE GOODWIN, BLACK MARKETS: THE SUPPLY AND DEMAND OF BODY PARTS 121 (2006) (arguing that presumed consent laws for corneas resulted in the significant overrepresentation of Black and Latinx donors). I hedge this proposal with caution because its advisability depends empirically on whether indigent people would perceive an express exemption from the default as inflicting its own expressive harm and, if so, what comparative weight they would assign to this harm. My thanks to Mailyn Fidler and Joshua Sellers for raising this concern.

575. *E.g.*, Anne Saker, *Disposition of Unclaimed Bodies in U.S. Varies by State, Jurisdiction*, OREGONIAN (June 12, 2009, 3:02 PM), https://www.oregonlive.com/special/2009/06/disposition_of_unclaimed_bodie.html [<https://perma.cc/ZV7J-Z6J6>]; Waters, *supra* note 472.

relatives—and in the absence of relatives, funeral directors and coroners—from offering indigent decedents a dignified disposition. States could increase their assistance, for instance, by raising the filing fees for death certificates, as Oregon has done.⁵⁷⁶ In addition, Congress could provide federal assistance for indigent dispositions.⁵⁷⁷ Some large-scale federal benefit programs for burials are already in place and could serve as models: The federal government has long provided burial benefits to all soldiers and veterans who were honorably discharged.⁵⁷⁸ And pursuant to congressional authorization during the pandemic, the Federal Emergency Management Agency has offered generous reimbursements for the disposition of all decedents who died of COVID-19 regardless of their means.⁵⁷⁹ But so far, Congress has not enacted any of the legislative proposals for indigent funeral assistance that members have introduced over the years.⁵⁸⁰

States, moreover, should add nontraditional family members to the statutory lists of agents authorized to dispose of dead bodies. Such additions could, for instance, include significant others and step-relatives. They could also include friends, religious bodies, or other social and civic groups that already feature in the general authorization lists of a few states,⁵⁸¹ and in the unclaimed bodies laws of several

576. Zezima, *supra* note 457.

577. At the moment, decedents who were on Social Security are entitled to two hundred and fifty-five dollars, and decedents under sixty-two receive nothing. DAWDY, *supra* note 130, at 191.

578. See HEATHER M. SALAZAR, CONG. RSCH. SERV., R44426, MILITARY FUNERAL HONORS FOR VETERANS 1 (2016); see also Jordan & Sullivan, *The Unclaimed Soldier*, *supra* note 434 (“The federal government spends half a billion dollars a year to bury veterans, from maintaining its cemeteries to the \$27 million for U.S. burial flags presented to families.”).

579. Mary Jordan & Kevin Sullivan, *Biden Administration to Launch Massive Funeral Assistance Program for Covid Victims*, WASH. POST (Apr. 6, 2021, 4:49 PM), https://www.washingtonpost.com/national/covid-funerals-assistance/2021/04/06/d7d1db20-9659-11eb-b28d-bfa7bb5cb2a5_story.html [<https://perma.cc/WW27-PSHS>].

580. *E.g.*, Indigent Funeral Expense Reimbursement Act, H.R. 1033, 112th Cong. (2011) (offering a tax credit of up to \$3,000); see also Boldt, *supra* note 472, at 151–52, 164–65, 173–74 (discussing this and additional proposals).

581. *E.g.*, ARIZ. REV. STAT. ANN. § 36-831(A) (2024) (including any “adult who exhibited special care and concern for the dead person” and “any person or fraternal, charitable or religious organization willing to assume responsibility”); 755 ILL. COMP. STAT. ANN. 65/5(6.5) (West 2023) (including “any recognized religious, civic, community, or fraternal organization willing to assume legal and financial responsibility”). Many of these statutes currently also include a catch-all category at the bottom of their lists, typically phrased as “any other person willing to assume the responsibility of acting on and arranging the final disposition of the remains of the decedent.” *E.g.*, ALA. CODE § 34-13-11(a)(13) (2024); ALASKA STAT. ANN. § 13.75.020(a)(8) (West 2023); ARK. CODE ANN. § 20-17-102(d)(2) (West 2023); GA. CODE ANN. § 31-21-7(b)(12) (West 2023); OKLA. STAT. ANN. tit. 21, § 1158(10) (West 2024); W. VA. CODE ANN. § 30-6-22a(b)(12) (West 2023). But often, authority only devolves to this final group, once public officials have failed to assume responsibility. In any case, express inclusion is preferable, as it gives coroners clearer direction whom to notify.

more.⁵⁸² Expanding disposition authorization statutes beyond individuals who are related by marriage or blood would help to tailor them better to our changing kin structures.⁵⁸³ And it would give indigent decedents a better chance of being claimed and brought to rest with dignity.⁵⁸⁴

A final set of legal reforms would ensure that any unclaimed bodies that continue to be disposed of by states and counties enjoy all the legal protections that are expressive of their quasi-personhood: differentiation from property, waste, and animals; treatment as individuals with a name; and protections against abuse. These legal protections may well change in the future: their underlying sensibilities are already in flux, as we saw. Indeed, we may be able and obligated to accelerate their change in order to align our dignity sensibilities more with our utility needs. But unclaimed bodies are not the right population of dead bodies to use for pursuing that alignment. As long as our default protections remain what they are, they should fully apply to unclaimed bodies.

That means, for one, that we should avoid any intimation that unclaimed bodies are property, whether property of the sovereign or otherwise. Rather than voicing our entitlement to unclaimed bodies, the state should emphasize its duty to give them a decent burial. Having failed to provide for the unclaimed in life, if anything, we may be indebted to them, not they to us. With one group of unclaimed bodies—unclaimed veterans—this alternative framing has succeeded. It is the reason that states, for instance, exempt the unclaimed bodies of veterans from scientific use and ensure their dignified disposition

582. *E.g.*, ARIZ. REV. STAT. ANN. § 36-805 (2024) (including friends); IOWA CODE ANN. § 142.1 (West 2023) (friends); MASS. GEN. LAWS ANN., ch. 113, § 3 (West 2023) (friends); MICH. COMP. LAWS ANN. § 333.2653(3) (West 2023) (religious benevolent associations); MO. ANN. STAT. § 194.150(1) (West 2023) (friends); NEB. REV. STAT. ANN. § 23-1816 (West 2024) (friends); N.Y. PUB. HEALTH LAW § 4211(3)(a), (4) (McKinney 2024) (friends); N.C. GEN. STAT. ANN. § 130A-415(i) (West 2023) (Lifeguardianship Council of The Arc of North Carolina, Inc., an organization providing guardianship services for people with disabilities); N.D. CENT. CODE ANN. § 23-06-15 (West 2023) (friends); OKLA. STAT. ANN. tit. 63, § 92 (West 2023) (fraternal societies, charitable organizations, and friends); 42 R.I. GEN. LAWS ANN. § 42-56-23 (West 2024) (friends); S.D. CODIFIED LAWS § 34-26-10 (2024) (friends); WASH. REV. CODE ANN. § 68.50.070(2) (West 2023) (religious organizations); WYO. STAT. ANN. § 7-13-915 (West 2023) (friends).

583. *See, e.g.*, RHAINA COHEN, THE OTHER SIGNIFICANT OTHERS: REIMAGINING LIFE WITH FRIENDSHIP AT THE CENTER 236–39 (2024); Tanya K. Hernández, *The Property of Death*, 60 U. PITT. L. REV. 971, 1004–19 (1999); PRICKETT & TIMMERMANS, *supra* note 97, at 231–36; Timmermans & Prickett, *supra* note 403, at 509.

584. *See* Timmermans & Prickett, *supra* note 403, at 505. There is a risk that coroners may fail to notify nontraditional family members, even once they are authorized to do so. *Id.* at 519. If that is the case, states should consider incentivizing proper notification, for example, by shielding coroners from liability when blood relatives respond with delay and then object to the involvement of nontraditional family members.

through public funds.⁵⁸⁵ We may well have special duties toward those who put their lives on the line to ensure our safety—duties that may call for special honors, such as wrapping their coffins in American flags and playing “Taps” at their funeral.⁵⁸⁶ But our basic duty is the same for all unclaimed bodies: to afford them full legal protections as equal quasi-persons.⁵⁸⁷

Next, we should avoid associations between the disposition of unclaimed bodies and the disposal of waste. For instance, we could tighten statutory requirements and increase coroners’ public funds to ensure speedier identification and cooler storage to avert advanced decomposition. We could also legally require and increase funding for the better upkeep of indigent graves to put an end to their resemblance of dump yards, as Maine already does for veteran graves.⁵⁸⁸ Similarly, we should put distance between the disposition of unclaimed bodies and animals. That would mean, for instance, processing and interring unclaimed bodies in crematories and cemeteries that dispose exclusively of human remains.

Next, we should inter unclaimed bodies in individual graves or urns with markers that bear their names.⁵⁸⁹ And we should avoid

585. See, e.g., FLA. STAT. ANN. § 406.50(1)(e) (West 2023); KAN. STAT. ANN. § 65-902a (West 2023); MASS. GEN. LAWS ANN. ch. 113, § 2 (West 2023); MICH. COMP. LAWS ANN. § 339.1809b(3) (West 2023); N.H. REV. STAT. ANN. § 291:3 (2023); 35 PA. STAT. AND CONS. STAT. ANN. § 1092 (West 2023); TENN. CODE ANN. § 68-4-102(a) (West 2023); WYO. STAT. ANN. § 35-4-602(a)(iv) (West 2023); Jordan & Sullivan, *The Unclaimed Soldier*, *supra* note 434 (quoting President Biden who called the duty to care for veterans a “truly sacred obligation [we have] as Americans”).

586. *Military Funeral Honors and the Committal Service*, U.S. DEP’T OF VETERAN AFFS., <https://www.va.gov/burials-memorials/what-to-expect-at-military-funeral/> (last updated Oct. 12, 2022) [<https://perma.cc/A2BC-P5QX>].

587. Some states have begun to fulfill this more basic duty selectively by shielding the unclaimed bodies of prisoners and of decedents with mental illness or intellectual disability from anatomical dissections. E.g., KY. REV. STAT. ANN. § 431.270 (West 2023) (exempting unclaimed executed prisoners from scientific use); WYO. STAT. ANN. § 7-13-915 (West 2023) (same); CAL. PENAL CODE § 5061 (West 2023) (exempting unclaimed prisoners from scientific use); N.J. ADMIN. CODE § 10A:16-7.5(a) (2024) (same); N.Y. STATE DEP’T OF CORR. & CMTY. SUPERVISION, DIRECTIVE NO. 4013, INCARCERATED INDIVIDUAL DEATHS-ADMINISTRATIVE RESPONSIBILITY 7–9 (2020), <https://doccs.ny.gov/system/files/documents/2024/03/4013.pdf> [<https://perma.cc/JTM4-4RMP>] (same); MISS. CODE ANN. § 41-39-7 (West 2024) (exempting unclaimed bodies of “persons with mental illness and . . . intellectual disability” from scientific use); cf. U.S. IMMIGR. & CUSTOMS ENF’T AGENCY, FAMILY RESIDENTIAL STANDARDS: 4.7 TERMINAL ILLNESS, ADVANCE DIRECTIVES, AND DEATH 6 (2020), https://www.ice.gov/doclib/frs/2020/4.7_TerminalIllnessAdvanceDirectivesDeath.pdf [<https://perma.cc/6ZL4-EBQC>] (“Under no circumstances will ICE/ERO authorize . . . donation of the remains [of an individual who died in ICE/ERO custody] for medical research.”).

588. ME. REV. STAT. ANN. tit. 13, § 1101 (2024).

589. Currently, only Vermont imposes this requirement generally. VT. STAT. ANN. tit. 18, § 5371 (West 2023). Some states have more selective requirements. See, e.g., Saker, *supra* note 575 (reporting that Massachusetts requires a funeral home to furnish a metal plate engraved with the decedent’s name as a condition of reimbursement); MO. ANN. STAT. § 58.460 (West 2023) (requiring a “marked grave” for unclaimed bodies following an inquest); OHIO REV. CODE ANN. §§ 5120.45,

interring them in exclusive indigent cemeteries, as we already do for the remains of unclaimed veterans.⁵⁹⁰ For unclaimed bodies that were buried collectively and anonymously in the past, we could honor them with memorials to mourn their loss of individuality and identity—erecting tombs of the unknown indigent, akin to our tombs of the unknown soldier.⁵⁹¹

We should also ensure unclaimed bodies' dignified covering. States could, for instance, require that unclaimed bodies be dressed in a "suitable burial garment" for full-body burials, as currently only Massachusetts provides.⁵⁹² States should also prohibit the scattering of cremains of unclaimed bodies.⁵⁹³ And more states should follow Florida's lead and prohibit the display of unclaimed bodies in plastination exhibitions, which showcase whole or dissected dead bodies in lifelike poses after preserving them through plastic injections.⁵⁹⁴

Finally, we should avoid the disturbance and mutilation of unclaimed bodies. States, for instance, should be as reluctant to disinter them as to disinter other dead bodies.⁵⁹⁵ And they should minimize

5121.11 (West 2023) (requiring a gravestone with a name for unclaimed inmates and disabled residents of state institutions, but only if they end up being buried by the state rather than a scientific institution). But also absent a legal requirement, some communities have begun to provide unclaimed bodies with individualized and marked graves. *See, e.g.*, Jordan & Sullivan, *The Unclaimed Soldier*, *supra* note 434 (for unclaimed veterans); Harmon, *supra* note 148, at 970 n.286 (for unclaimed patients of Rockland Psychiatric Center, New York); McCoy, *supra* note 3 (for unclaimed residents of Fairfax County, Virginia).

590. *E.g.*, KAN. STAT. ANN. § 73-304 (West 2023); 30 R.I. GEN. LAWS ANN. § 30-25-5 (West 2024); UTAH CODE ANN. § 71A-7-201 (West 2023).

591. *See, e.g.*, Ceasar, *supra* note 512 (reporting planned disposition of cremains of 3,476 unclaimed patients of Oregon State Hospital in memorial with "personalized, handmade vessels"); Harmon, *supra* note 148, at 979 n.332 (describing a memorial for an estimated twenty-five thousand to thirty thousand unclaimed psychiatric patients in Milledgeville, Georgia, using numbered iron markers from historical graves). Some restoration projects manage to retrieve names. *E.g., id.* at 978–79, 978 n.330 (describing the volunteer work of the Friends of Athens Asylum Cemeteries in Ohio, adding to the numbered headstones a marker with the name of the decedent, birth date, and date of death). States can facilitate the erection of memorials with names by disclosing information about unclaimed bodies, as Oregon has done. *See* OR. REV. STAT. ANN. § 409.742(1)(b) (West 2023) (requiring disclosure for "[c]reating a memorial for those persons whose cremated or reduced remains are not claimed").

592. Saker, *supra* note 575. Some officials provide dignified burial garments also in the absence of legal requirements. *See, e.g.*, Ross, *supra* note 496 (describing a Texan practice of dressing the corpses of unclaimed prisoners in a suit).

593. Some states apply such restrictions already to the unclaimed cremains of veterans. *E.g.*, KAN. STAT. ANN. § 65-1732(c)(3) (West 2023) ("Disposition . . . shall not include the scattering of cremated remains.").

594. FLA. STAT. ANN. § 406.61 (West 2023) (requiring exhibitors to show documentation of body donation by express consent). Hawaii went even further and banned plastination exhibits regardless of decedents' consent. *See* HAW. REV. STAT. ANN. § 327-38(c) (West 2023); Giunta, *supra* note 509, at 182–84; CONWAY, *supra* 14, at 53.

595. *See* Smith, *supra* note 255, at 256–58 (proposing a review process for the disinterment of inadvertently discovered slave cemeteries).

incisions, for instance, by requiring coroners to cool unclaimed bodies at lower temperatures instead of routinely embalming them for the sake of prolonged storage. When it comes to choosing disposition methods for unclaimed bodies whose decedents left no indication of their preferences,⁵⁹⁶ states can no longer rely on a national consensus regarding which legalized methods are free of mutilation.⁵⁹⁷ To minimize the risk that decedents and onlookers would perceive a given method as mutilating, each jurisdiction should pick as the default whichever method is chosen in a plurality of private dispositions.⁵⁹⁸ At the moment, that would mean embalment and full-body burial in nine states and Puerto Rico, and cremation in forty-one states.⁵⁹⁹ Alkaline hydrolysis, human composting, and burial at sea ought to be avoided for now.⁶⁰⁰

These reforms can rectify our mistreatment of unclaimed bodies. And they also have the potential to transform our treatment of the poor and the isolated in life. The dignified disposition of unclaimed bodies can become a moment of resolve, in which we commit to bringing individuals from the margins of society into its center. Perhaps pairing the reforms, as some jurisdictions and private groups have done,⁶⁰¹ with

596. *E.g.*, OR. REV. STAT. ANN. § 97.170(3)(c) (West 2023) (prohibiting disposition methods that “conflict with known wishes of the deceased”); MISS. CODE ANN. § 73-11-58(7) (West 2024) (same). An indication of opposition to cremation could also, for instance, consist in the observance of Jewish or Islamic law; or vice versa in Hindu practice. A number of states already look to such indications. *E.g.*, MINN. STAT. ANN. § 261.035 (West 2023); WASH. REV. CODE ANN. § 68.50.070(2) (West 2023). Another indication of preference can consist in tribal membership. Several states defer to the tribe’s disposition methods in that case. *E.g.*, ARIZ. REV. STAT. ANN. § 36-831(E) (2024); WASH. REV. CODE ANN. § 68.50.325(2) (West 2023).

597. *See* DAWDY, *supra* note 130, at 196.

598. To render the plurality standard operable, it may make sense to look to the most recent year for which disposition numbers or reliable estimates exist, which is usually the previous year. *See, e.g.*, *Industry Statistical Information*, CREMATION ASS’N OF N. AM. (2022), <https://www.cremationassociation.org/page/IndustryStatistics> [<https://perma.cc/X8FV-YM92>]. This suggestion, like others, holds all else equal. Other considerations might override the plurality standard. For instance, it might be important to preserve coroners’ ability to identify an unidentified unclaimed body and therefore to bury rather than cremate. *See, e.g.*, W. VA. CODE ANN. § 61-12-15(a) (West 2023) (providing for burial of unidentified dead bodies, but cremation of identified unclaimed dead bodies).

599. *Industry Statistical Information*, *supra* note 598.

600. *Contra* OR. REV. STAT. ANN. §§ 97.170(3)(c), 97.200(1) (West 2023) (requiring “the least costly and most environmentally sound” disposition method for unclaimed bodies and permitting “reduction”); N.C. GEN. STAT. ANN. § 130A-420(b1) (West 2023) (permitting “hydrolysis”).

601. *See, e.g.*, Alexandra King, ‘No Olvidado’: *These Americans Find and Bury Missing Migrants*, CNN (Dec. 2019), <https://www.cnn.com/interactive/2019/12/us/no-olvidado-missing-migrants-border/> [<https://perma.cc/B662-FUBU>] (describing interment ceremony of Imperial County, California, with laying of flowers, singing of hymns, and reading of names); Associated Press, *supra* note 440 (describing annual state-wide ceremony in Maryland); Harmon, *supra* note 148, at 977 (noting annual memorial service at Hawaiian Memorial Park in Kaneohe for historical unclaimed patients of Hawaii State Hospital); Steve Ahlquist, *A Memorial for Those Who Died While Homeless Has More Names than Ever*, UPRISE RI (Oct. 19, 2022, 1:44 PM),

public ceremonies and published obituaries in which we commemorate the lives of the unclaimed, read their names, tell their stories, and look into their faces would help us seize the opportunity of political transformation.⁶⁰² If we miss that opportunity or, worse, just walk away from our reformed dispositions of unclaimed bodies with self-satisfaction and quenched guilt,⁶⁰³ we fail to recognize the personhood of the living to which the quasi-personhood of dead bodies points us.

CONCLUSION

*That corpse you planted last year in your garden,
Has it begun to sprout? Will it bloom this year?*⁶⁰⁴

The law conceives of dead bodies as quasi-persons. That conception sheds light on the law's perspectives on who we are in death and who we were in life. Understanding this view also allows us to level a critique of systemic mistreatments of dead bodies on the law's own terms. And the conception of dead bodies as quasi-persons has

<https://upriseri.com/a-memorial-for-those-who-died-while-homeless-has-more-names-than-ever/> [<https://perma.cc/WMF5-BU6Q>] (describing memorial service by Rhode Island Coalition to End Homelessness, which included reading of names); Pamela J. Prickett & Stefan Timmermans, "If No One Grieves, No One Will Remember": *Cultural Palimpsests and the Creation of Social Ties Through Rituals*, 73 BRIT. J. SOCIO. 244, 248–49 (2022) (describing funeral ceremonies conducted by the organization Garden of Innocence for unclaimed stillbirths and infants, which involves giving them names). Memorial services for dead bodies donated to science have also become common at medical schools. See, e.g., Garment et al., *supra* note 423, at 1003–04. For unclaimed veterans, federal law requires an honor guard of at least two members of the military, and numerous volunteer organizations try to increase communal attendance at veteran funerals. See, e.g., Jordan & Sullivan, *The Unclaimed Soldier*, *supra* note 434 (discussing the Missing in America Project and Vietnam Veterans of America); Timmermans & Prickett, *supra* note 403, at 520 (discussing Veterans Without Families); PRICKETT & TIMMERMANS, *supra* note 97, at 184–85 (same). There are also recent efforts to publish the names of the unclaimed in searchable databases. See, e.g., LAQUEUR, *supra* note 78, at 419 (describing such efforts for Hart Island, New York).

602. See BUTLER, *supra* note 555, at 34 (arguing in the context of those killed by the U.S. war on terror that the obituary "is the means by which a life becomes, or fails to become, a publicly grievable life"); *id.* at 150 ("[I]f the media will not run those pictures, and if those lives remain unnameable and ungrievable, if they do not appear in their precariousness and their destruction, we will not be moved.").

603. Honig, for instance, warns of the danger that "a politics of lamentation can take a very reactionary form, and grievability itself may be as much a trap as a way to signal social acceptance." MARTEL, *supra* 156, at 63; see also Prickett & Timmermans, *supra* note 601, at 255–56:

By explicitly avoiding the circumstances and causes of death and renaming the deceased infant, the community members not only depoliticize the death but also forego an opportunity to question and witness the structural reasons of why infants die and go unclaimed. . . . [I]t is important to recognize both the constructive potential of this social coping mechanism and its conservative status-quo preserving effects.

604. T.S. Eliot, *The Waste Land* (1922) (internal quotation marks omitted), *reprinted in* T.S. ELIOT: COLLECTED POEMS 1909–1962, at 65 (London, Faber & Faber 1974).

implications that point beyond the confines of this Article to the law's treatment of other arguably liminal entities, such as animals, fetuses, plants, and AI models.

One set of implications follows specifically from the law's treatment of dead bodies as quasi-property based on their quasi-personhood. The law, I argued, allocates tailored property rights to humans for the primary purpose of facilitating living persons' duty of care toward dead bodies. This quasi-property approach to dead bodies, centered around a duty of care, might serve as an instructive model for the legal treatment of other entities with arguably elevated moral status, such as nonhuman animals and (more speculatively) plants. These entities, like dead bodies, may be vulnerable to mistreatment, yet lack the ability to represent themselves before the law. Their legal vulnerability, scholars and advocates charge, is made worse by the law's classification of most of these entities as property, which facilitates—and is in fact often designed to facilitate—their exploitation. Animal rights scholars and advocates, for instance, have long criticized the law's classification of the vast number of factory-farmed animals in the United States as property, and have demanded that the law recognize and protect their elevated moral status.⁶⁰⁵

But advocates have struggled to draw apt analogies and point to relevant legal precedents when mounting those arguments. One comparison to which prominent animal rights advocates have repeatedly returned is the abolition of slavery.⁶⁰⁶ The comparison invokes the moral imperative that persons ought not to be treated as property. Just as the abolition of slavery recognized previously enslaved Black Americans as persons rather than property, so the comparison goes, the law should recognize certain animals as persons rather than property. Such appeals to abolitionism, as advocates for racial justice have made clear, are deeply fraught.⁶⁰⁷ Not least because they perpetuate a vicious and ongoing history of racist comparisons between Black Americans and animals.⁶⁰⁸ The moral imperative behind

605. See generally GARY L. FRANCIONE, *ANIMALS, PROPERTY, AND THE LAW* (1995); Gary L. Francione, *Animals as Property*, 2 *ANIMAL L.* i (1996).

606. See, e.g., Luis C. Rodrigues, *White Normativity, Animal Advocacy and PETA's Campaigns*, 20 *ETHNICITIES* 71, 74 (2020); MARJORIE SPIEGEL, *THE DREADED COMPARISON: HUMAN AND ANIMAL SLAVERY* (1988); Steven M. Wise, *Of Farm Animals and Justice*, 3 *PACE ENV'T L. REV.* 191, 197–98 (1986).

607. See, e.g., Angela P. Harris, *Should People of Color Support Animal Rights?* 5 *J. ANIMAL L.* 15, 20–27 (2009); CLAIRE JEAN KIM, *DANGEROUS CROSSINGS: RACE, SPECIES, AND NATURE IN A MULTICULTURAL AGE* 283–86 (2015).

608. See, e.g., Fernandez, *Animals*, *supra* note 20, at 65–66 (discussing this and additional criticisms).

abolitionism also does not speak to how we should treat entities that are less than full moral persons.

The law's quasi-property approach to dead bodies offers a legal model that is less fraught, and also more broadly relevant. It demonstrates what it would look like for the law to commit to a limited property treatment and prioritize a duty of care for entities of elevated moral status that are not full persons. That category of quasi-persons could potentially encompass a wide spectrum of nonhuman animals and plants.⁶⁰⁹ In fact, the category of quasi-persons might encompass entities such as plants even if we believe that they ultimately do not have value in their own right, but only in relationship to humans.⁶¹⁰ After all, on a fictionalist understanding of dead bodies' quasi-personhood, too, the decedents and not dead bodies themselves really hold the interests that the law attributes to dead bodies. Whether viewed through a realist or fictionalist lens, the law's quasi-property treatment of dead bodies may provide particularly salient guidance at this moment of environmental reckoning. Those resisting an exploitative property approach to the natural world could turn to the quasi-property treatment of dead bodies for an alternative model that limits property rights and structures them around a duty of care. Quasi-property could thus provide a conceptual tool to reorient the law toward a relationship of greater care for nonhuman animals and the environment.

The law's treatment of dead bodies as quasi-persons may also have broader implications, beyond issues of property. In its fractured federalism, U.S. law is currently at risk of taking an all-or-nothing approach to the moral personhood of animals and fetuses. In two cases addressing the question of whether chimpanzees should be granted habeas relief, for instance, courts have reasoned that because a

609. The envisioned quasi-property treatment of animals would mark a significant departure from existing property frameworks. Margaret Radin, for instance, treats dogs as personal property. See Radin, *supra* note 369, at 968. On her account, limitations on our property treatment of dogs and other animals would follow from the personhood of their human owners (or other human beings). See, e.g., Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) (arguing that market-inalienability limits our property treatment of certain entities based on an ideal of human flourishing). My account, by contrast, would be responsive to the quasi-personhood of animals, and not just to the personhood of humans. Our duties toward animals, and not just our rights as humans, would structure and limit our property treatment of animals. My thanks to David N. Schleicher for prompting this clarification.

610. Realist conceptions of plants' quasi-personhood, according to which plants have intrinsic moral status, may also be available to our legal system. They could build, for instance, on Native American and environmentalist approaches that are less human-centric. See, e.g., *Wilde Cypress Branch v. Hamilton*, No. 6D23-1412, 2024 WL 203428, at *1 (Fla. Dist. Ct. App. Jan. 19, 2024) (affirming dismissal of a suit brought by several waterways in Florida); Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

chimpanzee was not both a rightsholder and a duty-bearer, it was not a person and, hence, not eligible for habeas relief.⁶¹¹ The courts did not consider the possibility that the law could give habeas relief also to an entity with less than full personhood as long as it held a relevant subset of rights.⁶¹² Similarly, recent legislative efforts to regulate abortions tend to imply an all-or-nothing approach to fetal personhood.⁶¹³

Dead bodies' quasi-personhood challenges this binary approach. It shows that the law can carve out space for a moral status between thing and person, in which entities hold just a subset of the interests and responsibilities, or rights and duties, usually associated with personhood. It thus points us to the possibility that animals and fetuses, too, could be quasi-persons in the eyes of the law. And it might point us to a similar possibility for other entities, such as certain AI models, as I will shortly discuss.

This account has implications both for how we understand legal history and how the law can approach divisive questions of personhood. Retrospectively, my account of dead bodies' quasi-personhood encourages us to take a fresh look at our historical treatment of animals and fetuses. Once we look beyond the polarized space of animal habeas suits and recent abortion legislation, it may turn out that the concept of quasi-personhood has implicitly informed American law's treatment of animals and fetuses across many different areas of law, including criminal prohibitions against animal cruelty, bestiality, and feticide; civil remedies for negligent loss, emotional distress, wrongful death, and prenatal injury; and laws governing the disposition of animal and fetal remains. In recent years, Fernandez has begun such an exploration for animals' legal status.⁶¹⁴ This Article adds to her analysis where animal law intersects with the laws governing the disposition of dead human bodies. We saw, for instance, that the law sometimes treats necrophilia and bestiality, as well as corpse abuse and animal cruelty,

611. *People ex rel. Nonhuman Rights Project v. Lavery*, 998 N.Y.S.2d 248, 250–52 (N.Y. App. Div. 2014); *Nonhuman Rights Project v. Lavery*, 54 N.Y.S.3d 392, 396 (N.Y. App. Div. 2017).

612. For a critique of the all-or-nothing approach to animals' personhood, see Fernandez, *A Quasi Approach*, *supra* note 20.

613. See, e.g., WYO. STAT. ANN. §§ 35-6-121, -123, *enacted by* Act of Mar. 17, 2023, ch. 184, 2023 Wyo. Sess. Laws 432 (restricting abortions on the grounds that “from conception, the unborn baby is a member of the human race” and as such is “created equal and . . . endowed by the[] creator with certain unalienable rights, the foremost of which is the right to life”); see also, e.g., *LePage v. Ctr. for Reprod. Med.*, SC-2022-0515, 2024 WL 656591, at *4 (Ala. Feb. 16, 2024) (holding that Alabama's Wrongful Death of a Minor Act applies to frozen embryos).

614. Fernandez, *A Quasi Approach*, *supra* note 20, at 158; Fernandez, *Animals*, *supra* note 20, at 3. As for fetuses' legal status, some judges have come close to calling them quasi-persons. See, e.g., *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992) (describing embryos as falling into an “interim category” between persons and property).

in parallel, suggesting that it conceives of both human corpses and living animals as quasi-persons.⁶¹⁵

Prospectively, the law's quasi-personhood approach to dead bodies offers a model that we could consider emulating in classifying animals and fetuses regardless of their historical status. In its treatment of dead bodies, the law confronts difficult and divisive moral and metaphysical issues on which American society tends to disagree—often based on divergent religious commitments and diverse cultural backgrounds. Yet, the law has managed to secure some common ground with its quasi-personhood approach. That approach privileges a nuanced spectrum against a simple binary. Indeed, the law maintains some of that nuance even in areas where polarization around the status of animals and fetuses has affected its treatment of dead bodies. As we saw, for instance, even states that have in recent years extended the law's dignity protections to fetal remains usually still permit their joint cremation and omit naming requirements, thus stopping short of treating fetal and other human remains as fully equal.⁶¹⁶ Moreover, where common ground is lacking, the law relies on consent to settle disagreements. As we saw, for instance, the law often defers to individual choice when the human remains in question are partial and, for that reason, their moral status is particularly open to disagreement (as with body parts, cremains, and skeletal remains).

All this could potentially be translated to the contexts of animals and fetuses where moral and metaphysical disagreements likewise abound. The concept of quasi-personhood can stake out some shared middle ground and then leave the remaining narrower disagreements for consent to resolve. Concretely, that could mean, for instance, that the law might attribute quasi-personhood to animals and fetuses that, like whole dead bodies, have most resemblance to (born) human beings.⁶¹⁷ And where, as in the case of partial remains, the animals and fetuses in question have little resemblance to (born) human beings, the law might settle disagreements by deferring to individual choice. But

615. These structural parallels leave room to recognize that human corpses and living animals are quasi-persons with different subsets of moral interests. The law, for instance, may well stress welfare interests rather than dignity interests in the case of animals, due to their sentience.

616. *E.g.*, IND. CODE ANN. §§ 16-21-11-6(b), 16-34-3-4(a) (West 2023).

617. Though to assess the desirability of such a translation, we would need to grapple with powerful arguments against it—warning, for instance, that human similarity is not decisive for the moral status of animals, and that at least some animals and fetuses (such as primates and late-term fetuses) are full moral persons. *See, e.g.*, Taimie L. Bryant, *Similarity or Difference as a Basis for Justice: Must Animals Be like Humans to be Legally Protected from Humans?*, 70 LAW & CONTEMP. PROBS. 207, 215–26 (2007); Gary L. Francione, *Animals—Property or Persons?*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 108, 131–32 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

whatever shape the translation might take, the law's treatment of dead bodies as quasi-persons offers fertile soil for reimagining the law's approach to animals and fetuses, and even for other arguably liminal entities such as AI.

AI confronts the law with a host of novel and divisive questions about personhood. The law's treatment of dead bodies may offer a valuable comparative foil in pinpointing those questions. Dead bodies, like AI (at least for now), lack sensation. Yet the law nonetheless attributes some degree of moral personhood to dead bodies. Dead bodies, though, owe this elevated status to their continuity with living human beings. Should the law think of AI, too, as continuous with living humans—for example, the human creators of its underlying software or training data? Take the app “Talk to Your Ex,” which invites users to feed text exchanges with a former significant other into a large language model “so you can still text/date her even though she dumped you.”⁶¹⁸ Once trained on those text messages, is the chatbot sufficiently continuous with the ex to make claims on its user? In other words, should we attribute moral interests to this chatbot, as we do to a corpse? Or does it matter that the continuity in the case of the chatbot is informational, whereas it is physical in the case of the corpse? If we are to draw parallels, should some of the chatbot's interests withstand the former significant other's attempt to waive them, as some of a corpse's interests withstand a decedent's waiver? Might certain interests against sexual use, for instance, fall into that category, similar to necrophilia? And, finally, should some of the chatbot's interests diminish with time, perhaps once the ex dies and our memory of them starts to fade, as a corpse's interests diminish with time once it disintegrates? In probing the moral status of AI, the law need not draw on a completely blank slate. Its treatment of dead bodies as quasi-persons provides a rich set of precedents to which we may turn—if not for ready answers, then for better questions.

618. TALK TO YOUR EX, <https://talktoyourex.com/> (last visited May 19, 2024) [<https://perma.cc/7Y3L-KCJ2>]; see Mala Chatterjee, *Our Avatars, Ourselves*, BOS. REV. (Sept. 29, 2023), <https://www.bostonreview.net/articles/our-avatars-ourselves/> [<https://perma.cc/QFF2-UK2U>]. My thanks to Mala Chatterjee and Ketan Ramakrishnan for helpful discussions on this topic.